Max Planck Yearbook
of
United Nations Law

Volume 10
2006
Max Planck Yearbook of United Nations Law

Founding Editors
Jochen A. Frowein
Rüdiger Wolfrum
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LL.M. Theses:

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Cherro Varela, Karina
Abbreviations

ACABQ  Advisory Committee on Administrative and Budgetary Questions
AD  Annual Digest of Public International Law Cases
A.F.D.I.  Annuaire Français de Droit International
AJDA  Actualité Juridique – Droit Administratif
AJIL  American Journal of International Law
Anu. Der. Internac.  Anuario de Derecho Internacional
Arch. de Philos. du Droit  Archives de Philosophie du Droit
ASIL  American Society of International Law
Aus Pol. & Zeitgesch.  Aus Politik und Zeitgeschichte
Austr. Yb. Int’l L.  Australian Yearbook of International Law
AVR  Archiv des Völkerrechts
BauR  Baurecht
BayVBl.  Bayerische Verwaltungsblätter
BGBl.  Bundesgesetzblatt
Brook. J. Int’l L.  Brooklyn Journal of International Law
**B. U. Int’l L. J.**  
*Boston University International Law Journal*

**BVerfGE**  
Decisions of the German Federal Constitutional Court

**BYIL**  
*British Yearbook of International Law*

**Cal. W. Int’l L. J.**  
*California Western International Law Journal*

**Cal. L. Rev.**  
*California Law Review*

**Cal. W. L. Rev.**  
*California Western Law Review*

**Case W. Res. J. Int’l L.**  
*Case Western Reserve Journal of International Law*

**Chi. J. Int’l L.**  
*Chicago Journal of International Law*

**CLJ**  
*Cambridge Law Journal*

**CML Rev.**  
*Common Market Law Review*

**Colo. J. Int’l Envtl. L. & Pol’y**  
*Colorado Journal of International Environmental Law and Policy*

**Colum. Hum. Rts L. Rev.**  
*Columbia Human Rights Law Review*

**Colum. J. Transnat’l L.**  
*Columbia Journal of Transnational Law*

**Colum. L. Rev.**  
*Columbia Law Review*

**Comunità Internaz.**  
*La Comunità Internazionale*

**Conn. J. Int’l L.**  
*Connecticut Journal of International Law*

**Cornell Int’l L. J.**  
*Cornell International Law Journal*

**CTS**  
*Consolidated Treaty Series*

**CYIL**  
*Canadian Yearbook of International Law*

**Den. J. Int’l L. & Pol’y**  
*Denver Journal of International Law and Policy*

**DGVR**  
Deutsche Gesellschaft für Völkerrecht  
(German Society of Public International Law)

**Dick. J. Int’l L.**  
*Dickinson Journal of International Law*

**DÖV**  
*Die Öffentliche Verwaltung*
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<tr>
<td>Duke J. Comp. &amp; Int’l L.</td>
<td>Duke Journal of Comparative and International Law</td>
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<td>Duq. L. Rev.</td>
<td>Duquesne Law Review</td>
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<td>DVBl.</td>
<td>Deutsches Verwaltungsblatt</td>
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<td>exempli gratia</td>
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<td>EJIL</td>
<td>European Journal of International Law</td>
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<td>ELJ</td>
<td>European Law Journal</td>
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<td>Env. Policy &amp; Law</td>
<td>Environmental Policy and Law</td>
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<td>EPIL</td>
<td>Encyclopedia of Public International Law</td>
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<td>EuGRZ</td>
<td>Europäische Grundrechte-Zeitschrift</td>
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<td>EuZW</td>
<td>Europäische Zeitschrift für Wirtschaftsrecht</td>
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<td>FAO</td>
<td>Food and Agriculture Organization</td>
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<td>Fla. J. Int’l L.</td>
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<td>Foreign Aff.</td>
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<td>Ga. J. Int’l &amp; Comp. L.</td>
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<td>Geo. L. J.</td>
<td>Georgetown Law Journal</td>
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<td>ILSA J. Int’l L.</td>
<td><em>ILSA Journal of International Law (International Law Students Association)</em></td>
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<td>IMF</td>
<td>International Monetary Fund</td>
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<td>IMO</td>
<td>International Maritime Organization</td>
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<td>Ind. J. Global Legal Stud.</td>
<td><em>Indiana Journal of Global Legal Studies</em></td>
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<td>Ind. Int’l &amp; Comp. L. Rev.</td>
<td><em>Indiana International and Comparative Law Review</em></td>
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<td><em>International Affairs</em></td>
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<td><em>The International Lawyer</em></td>
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<td>Int’l Rev. of the Red Cross</td>
<td><em>International Review of the Red Cross</em></td>
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<td>Iowa L. Rev.</td>
<td><em>Iowa Law Review</em></td>
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<td>IP</td>
<td><em>Die internationale Politik</em></td>
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<td>Isr. L. R.</td>
<td><em>Israel Law Review</em></td>
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<td>Isr. Y. B. Hum. Rts</td>
<td><em>Israel Yearbook on Human Rights</em></td>
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<td>J. History Int’l L.</td>
<td><em>Journal of the History of International Law</em></td>
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<td>J. Int’l Aff.</td>
<td><em>Journal of International Affairs</em></td>
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<td>JA</td>
<td><em>Juristische Arbeitsblätter</em></td>
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<td>JIEL</td>
<td><em>Journal of International Economic Law</em></td>
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<td>JIR</td>
<td><em>Jahrbuch für internationales Recht</em></td>
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<td>JPR</td>
<td><em>Journal of Peace Research</em></td>
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<td>JuS</td>
<td><em>Juristische Schulung</em></td>
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<td>JWT</td>
<td><em>Journal of World Trade</em></td>
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<td>JWTTL</td>
<td><em>Journal of World Trade Law</em></td>
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<td>Law &amp; Contemp. Probs</td>
<td><em>Law and Contemporary Problems</em></td>
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<td>LJIL</td>
<td><em>Leiden Journal of International Law</em></td>
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<td>LNTS</td>
<td>League of Nations Treaty Series</td>
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<td>Miami U. Int’l &amp; Comp. L. Rev.</td>
<td><em>University of Miami International and Comparative Law Review</em></td>
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<td>McGill L. J.</td>
<td><em>McGill Law Journal</em></td>
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<td>Mil. L. Rev.</td>
<td>Military Law Review</td>
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<td>Minn. J. Global Trade</td>
<td>Minnesota Journal of Global Trade</td>
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<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
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<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
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<td>NILR</td>
<td>Netherlands International Law Review</td>
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<td>NJCL</td>
<td>National Journal of Constitutional Law</td>
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<td>NJW</td>
<td>Neue Juristische Wochenschrift</td>
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<td>Nord. J. Int’l L.</td>
<td>Nordic Journal of International Law</td>
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<td>NQHR</td>
<td>Netherlands Quarterly of Human Rights</td>
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<td>NuR</td>
<td>Natur und Recht</td>
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<td>NVwZ</td>
<td>Neue Zeitschrift für Verwaltungsrecht</td>
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<tr>
<td>NYIL</td>
<td>Netherlands Yearbook of International Law</td>
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<td>Ocean &amp; Coastal L. J.</td>
<td>Ocean and Coastal Law Journal</td>
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<td>ODILA</td>
<td>Ocean Development and International Law</td>
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<td>OJEC</td>
<td>Official Journal of the European Communities</td>
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<td>Pace Int’l Law Rev.</td>
<td>Pace International Law Review</td>
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<td>PCIJ</td>
<td>Permanent Court of International Justice</td>
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<td>Pol. Sci.</td>
<td>Political Science</td>
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<td>RADIC</td>
<td>Revue Africaine de Droit International et Comparé</td>
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<tr>
<td>RBDI</td>
<td>Revue Belge de Droit International</td>
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<td>RdC</td>
<td>Recueil des Cours de l’Académie de Droit International</td>
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<tr>
<td>RDI</td>
<td>Revue de Droit International, de Sciences Diplomatiques et Politiques</td>
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<td>RECIEL</td>
<td>Review of European Community and International Environmental Law</td>
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<td>REDI</td>
<td>Revista Española de Derecho Internacional</td>
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<td>Rev. Dr. Mil. Dr. Guerre</td>
<td>Revue de Droit Militaire et de Droit de la Guerre</td>
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<td>Rev. ICR</td>
<td>Revue Internationale de la Croix Rouge</td>
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<td>RGDIP</td>
<td>Revue Générale de Droit International Public</td>
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<tr>
<td>RIAA</td>
<td>Reports of International Arbitral Awards</td>
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<td>Riv. Dir. Int.</td>
<td>Rivista di Diritto Internazionale</td>
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<td>RTDE</td>
<td>Revue Trimestrielle de Droit Européen</td>
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<td>RUDH</td>
<td>Revue Universelle des Droits de l’homme</td>
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<td>San Diego L. Rev.</td>
<td>San Diego Law Review</td>
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<td>Stanford L. Rev.</td>
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<td>SZIER/RSDIE</td>
<td>Schweizerische Zeitschrift für internationales und europäisches Recht/Revue Suisse de Droit International et de Droit Européen</td>
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<td>Tex. L. Rev.</td>
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<td>Tul. Envtl L. J.</td>
<td>Tulane Environmental Law Journal</td>
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<td>Tul. J. Int’l &amp; Comp. L.</td>
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<td>U. Chi. L. R.</td>
<td>University of Chicago Law Review</td>
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<td>UCDL Rev.</td>
<td>University of California Davis Law Review</td>
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Abbreviations

UPU Universal Postal Union
Va. J. Int’l L. Virginia Journal of International Law
Va. L. Rev. Virginia Law Review
Vand. J. Transnat’l L. Vanderbilt Journal of Transnational Law
Vol. Volume
VRÜ Verfassung und Recht in Übersee
VVDSrL Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer
Wash. L. Rev. Washington Law Review
WFP World Food Programme
WIPO World Intellectual Property Organization
WMO World Meteorological Organization
WTO World Trade Organization
Yale L. J. Yale Law Journal
Yale J. Int’l L. Yale Journal of International Law
ZaöRV/ HJIL Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law
ZEuS Zeitschrift für europarechtliche Studien
ZfBR Zeitschrift für deutsches und internationales Bau- und Vergaberecht
ZHR Zeitschrift für das gesamte Handelsrecht
ZRP Zeitschrift für Rechtspolitik
ZSchwR Zeitschrift für Schweizerisches Recht
The Future of the Charter of the United Nations

Nico J. Schrijver

Introduction
I. The Creation and the Legal Nature of the Charter
   1. Creation
   2. Legal Nature
II. The United Nations, Then and Now
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   2. Uniting for Peace Procedure and the Expansion of the General Assembly’s Powers
   3. Collective Diplomacy and Peacekeeping
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   5. Development Co-operation and Environmental Conservation as New Objectives
   6. Authorising Coalitions of the Able and Willing to Use Force
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   4. Clearing Away the Dead Wood in the Charter
V. Final Observations: The United Nations of the Future and the Future of the Charter

Introduction

The United Nations Charter has weathered many storms during and after the Cold War leading to the question of the secret of its success as well as speculation on its future. The Charter entered into force on 24 October 1945, upon the required ratification by the five Great Powers and the majority of the other states which had signed the Charter in San Francisco on 26 June 1945.1

The UN Charter is a relatively short treaty of less than 9,000 words. By comparison, the draft Constitution for Europe is almost 155,000 words long.2 To some extent the secret of the UN Charter’s survival has depended on its concise character. An abundance of detail would undoubtedly have failed the test of time. In addition, the formulations of the Charter itself are obviously also responsible for its success. They are of a fairly general nature, but were carefully chosen, albeit sometimes deliberately ambiguous because of the character of compromise. In a number of fields this has created room for additional and dynamic interpretations in the light of new needs and changing circumstances.3 Moreover, all Member States, of course, shared the conviction that they would be better off with an organization of nations than with none. This has also protected the Charter. So far, none of the Member States has ever really wanted to turn its back on the organization. Only one country has ever withdrawn its membership: Indonesia, under President Sukarno, although it subsequently returned.4 Admittedly American ambassadors have sometimes been less than complimentary: one

1 See Charter of the United Nations, always reprinted in the newest Volume of the Yearbook of the United Nations. Available also at: <http://www.un.org/aboutun/charter/index.html>; Article 110, para. 3. On 24 October 1945, the five permanent powers and another 24 of the 50 original signatory states had ratified the Charter.


3 The conventional rules of treaty interpretation are recorded in arts 31-32 of the Vienna Convention on the Law of Treaties (1969), UNTS Vol. 1155 No. 18232, ILM 8 (1969), 679 et seq. The principal rule is that treaty provisions “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”, article 31, para. 1.

called the United Nations *A Dangerous Place* (Moynihan, 1978), while another said that no one would notice if it lost ten storeys (Bolton, 2004), but nevertheless all the 192 nations are clearly united in a desire that the organization should continue to exist. This in itself is unique in the history of the world.

The first part of this article looks briefly at the creation of the UN Charter and discusses its legal nature. It then examines seven main differences between the United Nations of 1945 and the United Nations at the start of the 21st century. The third part reviews a number of instances of additional and dynamic interpretation of the Charter in the light of these changed circumstances and new needs, all of which could be effected without formal amendment. The fourth part draws up the balance of the agenda for Charter reform at the World Summit held in September 2005 on the occasion of the sixtieth anniversary. According to Kofi Annan, this was the chance for UN structural reform, an opportunity which arises only once every generation. Was this opportunity taken? And finally: what is the future of the Charter of the United Nations in the 21st century?

I. The Creation and the Legal Nature of the Charter

1. Creation

The UN Charter is the successor of the Covenant of the League of Nations, which collapsed together with the League of Nations as a result of World War II. Some important lessons that were learned as a result of the failure of the League of Nations were that the organization should be more than an instrument to merely protect the status quo and the territorial integrity of independent states. It should also be concerned with promoting social justice. This broader aim, *inter alia*, of ensuring “freedom from want” had already emerged in 1941 in Roosevelt’s “Four Freedoms” speech and Roosevelt’s and Churchill’s Atlantic Charter. The second lesson of the failure of the Members of the League

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6 State of the Union address before the American Congress by President Franklin D. Roosevelt, 6 January 1941. Source: F.D. Roosevelt, *Develop-
of Nations was that it was necessary to break down the system of decision making with unanimous votes, which meant that in the League of Nations every state actually had a right of veto. The third lesson was that the organization should be created with supranational competences that could take decisions binding all the members.

Fifty states participated in the founding conference of the United Nations in San Francisco from April to June 1945. There was a good atmosphere amongst the 300 government representatives, but there were still difficult problems to be resolved on many issues. This is apparent from the reports and documents of this conference, which still constitute a wealth of research material. No fewer than 1,500 amendments were submitted.

The draft Charter was accepted on 26 June 1945 without too many changes. The whole package, with the original document and all the fifty signatures was flown over to the depositary of the new treaty, the

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7 See article 5, para. 1 of the Covenant of the League of Nations, requiring in principle that “... decisions at any meeting of the Assembly or of the Council shall require the agreement of all the Members of the League represented at the meeting”, Covenant of the League of Nations, 28 June 1919, available at: <http://www.yale.edu/lawweb/avalon/leagcov.htm13>; AJILs 128, 112 BFSP 13.
9 As a result of serious disagreement between the United States and the Soviet Union on a new Polish Government the Polish delegation never arrived in San Francisco and some of its members were imprisoned during their stop-over in Moscow. However, Poland was later allowed to sign the Charter and to be viewed as an original member by which the number of original members became 51. See R.B. Russell/ J.E. Muther, A History of The United Nations Charter: The Role of the United States 1940-45, 1958, 929.
host and American President Truman. Alger Hiss, the young Secretary-General of the San Francisco conference, described for an oral history project how this was done with a small military aircraft, and how he had decided, after some hesitation, to attach the only parachute on board to the package containing the Charter, and not to himself, because he had been so conscious of the special mission entrusted to him, to take this precious document to the vaults of the White House.\textsuperscript{12}

2. Legal Nature

As a treaty, the Charter with its 111 articles has a hybrid character. It is \textit{contractual} with regard to its provisions on signing, amendments, ratification and entry into force.\textsuperscript{13} It is \textit{normative} with regard to its provisions on aims and principles.\textsuperscript{14} It is \textit{constitutive} with regard to its provisions on membership and the organization of the United Nations with its six principal organs, establishing the composition, functions and powers, and their voting procedures.\textsuperscript{15} The Charter should primarily be interpreted objectively, in accordance with the meaning of the terms of the treaty based on the normal use of language. However, the most innovative aspect must be the possibility of following a teleological method of interpretation for the provisions of the Charter, in which in particular the broad normative provisions of the Charter are interpreted in such a way that the aim of the treaty is most fully achieved.

If there are two or more possible methods of interpretation, the one to be chosen is that which best serves the aim of the treaty: this is also known as the rule of effectiveness (\textit{effet utile}).\textsuperscript{16} The doctrine of \textit{implied


\textsuperscript{13} See Arts 108-110 UN Charter.

\textsuperscript{14} See the preamble and Arts 1-2 but also Article 55 and Arts 73-74 and 76 UN Charter.

\textsuperscript{15} E.g. see Arts 3-32 UN Charter.

powers is also part of this method of interpretation.\textsuperscript{17} The Organization must have all the competences which are necessary for the proper execution of the main functions, whether these are explicitly or merely implicitly formulated. One example is the establishment of peace-keeping operations (blue helmets), which had not been explicitly anticipated. Professor Georg Ress distinguished the dynamic-evolutionary method in addition to the teleological method, providing a useful handle for the interpretation of such an important treaty which has been effective for so long and covers so many subjects.\textsuperscript{18} The starting point of this method is that it is logical for the Charter to evolve over time, and also that this can change the meaning of the provisions. One clear example concerns the provisions of the Charter on territories whose peoples have not yet attained a full measure of self-government.\textsuperscript{19} These are no longer used, and have even lost their legitimacy because new legal instruments have raised the self-determination of nations from a principle to a right.\textsuperscript{20} In 1960 this development culminated in the important Declaration on the Granting of Independence to Colonial Countries and Peoples in Accordance with the Charter of the United Nations, A/RES/1514 (XV) of 14 December 1960. See on the law and practice of decolonisation J. Crawford, \textit{The Creation of States in International Law}, 2006, Part III. With the termination of the Trusteeship Agreement for the Trust Territory of the Pacific Islands, and Palau’s admission as the 185th Member of the UN in 1994, the Trusteeship Council completed the task entrusted to it under the Charter. The Council now meets as and where required.

\textsuperscript{19} See the Chapters XI-XIII UN Charter.

\textsuperscript{21} Declaration on the Granting of Independence to Colonial Countries and Peoples in Accordance with the Charter of the United Nations, A/RES/1514 (XV) of 14 December 1960. See on the law and practice of decolonisation J. Crawford, \textit{The Creation of States in International Law}, 2006, Part III. With the termination of the Trusteeship Agreement for the Trust Territory of the Pacific Islands, and Palau’s admission as the 185th Member of the UN in 1994, the Trusteeship Council completed the task entrusted to it under the Charter. The Council now meets as and where required.

\textsuperscript{22} See the Advisory Opinion on Namibia, in which the ICJ observed: “... an international instrument has to be interpreted and applied within the
tainty as to the content of the law and about how to find and indicate the law. Therefore, the law and the practice of the main political organs of the UN are also extremely important. The Advisory Opinions of the ICJ have also contributed to the clarification and interpretation of existing Charter law as well as to the consolidation of new trends in and to the progressive development of international law. In these Opinions the Court has regularly explored the limits of the competences of the principal organs of the UN, and not infrequently also extended the boundaries somewhat.23 Recently, the Security Council also appeared to embark on the path of interpreting the law – if not creating law – by making pronouncements in a general sense,24 i.e. not in the specific situation of a particular conflict, but for example, on the threat to peace as a result of the large-scale violation of human rights, international terrorism or the spread of what has so dramatically but correctly been called “diseases of mass destruction”, such as AIDS.25

The interaction of all these resolutions, the practice of the political organs of the UN and the judgements and advisory opinions of the ICJ


are important sources for the interpretation of the Charter in a contemporary context.\textsuperscript{26}

**II. The United Nations, Then and Now**

Seven points may illustrate the extent to which the current United Nations differs from that in 1945.

1. **Universal Membership**

In the first place, the organization evolved from a limited to a universal cooperative venture. In 1945 the United Nations was an alliance against Nazism and fascism, an alliance of the victors of World War II. Initially Germany, Japan and Italy were, as former enemy states, not permitted to be members. This was the privilege of “peace loving” states which had accepted the obligations under the Charter and were deemed to be “able and willing to carry out these obligations”.\textsuperscript{27} Gradually this demand lost its substantive significance and now the Organization aims to achieve universal membership.

2. **The End of Colonialism and the Emergence of the North-South Divide**

The second major change is the end of colonialism. This radically changed the UN. The number of members almost quadrupled, in a way that had never been anticipated. Not long ago, the New York professor Schachter related how he had been asked to advice on the number of seats which would have to be placed in the hall of the General Assembly building that was being constructed, when he was a young UN official in 1948. He had thought he would allow a generous margin and said: “You can count on a maximum of 75 states.”\textsuperscript{28} In view of all the

\textsuperscript{26} For an early work see R. Higgins, *The Development of International Law Through the Political Organs of the United Nations*, 1963.

\textsuperscript{27} See Article 4, para. 1 UN Charter.

subsequent rebuilding, this proved to be a very expensive miscalculation. However, the qualitative change was even more important than the quantitative change. The process of decolonisation led to very different types of states joining the UN: often poor and vulnerable, and extremely anxious to maintain their newly acquired independence and sovereignty. They sought protection, security and assistance from the UN. The unequal position of developed and developing countries led frequently to debates, if not confrontation on the need for structural reform of the international economic and social order. The cause of the developing countries had a great influence on the development of international law.29 We now see that several of these countries have become fragile states, sometimes with governments which have lost the monopoly on the use of force, and are no longer able to guarantee the security of their citizens.30 Obviously, this problem of “failing states” had not been anticipated at all in 1945.

3. From a “Negative” to a “Positive” Concept of Peace

The third change is the drastically different interpretation of the term “threat to peace”. In 1945 this referred to maintaining a “negative peace”, in the sense of the absence of the threat of war.31 More attention was soon devoted to “positive peace”, a legal order based on the other global values reflected in Article 1, paras 2 to 4. Now there exists a consensus in the United Nations that threats to peace do not only result from wars between and within states, but also from the spread of weapons of mass destruction, international terrorism, transnationally organized crime, infectious diseases, and even – if not yet in the practice of


the Security Council – from serious poverty and underdevelopment and from serious environmental pollution.\textsuperscript{32}

4. Human Security as well as State Security

The fourth change is the emergence of the concern for human security in addition to the security of states.\textsuperscript{33} In 1945 the concern was to create a system of collective security against aggression by states. In 2006 the threats come both from states and from non-state elements, and these are a threat to the security of both states and people. In fact, the Charter had been ahead of its time in that respect, by already making the link between peace and security, and socio-economic development and a respect for human rights, for example, in Article 55.\textsuperscript{34}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{34} Article 55 UN Charter provides: “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

\begin{itemize}
\item a) higher standards of living, full employment, and conditions of economic and social progress and development;
\item b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
\item c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”
\end{itemize}
Reference could also be made to Article 1, para. 4 UN Charter listing among the purposes of the UN: “to be a centre for harmonizing the actions of nations in the attainment of these common ends.”
\end{itemize}
\end{footnotesize}
5. The End of the Cold War

The fifth point concerns the end of the Cold War. This was an important turning point in the history of the UN which created new opportunities for it: the process of independence in Namibia, the end of apartheid in South Africa, peace and reconstruction in Cambodia, Angola and Mozambique and a very clear position against the occupation of Kuwait by Iraq. It also resulted in an increased status of the issue of human rights in international affairs, despite culturally relativist criticism. At the World Conference on Human Rights, human rights were defined as both universal and indivisible. However, it soon became clear that the “honeymoon” period following the Cold War did not cover everything. Long-term regional conflicts, such as that e.g. between Israel and the Palestinians, remained unresolved. Nevertheless, the end of the Cold War was an important turning point for the UN in many different fields.

6. The Impact of September 11th

And then, in the sixth place, there was September 11th 2001. The horrifying terrorist attacks on the United States, and subsequently in Bali, Madrid and London, amongst other places, gave rise to a thorough reconsideration of applicable legal principles in the field of war and peace and on the adequacy of the current arsenal of international regulations to respond to the worldwide threat of international terrorism. Obviously the principles of the Charter are not cut out to serve as a response to attacks on a state by a group of often loosely organized international terrorists. However, following September 11th, new interpretations are being developed, partly on the basis of a new practice in response to situations which have resulted from terrorism, in addition to a series of multilateral and regional anti-terrorism conventions. Major stumbling

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blocks still exist, for example as regards the definition of terrorism, the issue of state terrorism and the political offence exception. However, the determination of the political organs of the UN to take the necessary measures in combating international terrorism is encouraging. Nevertheless, it would be reasonable to expect more from the United Nations with regard to actively and effectively combating international terrorism. In that case, states must allow more room for multilateral, anti-terrorist measures, and should not endlessly take measures unilaterally to extend the right of self-defence. Successfully preventing and combating international terrorism in the long term requires a multifaceted and integrated approach. The UN can provide a good, if not the only forum for this.

7. The UN in a Multi-Actor World

The seventh and last point is that not only the number of members has increased from 51 to 192 states, but that the circle of legal participants has also grown enormously in another respect. Industry, social movements and non-governmental organizations also have a foot in the door, and sometimes even play a role in the UN which had not been anticipated in 1945.

These seven points show that the UN in 2006 is actually very different from that in 1945, and that the organization has revealed a great capacity for adaptation. In the next section some main examples of new interpretations, if not modifications of the Charter itself will be discussed from an international law point of view.

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37 S/RES/1566 (2004) of 8 October 2004. See e.g. the interesting definition of terrorism in para. 3 of this unanimously adopted resolution.


39 On 28 June 2006, the Republic of Montenegro was admitted as the 192nd Member of the United Nations. See A/RES/60/264.

III. Applying, Interpreting and de facto Modifying the Charter

Soon after the establishment of the United Nations it became obvious that the Cold War would block any decision-making required to amend the UN Charter. Simultaneously, the envisaged system of collective security could not materialize as a result of the large number of vetoes in the initial years of the United Nations. However, in practice a modus operandi evolved to cope with this stalemate. Furthermore, the UN could expand its activities in other fields without any substantive Charter amendment. So far the only amendments of the Charter related to the increase of the size of the Security Council (in 1963, from 11 to 15 members) and the Economic and Social Council (in 1963 from 18 to 27 and in 1971 to 54 members). This section discusses the various ways in which new practices, goals and objectives emerged and adaptations could be made, which constitute dynamic interpretations if not de facto modification of the Charter.

1. Voting Procedure in the UN Security Council

Article 27, para. 3 of the UN Charter requires a majority of nine out of 15 votes (before the amendment took effect in 1965 it was seven out of 11) in the Security Council for the adoption of decisions on non-procedural matters, including “the concurring votes of the permanent members.” In order to avoid constant paralysis during the Cold War, an early practice emerged that an abstention by one or more permanent members would not block the adoption of a legally valid decision by the Council. In its Namibia Opinion the ICJ rubberstamped this practice “… as not constituting a bar to the adoption of resolutions.”

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44 Advisory Opinion on Namibia, see note 22, para. 22.
2. Uniting for Peace Procedure and the Expansion of the General Assembly’s Powers

During the Korean crisis in 1950, the Soviet Union pursued a policy of the “empty chair”, in reaction to Western refusal to grant the permanent seat on the Council to the newly established People’s Republic of China. Only under these circumstances was the Council in a position to take collective action against North Korea, which had been identified as the aggressor and held responsible for a breach of peace.\(^{45}\) The Korea resolutions were adopted with the then required minimum majority of seven votes in favour. Obviously, Western powers were aware that the absence of the Soviet Union from the Security Council might not last for long. In a political move taking advantage of the presumed non-functioning of the Council the United States and its allies transferred part of the powers of the Council to the Assembly which at the time could more easily be controlled by Western states. Under the appealing title *Uniting for Peace*, the Assembly adopted Resolution 377 (V) on 3 November 1950, by 52 to 5 votes, with 2 abstentions.\(^{46}\) This Resolution enables the Council on the vote of any seven (from 1965 nine) members or a majority of the members of the General Assembly to call emergency special sessions, should the Council not be in a position to exercise its primary responsibility to address a threat to peace, breach of the peace or act of aggression as a result of lack of unanimity. In the specific cases of a breach of the peace or act of aggression the Assembly even vested itself with the power to recommend the taking of military action. Obviously, such a self-vested power was not in line with the Charter’s division of competences between the Council and Assembly as included in Arts 11-14 of the Charter. Not without reason the Soviet Union labelled this particular aspect of the Resolution at the time as “Disuniting for War” rather than “Uniting for Peace”.

Employing the Uniting for Peace procedure, the Assembly established in 1956 a peace-keeping operation in the Middle East (UNEF I) being the first UN peace-keeping force.\(^{47}\) The Assembly did not recommend the use of force as envisaged under the Uniting for Peace Procedure. Moreover, the Assembly did not find a breach of the peace or act of aggression. From 1958 also the Soviet Union appeared to have ac-

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\(^{46}\) See UNYB 1950, 193.

\(^{47}\) A/RES/1009 (ES-1) of 5 November 1956.
cepted the procedure and even called on it, albeit not explicitly, when a dead-locked Council could not act during the Arab-Israeli War in 1967.48

As a procedure, the Uniting for Peace Resolution has been invoked and applied on numerous occasions, most recently in 2002 in the procedure when the General Assembly sought an Advisory Opinion from the ICJ on the legal consequences of the construction by Israel of a wall in occupied Palestinian territory.49 As a procedure, the Uniting for Peace procedure appears to have become part and parcel of the institutional law of the United Nations. However, thus far the Assembly has never recommended the use of force under this resolution. One can only speculate on the reasons why the Assembly has shown so much self-restraint in this respect. One explanation could be that the Assembly has been well aware of the fundamental character of the norm of the prohibition to use force in the Charter, including the danger of eroding this norm at a time when international tension is still prevalent. Another reason could well be a policy not to antagonize the majority of the Security Council, if not all of its permanent members. Hence, this particular aspect of the Uniting for Peace Procedure relating to the use of force cannot be deemed a legally valid exercise of the powers of the Assembly and by now it has been well interred in the graveyard of the Cold War. In general terms, through the Uniting for Peace procedure and other relevant practice the functions and powers of the General Assembly have been interpreted in such a manner that the Assembly can also assume responsibility for matters relating to the maintenance of peace and security side by side with the Security Council.

3. Collective Diplomacy and Peacekeeping

The United Nations force as envisaged in the Charter could not be established. Thus the Security Council missed the “teeth with which to bite.”50 But when collective diplomacy did result in a cease-fire there was a need to supervise the implementation of the arrangements in the area of dispute. For this purpose UN peace-keeping operations have

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48 Zacklin, see note 43, 188 fn. 52.
49 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, 136 et seq. (146-152).
been established, initially by the Assembly (e.g. UNEF I)\textsuperscript{51} and subsequently mostly by the Council (e.g. Cyprus), and sometimes upon the basis of Chapter VI and sometimes upon the basis of Chapter VII. Hence, the finding that they constitute so-called Chapter VI 1/2 operations.\textsuperscript{52} These peace-keeping operations have essentially different tasks and more limited powers than the peace enforcement operations envisaged at the time. The legality of the establishment of UNEF I was later upheld by the ICJ in the Certain Expenses case.\textsuperscript{53} Among the reasons given, the Court stated that it was only an enforcement action and not a peace-keeping action that must be referred to the Security Council under Article 11, para. 2 of the Charter.

Despite the lack of an institutional structure and the serious problems in financing, these peace-keeping operations can be viewed as a major success in the actual operation of the United Nations. The presence of an impartial, international element in a conflict situation has often had a stabilizing function, although all too often a definitive solution could not be achieved.\textsuperscript{54}

4. The Concept of a Threat to Peace

Without doubt, the primary preoccupation of the United Nations in 1945 was to maintain the “negative peace”, i.e. to maintain the status quo and to prevent the use of force in international relations. If a state were to prepare an armed attack against another state, the Security Council was to identify this as a “threat to peace” and take mandatory measures under Chapter VII, such as the imposition of a cease-fire and diplomatic measures to prevent an escalation. As a result of interna-

\textsuperscript{51} A/RES/1000 (ES-1) of 5 November 1956.
\textsuperscript{53} Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion, ICJ Reports 1962, 151 et seq.
tional law developments in the field of human rights and the self-determination of peoples, the Assembly, and somewhat hesitantly the Council as well, came to recognize that a threat to peace can also emanate from a refusal by a state to change a situation deemed to be intolerable, particularly colonial domination, apartheid or foreign occupation. Hence the view took hold that the “negative peace” cannot be maintained in the light of continued flagrant and mass violations of human rights. For this reason the Council labelled, at the time, the situation in Southern Rhodesia and the continued supplying of arms to apartheid South Africa as a threat to peace and ordered coercive measures: in the former case, comprehensive economic sanctions, in the latter, only an arms embargo. The fact that the political organs of the United Nations thus assumed the power to determine that serious violations of human rights constitute a threat to peace can be viewed as one of the most fundamental policy changes within the United Nations system, if not in international relations as a whole. In more recent times, the Council has also determined that any act of international terrorism and the proliferation of weapons of mass destruction constitute threats to peace under Article 39 of the UN Charter.

5. Development Co-operation and Environmental Conservation as New Objectives

The preamble, Article 1 and Arts 55-56 of the Charter make reference to the role of the United Nations in promoting international economic and social co-operation. Yet, in 1945 this was based upon the interesting assumption that such co-operation would be instrumental in achieving “peaceful and friendly relations among nations”. Hence, the interest of international economic and social welfare was thus subordinated to

59 See the opening text of Article 55, reading: “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples ...”
the overriding concern to maintain peace and security. Furthermore, “development” as an objective is only mentioned twice, in Article 55 as a general objective and in Article 73 specifically with respect to non-self-governing territories, and not as such in the Preamble or Article 1 on the Purposes and Principles. This can be explained by the fact that in 1945 developing countries hardly participated in international politics. After all, when the UN was established 45 per cent of the world population still lived under colonial rule. This changed rapidly in the years following the establishment of the UN, and as a result the membership of the organization increased in the period 1945-1960 from 51 to 100 states. In addition to decolonisation, the development of the peoples and the countries of the South soon emerged as an important new objective. In the late 1940s, the UN was already establishing the first programs for technical aid and programs of grants. Not only did the UN over time establish a host of subsidiary organs to undertake operational activities and to address concerns of developing countries (WFP, UNCTAD, UNDP, UNIDO, to mention just a few), the United Nations also evolved as the major agent of normative development in this field. Throughout the history of the United Nations, numerous resolutions have been adopted, especially by the General Assembly, which have shaped the contours of both a UN development ideology and international law relating to the development of developing countries. The latter emerged as a result of both UN normative resolutions and the practice of states and international institutions such as the World Bank and the GATT/WTO.

Similarly, environmental conservation emerged as a new key concern of the United Nations. While environmental problems have featured on the UN agenda from the 1950s, it can be said that the main impetus came from the 1972 Stockholm Conference on the Human Environment. Ever since, the UN and its various organs (most notably the UNEP and UNECE) have served as major platforms for dia-

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63 United Nations Economic Commission for Europe, which adopted among other legal instruments the Convention on Long-range Transboundary Air Pollution (1979), the Convention on Environmental Impact Assessment in
logue and standard-setting as well as for operational activities, also in co-operation with other institutions such as the World Bank through the Global Environment Facility. The various objectives of the United Nations in the field of environment and development are now aptly summarized in the concept of sustainable development, which in the concise definition of the Brundtland Commission means “development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs”. The concept of sustainable development was introduced into international politics at the Rio Conference on Environment and Development in 1992. Since 1992 sustainable development has been endorsed and recognized as a legally relevant concept in a number of instruments of international law. Thus, it is incorporated in various environmental treaties, international fisheries agreements, development co-operation treaties as well as in the 1994 Agreement Establishing the World Trade Organization and in EU law. Currently, the United Nations is attempting to mainstream the concept of sustainable development as a key objective into all relevant fields of policy.

64 World Commission on Environment and Development, Our Common Future, 1987, 43.
67 See the 2005 World Summit Outcome Document in which the world leaders state that their efforts in this respect will promote: “the integration of the three components of sustainable development – economic development, social development and environmental protection – as interdependent and mutually reinforcing pillars. Poverty eradication, changing unsustainable patterns of production and consumption and protecting and managing the natural resource base of economic and social development are overarching objectives of and essential requirements for sustainable development,” A/RES/60/1 of 16 September 2005, para. 48.
The promotion of sustainable development as well as international development and environmental co-operation are now among the core objectives of the United Nations.

6. Authorising Coalitions of the Able and Willing to Use Force

In response to the non-conclusion of the special agreements as envisaged in Article 43 for the delivery of armed forces, assistance and facilities by Member States to the United Nations, an interesting practice emerged by which the Council authorizes Member States “to use all necessary means” to implement Security Council resolutions. An early example of what is nowadays called an “authorization” resolution is Security Council Resolution 83 of 27 June 1950, by which the Council recommended “that the members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security”. Members providing military forces (sixteen in total) were advised to make these available “to a unified command under the United States of America”.68

The diplomatic phrase of with “all necessary means” has become a euphemism for authorizing Member States to use force in international relations.69 Apart from imposing a variety of sanctions, the Council did not in recent years shy away from showing its teeth, although the actual “biting” became routinely delegated to coalitions of Member States.70 Thus in Resolution 678 (1990) of 29 November 1990 the Council authorized Member States “co-operating with the Government of Kuwait” to use “all necessary means to uphold and implement” its resolutions ordering Iraq out of Kuwait as well as “to restore international peace and security in the area”.71 The particular phrase “all necessary means” evolved into the standard formula by which the Security Coun-

68 S/RES/84 (1950) of 7 July 1950.
69 N.M. Blokker, “Is the authorization authorized? Powers and practice of the UN Security Council to authorize the use of force by ‘coalitions of the able and willing’”, EJIL 11 (2000), 541 et seq.
cil authorized *ad hoc* coalitions or regional organizations to use military force, if necessary, to maintain or restore peace and security. Main examples of employing this technique to authorize coalitions to take “all necessary means” include Operation Restore Hope in Somalia,\(^1\) various resolutions adopted during the crises in the former Yugoslavia, and UN actions in Haiti,\(^2\) East Timor,\(^3\) Afghanistan,\(^4\) Côte d’Ivoire,\(^5\) Burundi,\(^6\) Iraq\(^7\) and Liberia.\(^8\)

### 7. Re-Interpreting the Right to Self-Defence

The Charter codified in Article 51 the “inherent” right of every state to individual or collective self-defence in case of an armed attack. However, it qualified this traditional right by requiring immediate reporting to the UN Security Council on the measures taken by Member States in the exercise of this right, and by reserving the right of the Council to take collective measures at any time in discharge of its primary responsibility for the maintenance or restoration of peace and security, thus suspending the right of the victim state to self-defence.\(^9\)

Obviously, the right of self-defence as codified in Article 51 stems from a different period. Only inter-state wars were contemplated in 1945. However, the exact interpretation of Article 51 is not cast in iron but has evolved over time. In the post-September 11th world, strong indications exist that Article 51 could also be extended to include armed attacks by non-state actors.\(^10\)

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\(^1\) See S/RES/794 (1992) of 3 December 1992, which authorizes “the Secretary-General and Member States […] to use all necessary means to establish […] a secure environment for humanitarian relief operations.” (para. 10).


entities. Moreover, based on the *Caroline* criteria, but dating back to the period of 1837-1841, the right to self-defence also encompasses self-defence against identifiable imminent attacks.\(^81\) This is widely recognized as reflecting customary international law.\(^82\) The use of the words “inherent right” in Article 51 (in the French text of the Charter “droit naturel”) may well incorporate these criteria, subject of course to the requirements of Article 51 such as immediate reporting to the Security Council and suspension of the right of self-defence as soon as the Council takes collective measures. This led the High-level Panel and the Secretary-General to conclude that there is no need to amend or rewrite Article 51 from the perspective of pre-emptive action. If this interpretation of a wider scope of the right to self-defence is consolidated,\(^83\) there is consequently less reason to allow any room for additional unilateral military action.

8. Expansion of Security Council Powers

In the post-Cold War era the Security Council explored new avenues for discharging its special responsibilities in the field of peace and security. In the early 1990s, the Council established two *ad hoc* international criminal tribunals, one for the former Yugoslavia\(^84\) and another for Rwanda.\(^85\) The competence of the Council to establish such tribunals was not without controversy. It was challenged by several defendants before the Yugoslavia and Rwanda tribunals, but upheld by both tribu-

\(^81\) During the incident with the *Caroline* U.S. Secretary of State Daniel Webster made a classic attempt to define and to limit anticipatory self-defence. In response to wider claims by the British, he stated that such a right arises only when there is: “a necessity of self-defence, ..., instant, overwhelming, leaving no choice of means and no moment for deliberation”, reproduced in *British and Foreign State Papers* 39 (1857), 1126 et seq.


\(^83\) However, see what appears to be *contra* in the recent Advisory Opinion of the ICJ on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, see note 49, 36, para. 139.


\(^85\) International Criminal Tribunal for Rwanda (ICTR), established by S/RES/955 (1994) of 8 November 1994.
Moreover, after September 11th the Council initiated a new practice by adopting binding resolutions under Chapter VII which were not directly related to a particular situation or country. Thus, in Resolution 1373 of 28 September 2001, the Council imposed a far-reaching set of obligations on all states to prevent providing terrorists a safe haven or any sustenance or support and denying any access to financial resources. In order to monitor the implementation of a package of general anti-terrorism measures, the Council established the Counter-Terrorism Committee. In a similar vein, the Council adopted general resolutions to prevent the proliferation of weapons of mass destruction, including a duty for states to refrain from providing any support to non-state actors to develop such weapons. It is interesting to note that here the Council is taking on a quasi-legislative role, which hitherto was considered the prerogative of the General Assembly only.

9. The Emergence of the Responsibility to Protect Citizens

In response to the atrocities in Cambodia, Somalia, Rwanda and the former Yugoslavia, it is often stated that this should never happen again. Yet, it does, as can be witnessed for example in Darfur. In recent years, the discussion has been focused on the concept of the responsibility to protect an innocent population, a debate sparked off by the International Commission on Intervention and State Sovereignty. The doctrine of humanitarian intervention is often also labelled as the responsibility to protect innocent people from genocide, crimes against humanity and war crimes. The issue was also addressed in the September 2005

Summit Outcome Document where notable progress was made. The world leaders state that:

“each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.”

In addition, it is said that “the international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means,” “to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity,” and that in that context the UN Member States are prepared:

“to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.”

Obviously, this formulation contains quite a number of qualifications and limits the concept of the responsibility to protect populations to situations of genocide, war crimes, ethnic cleansing and crimes against humanity. Nevertheless, it serves as a strong endorsement of the growing opinion held in global civil society that, first of all, national

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91 See the article of P. Hilpold in this Volume.
92 World Summit Outcome Document, see note 67, para. 138.
93 Ibid., para. 139. Emphasis added.
governments should exercise their sovereignty in a responsible way and that providing safety for its citizens is a prime duty and that, secondly, there is a secondary responsibility incumbent upon the international community to act should a national government be unable or unwilling to discharge its duties in this respect. The two paragraphs in the World Summit Document seem a step forward on the long road towards better protection – or to protection at all – of innocent populations all over the world against leaders who abuse their powers or manifestly fail in the execution of their duties. Naturally, this will depend very much on the question whether the United Nations suit indeed the act to the word in such situations. If this principle of the responsibility to protect citizens and populations really does take root in further legal development and is put into practice in cases that arise, and thus further qualifies the scope of matters which are, in the words of Article 2, para. 7 of the UN Charter, “essentially within the domestic jurisdiction of any state”, this could herald the start of a fundamental reorientation in international law: after all, its starting point is the security and fate of citizens, and not, in the first place, national security and the sovereignty of states. It is still too early to determine whether this will actually happen, as the development of the principle of the responsibility to protect is still in its infancy.

These examples demonstrate how the Charter, within the framework of its basic principles and purposes, can accommodate far-reaching changes without resort to cumbersome formal amendment procedures as provided for in Arts 108 and 109 of the Charter. Nevertheless, at regular intervals, such formal attempts have been made mostly unsuccessfully.

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IV. The Agenda for Charter Reform at the World Summit of September 2005

“A once-in-a-generation opportunity.” These were the appealing words employed by UN Secretary-General Kofi Annan to identify the momentum and set the stage for reform of the United Nations on the occasion of its sixtieth anniversary in 2005. Indeed, reform discussions appeared to have gained once again momentum in recent years in response to both increased demands upon the Organization and challenges to its role as a relevant actor in today’s international relations. Increased demands stem from the multiple expectations of a role of the United Nations in maintaining or restoring peace and security, combating international terrorism, fighting poverty and promoting sustainable development and respect for human rights. Scepticism as to the relevancy of the organization results from its failure to act timely and decisively in situations such as Rwanda, former Yugoslavia and Darfur. Yet, it was especially the unilateral decision by the United States and the United Kingdom to resort to war against Iraq in 2003 in contravention of the UN Charter which provoked a crisis of relevance of the United Nations.

It is notable that amongst the many reform proposals in the 129 page report *A More Secure World: Our shared responsibility* by Annan’s High-level Panel of eminent persons and the 87 page subsequent report *In Larger Freedom* of the Secretary-General himself only few proposals would involve amendment of the Charter of the United Nations. They relate to institutional proposals for a more effective United Nations for the 21st century and to clearing away dead wood in the Charter.

98 See paras 297-302 of *A More Secure World*, and paras 216-219 of *In Larger Freedom*, respectively, see note 32.
1. Reform of the Security Council

As regards institutional reform, the High-level Panel elaborated two alternative models for expansion of the membership of the UN Security Council from the current 15 to 24: model A envisaging six new permanent members without veto power and thirteen additional non-permanent members. Model B envisaging eight new semi-permanent members with four year renewable terms and eleven additional non-permanent members. Model B thus creates a new category of eight four-year renewable term seats, in addition to the current five permanent seats and eleven two-year (non-renewable) seats.\footnote{A More Secure World, see note 32, Chapter XIV, paras 244-260.}

Obviously, this would involve amending Arts 23 and 27 of the Charter. In order to make this change not unchallengeable in future, the Panel proposed a review of the composition of the Security Council in 2020, including a review of the contribution of permanent and non-permanent members from the point of view of the Council’s effectiveness in taking collective action. Annan endorsed these two models as relevant ones, but in response to widespread dissatisfaction with the proposals of the High-level Panel he explicitly opened the option for “any other viable proposals in terms of size and balance” on which consensus might emerge.\footnote{In Larger Freedom, see note 32, para. 170.}

It is a well-known fact that the World Summit failed to make any progress in this particular field. Only two vague paragraphs are included on the reform of the Security Council,\footnote{See World Summit Outcome Document, see note 67, paras 153-154.} stating that the world leaders “support early reform of the Security Council as an essential element of our overall effort to reform the United Nations in order to make it more broadly representative, efficient and transparent” and “thus to further enhance its effectiveness and the legitimacy and implementation of its decisions”, followed by the intention “to continuing our efforts to achieve a decision to this end”.\footnote{Ibid., para. 153.} It was striking that the candidate countries, Japan, Germany, India and Brazil, were not able to gather together the required two-thirds majority of 128 votes, despite their lengthy preparations and active diplomacy, to even make a start on
extending the Council. Fassbender has already referred to a “boulevard of broken dreams.”

2. Human Rights: Replacement of the Commission by a Council

The second institutional reform related to the UN Commission on Human Rights. The High-level Panel proposed a universal membership of the 53-member and allegedly highly politicised body and the establishment of an advisory council of some 15 independent experts, whereas Annan proposed to do away altogether with the Commission in view of its declining credibility and professionalism and to replace it by a Human Rights Council of equal standing with the Security Council and the Economic and Social Council. Although the Secretary-General did not say so, it would have required amendment of the UN Charter to effect such a footing of equality of the Human Rights Council as a principal organ of the UN with these two other Councils. The World Summit endorsed the establishment of such a new Council in principle, but left it to the General Assembly to decide on its modalities following “open, transparent and inclusive negotiations to be completed as soon as possible during the sixtieth session, with the aim of establishing the mandate, modalities, functions, size, composition, membership, working methods and procedures of the Council”.

Upon extensive consultations and rather difficult negotiations the Assembly succeeded at last on 15 March 2006 to establish such a Council. It was decided that the Council would serve as a subsidiary organ of the Assembly under Article 22 of the Charter, thus requiring no Charter amendment. Compared with the Commission membership was reduced only slightly, from 53 to 47, and to be elected by the Assembly by simple majority (at the time 96 votes) rather than by ECOSOC (by 28 votes or a majority of members present and voting). Furthermore,

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104 Established by E/RES/5 (I) of 16 February 1946.
105 A More Secure World, see note 32, paras 282-287.
106 Cf. Article 7 UN Charter.
107 World Summit Outcome Document, see note 67, para. 160.
the Council meets three times per year, for a total duration of ten weeks (the Commission had only six weeks), and can convene in emergency sessions (what it did for the first time in connection with the Lebanon crisis in August 2006). The Council has also the competence to suspend membership of a country which is found to be in fundamental breach of its human rights obligations. Notwithstanding such changes, the reform of the UN Commission on Human Rights into a Human Rights Council is in danger of just being more of the same at the moment.\textsuperscript{109}

3. The Establishment of the Peacebuilding Commission

A third institutional reform was the establishment of a Peacebuilding Commission.\textsuperscript{110} The World Summit endorsed this proposal as tabled by both the High-level Panel\textsuperscript{111} and Annan.\textsuperscript{112} As in the case of the Human Rights Council, further consultations were necessary as to the modalities of the Commission. These resulted, rather uniquely, in identical and simultaneously adopted resolutions of the Assembly and the Council, respectively, by which the Peacebuilding Commission was established.\textsuperscript{113} The core membership of this 31-member intergovernmental body comprises Security Council members, ECOSOC members, leading troop contributors, major donor countries and countries which experienced post-conflict recovery. The mandate of the Commission is mainly directed at post-conflict peacebuilding and recovery only and does not extend to peace diplomacy, aid and protection in the earlier stage of growing conflict.

Regrettably, the lessons learned as to “preventing is better than curing” could not as yet be put into practice. Initially, the High-level Panel


\textsuperscript{110} For an early comment see C. Stahn, “Institutionalizing Brahimi’s ‘Light Footprint’: A Comment on the Role and the Mandate of the Peacebuilding Commission”, \textit{International Organizations Law Review} 2 (2005), 403 et seq.

\textsuperscript{111} \textit{A More Secure World}, see note 32, paras 261-265.

\textsuperscript{112} \textit{In Larger Freedom}, see note 32, paras 114-119.

proposed the mandate of the Peacebuilding Commission to include pro-active monitoring and assistance in preventing countries under stress and risk slide towards state collapse.\(^\text{114}\) However, in response to concerns on infringements of national sovereignty Annan sought to limit the functions of the Peacebuilding Commission to the immediate aftermath of war and post-conflict recovery and this is what happened in the resolutions establishing the Commission.\(^\text{115}\) The establishment of the Peacebuilding Commission as a joint subsidiary body of the General Assembly and the Security Council could well be accommodated under the current Charter Arts 22 and 29 and thus required no amendment.

### 4. Clearing Away the Dead Wood in the Charter

Lastly, upon the proposals by the High-level Panel and Annan, the Heads of State and Government expressed their intention to delete Chapter XIII of the Charter on the Trusteeship Council as well as references to this Council in Chapter XII. They resolved to delete the “enemy States” clauses in Arts 53, 77 and 107 of the Charter and requested the Security Council to consider the (non-)functioning of the Military Staff Committee.\(^\text{116}\) These amendments are not very urgent since for decades these provisions have been dead wood that could be cut out as part of a wider amendment of the Charter. On the core proposals for amendment at the World Summit in September 2005, i.e. the composition of the UN Security Council and the establishment of the Human Rights Council as a new principal organ of the United Nations, no agreement could be reached at the World Summit.

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\(^\text{114}\) *A More Secure World*, see note 32, para. 262.

\(^\text{115}\) See most notably *In Larger Freedom*, see note 32, para. 115, where the Secretary-General states: “I do not believe that such a body should have an early warning or monitoring function, but it would be valuable if Member States could at any stage make use of the Peacebuilding Commission’s advice and could request assistance from a standing fund for peacebuilding to build their domestic institutions for reducing conflict, including through strengthening the rule-of-law institutions.”

\(^\text{116}\) Reference may be made to the cautious, non-committal language in paras 176–178 of the *World Summit Outcome Document*, see note 67, including: “should delete”, “resolve to delete” and “request to consider”.
V. Final Observations: The United Nations of the Future and the Future of the Charter

The Charter is a special treaty for all sorts of reasons: its widespread ratification; its conciseness; its long history; its primacy and special legal status; and the fact that the Charter itself was the legal basis for an extremely dynamic and comprehensive development of international law in many fields. Altogether this may be called “the law of the United Nations.”¹¹⁷

Obviously, this Charter law is part and parcel of contemporary international law. However, the features by which it is distinguished from ordinary public international law are its special legal nature, its sources and its increasingly wide circle of actors. Its special nature arises from the fundamental significance of the objectives of the United Nations, reflected in the powers of the Security Council and the special priority position which the obligations under the Charter have in relation to obligations arising from other treaties.¹¹⁸ Obligations under the Charter have priority over obligations arising from European Union law, as recognized by the European Court of the first instance in Luxembourg in a case on sanctions and anti-terrorist measures in September 2005.¹¹⁹


¹¹⁸ See especially Article 103 UN Charter: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” See also Arts 25 and 48 UN Charter.

As regards the sources: UN law was developed, in particular, on the basis of two categories: (i) through ‘soft law’, notably normative, often groundbreaking resolutions of the General Assembly in the field of human rights, self-determination, peace and security, development and the environment; and (ii) hard law, including peremptory norms (*ius consens*). The latter includes the prohibition of aggression, genocide, slavery and slave trade, racial discrimination and apartheid, torture and the right to self-determination, to mention the most compelling examples.\(^{120}\) In terms of actors, the United Nations has been evolving for a long time from an initially interstate organization into an increasingly pluriform world organization with many different actors. In addition to the recognition of the rights of peoples and of individual citizens and the cooperation with other international institutions with their own legal personality, new examples of this trend include Annan’s Global Compact initiative and the greatly increased role of “civil society”, as reflected in the Cardoso report of 2004 and in the role of NGOs, now sometimes also recognized in Security Council resolutions.\(^{121}\)

The question arises whether, after so many changes and adaptations, it is actually still possible to continue with this 1945 Charter. There is good reason for a thorough reform of the UN system in the 21st century and for an updating of the Charter. New objectives, such as combating poverty, the conservation of the environment, post-war peace reconstruction, and promoting the rule of law are not or are only barely mentioned in the Charter. The choice of the permanent members of the Security Council, which is still based on the balance of power in 1945, is anachronistic. The enormous increase in the involvement of business organizations and of social movements in the UN is inadequately regulated. Hence, it would be only healthy for a sixty-year-old organization to adapt its statutory texts to these new objectives and circumstances, and at the same time, clear away some dead wood, such as the chapters on the territories whose peoples have not yet attained a full measure of self-government and the provisions on former enemy states (Germany, Italy and Japan). However, as discussed above, this was not successful in the context of the World Summit in 2005. Probably the focus was too much on reforming the UN of the 20th century rather than adequately


\(^{121}\) An example is S/RES/1325 (2000) of 31 October 2000, which addresses the position of women during times of armed conflict. See also note 40.
equipping the UN of the 21st century for the needs of future generations.

This is most clearly reflected in the proposals for the expansion of the UN Security Council. A Council of 24, 25 or 26 members, rather than the current 15 members, might be more representative, but would probably not facilitate the Council’s aim to achieve greater effectiveness and efficiency. In the 21st century it would be more fitting to represent regional organizations in the Security Council, rather than add even more individual countries as permanent members, whether or not with the right of veto. Despite all the divisions and disappointments, the significance of European political cooperation has grown enormously. The African Union is making bold attempts to transcend the weaknesses and eventual fate of its predecessor, the Organization of African Unity. In Southeast Asia and Latin America, regional cooperation is visibly improving. These regional organizations could be initially represented by their presidencies, and in time, preferably by their independent organs: in the case of the EU, the European Commission or alternatively the High Representative for Foreign Affairs.

There is also a need to incorporate better mechanisms to protect transnational and global interests, such as the protection of the earth’s vital ecological functions or regulate the international arms trade. This requires many strong partnerships between international organizations, social movements, industry, science and coalitions of like-minded countries. These partnerships are indeed growing, as was evident in the opposition to landmines, and in the efforts to curb climate change and to establish a permanent International Criminal Court. The UN can provide a good forum for this development, provided it is given the opportunity to be more than a purely interstate organization.

The question arises whether the current Charter can accommodate all these changes. Can it still serve as a compass for the new directions we are taking, and can it save us from losing our way? Or can we expect a post-United Nations era? In his fascinating book, Global Civil Society? (2003), John Keane predicts that we are moving towards a “cosmocracy”, which will be essentially different from all earlier systems of government: from Aristotle to the Westphalian system of states. His ethical ideal is a type of society of world citizens with an ethos without boundaries. In a similar vein, Michael Walzer argues for a world order

122 On global environmental governance see Secretary-General Annan in his report In Larger Freedom, see note 32, para. 212.
in which states still do exist, but with a stronger international organization (more powerful than the UN) with its own armed forces, strong regional systems (such as the European Union) and NGOs with a great deal of influence. His choice is strongly influenced by considerations of the need to prevent the failure of the current world order and to create better guarantees of lasting peace, while promoting equality and individual freedom.\textsuperscript{124} In addition, Anne-Marie Slaughter predicts a “networked world order”,\textsuperscript{125} which, in this author’s opinion, is seen predominantly from the perspective of highly developed western countries.

Even if these developments were to take place, there is little reason to believe that the UN Charter can simply be cast aside. As discussed above, the Charter and UN law derived from it have shown a remarkable capacity for adaptation and informal modification in the light of changed circumstances and new needs.\textsuperscript{126} At fairly regular intervals global values and fundamental norms are revisited which in turn form the basis for a large number of concrete regulations. Today, these are often established in a vibrant interaction with industry, science, social organizations and pressure groups, together sometimes referred to as ‘civil society’. The UN Charter is still at the centre of this web of global values, norms and principles, and as such it is a sort of international constitution:\textsuperscript{127} not one that has been cast in concrete, but a living instrument. One would not wish to subject it to a referendum, but the Charter could well continue to serve as the main compass to show the way forward – also through troubled waters.

\textsuperscript{124} M. Walzer, “International Society. What is the Best We Can Do?”, Ethical Perspectives 6 (2001), 201 et seq. See also: <http://www.sss.ias.edu/publications/papers/papereight.pdf>.

\textsuperscript{125} A.M. Slaughter, A New World Order, 2004.

\textsuperscript{126} In his inspiring pocket-book The Changing United Nations, 1967, xvi, I.L. Claude compares the Charter with “a runway from which change takes off”.

The Duty to Protect and the Reform of the United Nations – A New Step in the Development of International Law?

Peter Hilpold

I. Introduction

The last years have been characterized by an intense debate on the role of the United Nations for the shaping of the international peace order. Probably never before in the history of this institution has world opinion been so divided between those who believe in the pivotal role of the United Nations for this task and those who have lost all hope of this or have even tried actively to sideline the organization.

While the Cold War had for decades reduced the activities of this institution to a minimum, providing at the same time a facile excuse for many its deficiencies, the thawing in East-West relations revealed new fault lines and introduced challenges which the United Nations were
manifestly unable to deal with. First, the Kosovo conflict and afterwards the invasion of the Iraq begged the question whether power politics was to supersede UN law. At the same time calls for intervention in cases of massive human rights violations grew ever louder.

It is against this background that the activities of the UN Secretary-General Kofi Annan directed at regaining a central role for the United Nations in international conflict prevention and settlement may be explained. In September 2003 he announced before the General Assembly that the time for radical change had come. Since fundamental decisions with far-reaching consequences were needed these could not be taken on the basis of political demands alone. Groundbreaking analysis by renowned authorities and bodies or by eminent persons were needed. While in the past the Secretary-General had himself exercised this role this time it was different as he was no longer a neutral referee but a party himself – at least, he could not take the first step.

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2 Of course, there was also the attempt by the Secretary-General to overcome criticism regarding allegations of personal mismanagement but this criticism may also not be unrelated to his position on the controversy between multilateralism and unilateralism in international relations.

3 This was the famous “fork in the road”-speech where he asked the governments to decide whether it was possible to continue on the basis agreed in 1945, or whether radical changes were needed. See under <http://www.un.org/News/Press/docs/sgsm891.doc.htm>. See also H. Corell, “Reforming the United Nations”, International Organizations Law Review 2 (2005), 373 et seq. (374). Also in the time before the Secretary-General had made clear that this was a very important subject to him. See, for example, his Millennium Report address of 3 April 2000, to the General Assembly: “We must protect vulnerable people by finding better ways to enforce humanitarian and human rights law, and to ensure that gross violations do not go unpunished. National sovereignty offers vital protection to small and weak States, but it should not be a shield for crimes against humanity.” See under <http://www.un.org/millennium/sg/report/state.htm>.


5 See note 2.
In November 2003 the Secretary-General appointed a High-level Panel of eminent persons to assess current threats to international peace and security. One year later, in December 2004, this High-level Panel on Threats, Challenges and Change as it was officially termed (HLP) presented its Report entitled *A more secure world: Our shared responsibility* (later on HLP Report). On 21 March 2005 the Secretary-General presented his own Report entitled *In Larger Freedom: Towards Development, Security and Human Rights for All* (later on Annan Report). This Report drew heavily on the HLP Report. In a certain sense the HLP Report prepared the ground for a profound change of perspective. On this basis the Secretary-General could further develop some ideas and, at the same time, exercise moderation in the most contentious fields, as would be expected from the holder of such a prominent and important office.

The natural completion of this procedure should have been the adoption of a comprehensive reform resolution by the UN General Assembly in September 2005. Alas, the proponents of the reform had not reckoned with the states, still the true masters of international law development. While the general public and in particular the media seemed to welcome the Annan Report favourably, the document had to undergo the grinding examination procedure of the state chancelleries and of the General Assembly’s preparatory institutions themselves. A leading role in this process was exercised by its 59th President Jean Ping from Gabon who prepared various documents in the attempt to find a common consensus in the state community.

The document resulting at the end of this process, the draft outcome document of the high-level plenary meeting of the Assembly in Sep-

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6 See on the following process also P. Hilpold, “Reforming the United Nations: New Proposals in a Long-lasting Endeavour”, *NILR* 52 (2005), 389 et seq.


9 To be fair, it must, however, also be mentioned that the whole reform discussion was poorly planned and followed a chaotic path. See D.M. Malone, “Threats, Challenges, and Change: The Secretary-General’s High-Level Panel”, *ASIL* 99 (2005), 58 et seq. (60).

tember (hereinafter: Ping Document) was sort of a compromise on the smallest common denominator. When the Ping Document was finally transposed into the 2005 World Summit Outcome (hereinafter: Outcome Document) it lost further substance.

This document is surely not devoid of suggestions and concrete proposals for reform but it is doubtful whether it has still sufficient substance to serve as a sign for the right way to follow when the United Nations have come to the fork at the road. It has been said that the reform documents have been “emasculated.” This seems true, at first sight, in two senses. First of all, the reform agenda has lost both in scope and in depth. It is far less vigorous and daring than the HLP Report and the Annan Report have been. It is very probable that any future attempt to revitalize the reform discussion will not be based on the Outcome Document alone but will also refer back to the Reports issued by the HLP and by the Secretary-General.

But there is a second sense to the metaphor used above: the main theme of the original reform initiative, the attempt to re-write the provisions on the use of force, is no longer perceptible. The reform agenda has shifted towards safer grounds and the content appears to be, on a whole, almost trivial. As will be seen later on, this does not, however, mean a definite negative judgment on the reform, as triviality is perhaps to be preferred to a counter-productive approach where the solution found, well-intended as it may be, could even worsen an already critical situation. As will be shown, this is exactly the danger with central provisions on the use of force both in the HLP Report and in the Annan Report. It is, therefore, short-sighted to blame the current unsatisfactory development of the reform discussion on the resistance by reform-opposing states defending their sovereign rights. It is rather the case

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13 Most prominent are the introduction of a Peacebuilding Commission (foreseen in para. 97 et seq. of the Outcome Document/ cf. also para. 261 et seq. of the HLP Report) and the transformation of the Commission on Human Rights into a Human Rights Council (see para. 157 et seq. of the Outcome Document/ cf. also para. 282 et seq. of the HLP Report).
14 Schrijver, see note 10, 273.
15 See extensively on this issue also P. Hilpold, “Die Vereinten Nationen und das Gewaltverbot”, Vereinte Nationen 53 (2005), 81 et seq.
that the documents mentioned do not adequately reflect the achievements both in international law peace preservation and in the international academic discussion. Nonetheless, this reform discussion deserves, as a whole, to be applauded as it touches dangerous wounds in the international law system. The sheer identification of these problematic areas can be considered an important step forward. At the same time the solutions proposed need to be discussed openly: where they appear to be wrong they need to be confuted in order to open the way for new ideas. Where they encapsulate ideas that seem to be useful these concepts have to be explained and further developed in order to meet the standards of present international law discussion. Once this level of development is achieved, the resulting proposals are more likely to be suitable for transposition in hard law provisions.

II. The Recourse to Force and the Development of the Theory of Humanitarian Intervention

As a consequence of the Kosovo conflict, the common consent on the content of the law on the use of force has been shattered. The seventy-eight day bombing campaign by NATO against the Federal Republic of Yugoslavia (FRY) starting on 24 March 1999, destroyed not only the fire power of the Serb forces but it also disrupted some core traditional beliefs with regard to the interpretation of United Nations law.\(^\text{16}\)

While previously the prohibition of the use of force according to Article 2 para. 4 of the UN Charter had been considered one of the few core international law rules to which every nation across all ideological and political barriers unconditionally subscribed (even though not al-

ways adhered), now it seemed possible to qualify this norm. An old concept, the so-called right to humanitarian intervention, resurfaced and its advocates tried hard to demonstrate that there was a direct line of development of this concept from the beginning to the present day. There were two fundamental problems with this proposition: the right to humanitarian intervention had never been truly recognized in the pre-Charter era and afterwards it conflicted manifestly with the letter of Article 2 para. 4 of this document.

Prior to World War I, when there were no legal restrictions to go to war, moral or “humanitarian” justifications bore a certain relevance on political grounds. In the concert of the European or the “civilized” nations such justifications were needed both to defend self-respect, the membership of the “club” which was ostensibly founded on religious and moral rules and to appease public opinion. One should not overlook the strong influence intellectuals and the bourgeoisie had on the forging of foreign policy in the leading European countries in the 19th

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17 For a comprehensive definition of such a position see, for example, F.R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2005.

Nonetheless, these interventions were questioned even on these limited, merely political, ambitions. The prevailing opinion in literature seems to be that these interventions were heavily inspired by egoistic motives. There is some irony in the fact that the right to humanitarian intervention could become a right proper only at the moment when the right to go to war was outlawed. As this happened, however, in a very extensive way, there seemed to be no place left for a competing principle. With the prohibition of the use of force being attributed the nature of *jus cogens* – whatever its practical meaning – the possibility that such a derogation could emerge appeared the more improbable.

This was particularly true with regard to the lot of Christians in the Ottoman Empire. It can be argued that the theory of humanitarian intervention developed in the 19th century more or less around this issue. See, in this sense, already L. Le Fur, “L’intervention pour cause d’humanité”, in: Vitoria et Suarez, *Contribution des théologiens au droit international moderne*, 1939, 237. The joint intervention of the United Kingdom, France and Russia in favour of Greek insurgents in 1827 took place after atrocities had been committed by the rulers against the Greek population and notice of these events had spread to Western Europe. French intervention in favour of Christian minorities in Lebanon took place in 1860 after these groups were harassed and attacked by Druses and Muslims. The U.S. intervention in Cuba in 1898 was preceded by massive human rights abuses by the Spanish authorities trying to quell local opposition. These events had caused outrage in the United States. See extensively on these and further cases of humanitarian intervention A. Pauer, *Die humanitäre Intervention*, 1985, 44 et seq.

See, for example, Pauer, see above, 75 and H. Köchler, *Humanitarian Intervention in the Context of Modern Power Politics*, International Progress Organization: Studies in International Relations, Vol. XXVI, 2001, 5 et seq. According to this writer’s view, however, such a negative view does not do full justice to the facts. As already stated, the governments’ decisions to intervene were regularly (also) prompted by domestic public opinion enraged about human rights abuses in third countries. See also A. Mandelstam, “La protection des minorités”, RdC 1923 (I), 367 et seq. (379): “Il serait injuste d’attribuer ces interventions collectives à des motifs d’egoïsme national.” That in these cases egoistic political motives were – to a greater or lesser extent – also at play cannot, of course, be denied. This becomes evident, for example, if one looks again at the U.S. intervention in Cuba as the relative decision was also influenced by U.S. hegemonial aspirations.

The only source from which such a development could depart was human rights. The spreading and the strengthening of a common understanding of core human rights seemed for some to lay the basis for such a fundamental change. In fact, the development of the human rights corpus has happened since 1945 at a breath-taking speed and there is broad agreement that to a core area of human rights the character of *jus cogens* cannot be denied. From this fact it does not follow automatically, however, that a right to humanitarian intervention would have come into existence. To this avail, first of all, formidable technical problems have to be solved. Thus it would not only be necessary to demonstrate in each case that the rights the single intervention is directed to protect pertain to *jus cogens* but also the fact that these rights now override the prohibition of the use of force which, as seen above, is also part of *jus cogens*. It does not seem, however, that the advocates of humanitarian intervention after World War II spent much time on such technicalities. The preponderant role of human rights over concerns for the preservation of state sovereignty was often taken as an implicit given which needed no further explanation.

In the post World War II state practice there were several actions that can be qualified as humanitarian interventions, even though it has to be said that such a qualification has primarily been made in literature while the intervening states haven been far more cautious in this regard. The most prominent cases of this period were the Belgian interventions in Congo in 1964; the U.S. intervention in the Dominican Republic in 1965; the Indian intervention in East Pakistan/Bangladesh in 1971; the Vietnamese intervention in Cambodia in 1978; the Israeli interven-

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22 This is true notwithstanding the fact that there is disagreement about the exact contours of this area. For rights as the prohibition of slavery or torture there can be no doubt as to the pertinence to this field. With regard to torture see the “Pinochet-case”, R.V. Bow Street Stipendiary Magistrate and others v Pinochet Ugarte (Amnesty International and others intervening) (1998) 4 All E.R. 897.


24 See, for example, A.D. D’Amato, “The invasion of Panama was a lawful response to tyranny”, *AJIL* 84 (1990), 516 et seq. D’Amato submits that the core understanding of Article 2 (4) of the UN Charter is directed at outlawing the use of military force for the purpose of territorial aggrandizement or colonialism, ibid., 520. See also Tesón, see note 17, 151.
tion in Uganda in 1976; the Belgian and French intervention in Zaire in 1978; the Tanzanian interventions in Uganda in 1978 and 1979; the United States intervention in Grenada in 1983; the United States intervention in Panama in 1989/90, and, most recently, the NATO intervention in Kosovo in 1999.25

If one tried to identify on the basis of these events a new customary law rule, state practice concomitant and consequent to these interventions has to be observed. This practice can hardly be considered to form a sufficient basis for a new customary law rule. First of all, the intervening states were – as already mentioned – themselves rather reluctant to qualify their interventions as measures taken on humanitarian grounds. In those cases where humanitarian considerations were advanced most forcefully they seemed to be, in hindsight, the least founded.26 The contentiousness of humanitarian intervention has most clearly been demonstrated on the occasion of the Vietnamese intervention in Kampuchea in 1978 and 1979. This intervention ended the savage, genocidal regime of the Khmer Rouge and saved probably millions of lives. Interestingly, however, the Vietnamese did not try to justify this intervention by a recourse to the concept of humanitarian intervention but referred rather to its right to self-defence because of continuous border violations by Khmer Rouge forces. Even at a time when the appalling acts of the

25 See, for example, F.K. Abiew, The evolution of the doctrine and practice of humanitarian intervention, 1999, 61 et seq. and M.T. Karoubi, “Unilateral use of armed force and the challenge of humanitarian intervention in International Law”, Asian Yearbook of International Law 10 (2001-2002), 95 et seq. (118). The intervention by the U.S. in Iraq together with the “coalition of the willing” could also be considered as a humanitarian intervention but the relevant intent was only one element among many and it could hardly be considered the most important one, neither officially nor in fact. If one tries to shed some light on the thicket of mutually contradictory justifications for this intervention it seems that it was the alleged possession of weapons of mass destruction by the Iraqi government that gave the decisive impetus for this military operation even though the suspicion proved to be unwarranted at the end.

26 This was, in particular, the case with the U.S. intervention in the Dominican Republic. See Pauer, see note 19, 156 and S.D. Murphy, Humanitarian Intervention – The United States in an Evolving Order, 1996, 94. It should also be remembered that even Indonesia justified her intervention in East Timor in 1975 referring inter alia to humanitarian considerations while it was more than evident that this intervention happened as a flagrant violation of basic principles of international law. See P. Hilpold, Der Osttimor-Fall, 1996.
Khmer Rouge had become fully known and documented, the Vietnamese intervention was the subject of widespread criticism and outright condemnation.\footnote{That such condemnation came from the People’s Republic of China can be explained in view of the rivalry between these countries in South East Asia. It appears more difficult to qualify the criticism by Western democracies as appropriate. True, these declarations were also primarily inspired by ideological considerations. On the other hand the situation in Cambodia under the Khmer Rouge regime was so outrageous that democracies which strongly identify with the fight against Nazi Germany can hardly condemn the termination of a genocidal regime without becoming contradictory. See, for example, the statement by the French representative in the Security Council, SCOR, 34th Year, 2109th Mtg, para. 36: “The notion that because a regime is detestable foreign intervention is justified and forcible overthrow is legitimate is extremely dangerous. That could ultimately jeopardize the very maintenance of international law and order and make the continued existence of various regimes dependent on the judgment of their neighbours.” For a very critical statement with regard to the position taken by the state community in this case see R. Falk, “The Complexities of Humanitarian Intervention: A New World Order Challenge”, \textit{Mich. J. Int’l L.} 17 (1996), 491 et seq. (504 et seq.). On the other hand, the elimination of the blood-thirsty regime of Idi Amin in Uganda by Tanzanian forces was greeted by the world community.} For many, the Kosovo crisis appeared to be a watershed. Probably never before in the post-war period had the concept of humanitarian intervention met with such wide-spread acceptance as a possible instrument for the solution of internal conflicts which had gone out of control.\footnote{See, for a very prominent author advocating the existence of such a right Ch. Greenwood, “Humanitarian Intervention: The Case of Kosovo”, \textit{Finnish Yearbook of International Law} 10 (1999), 141 et seq., with further references.} The most outspoken advocate of a right to humanitarian intervention was Belgium. A forum to present this position publicly was opened to this state by an action brought by Yugoslavia against 10 of the 19 NATO Member States before the ICJ.\footnote{Case Concerning Legality of Use of Force (Serbia and Montenegro v. Belgium), Order of 2 June 1999, ICJ Reports 1999, 124 et seq.} When Yugoslavia requested provisional measures Belgium, as the only one of the 10 involved NATO states responded with a broad reference to the right to humanitarian intervention in the sense of a duty to protect.\footnote{“L’OTAN, le Royaume de Belgique en particulier, était tenu d’une véritable obligation d’intervenir pour prévenir une catastrophe humanitaire qui était en cours et qui avait été constatée par les résolutions du Conseil de sél-}
the other respondents expressly referred to a right to humanitarian intervention. Outside this area the reaction of the state community to these events was also mixed. Protests came not only – as expected – from countries like China, Russia and India but also from large parts of the Third World. This being the state practice one could have come to the conclusion that some governments may have become more daring in their political announcements but on the normative level little has changed.

This was the point where legal literature came in. There was a host of writers who saw – notwithstanding the described practice – a new era set in. This is not necessarily a discrepancy as legal writers are not circumscribed in their activity to the definition of the actual status quo but can dedicate themselves to the identification of new legal trends. On the other hand, academics in the field of international law were often accused of being too emphatic in recognizing developments which were not always corroborated by state practice. In more recent times and in a somewhat more cautious way some lawyers began to speak about “emerging” international norms thereby having both the advantage of being the first to recognize that a certain political development is crystallizing into law and not having to fully demonstrate that this has already happened or will be happening within a pre-determined period.

The most prominent norm having been identified as an “emerging” one is without doubt the “right to democratic governance” by Thomas Franck.

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32 See generally on the role of the lawyers in the international law creation process R. Jennings, “International Lawyers and the Progressive Development of International Law”, in: ]. Makarczyk (ed.), Theory of International Law at the Threshold of the 21th Century, 1996, 413 et seq. (414): “[...] it remains broadly true that the professional international lawyers, including academics, have much more say in the shaping of international law, whether in treaty or in customary law form, than do their counterparts in domestic law making and changing. This is a very important competence and responsibility.”

33 Curité pour sauvegarder quoi, mais pour sauvegarder des valeurs essentielles qui sont elles aussi érigées au rang de jus cogens. Est-ce que le droit à la vie, l’intégrité physique de la personne, l’interdiction des tortures, est-ce que ce ne sont pas des normes érigées au rang de jus cogens? [...] Donc pour sauvegarder des valeurs fondamentales érigées en jus cogens, une catastrophe en cours constatée par l’organisation du Conseil de sécurité, l’OTAN intervient. [...] jamais l’OTAN n’a mis en question l’indépendance politique, l’intégrités de la République fédérale de Yougoslavie [...],” ibid., 10.
With regard to humanitarian intervention, it was Antonio Cassese who identified the emergence of a new customary rule legitimizing the use of force by a group of states in cases of large-scale atrocities committed by a state on its own territory, provided that a set of conditions were met. These conditions appear to be very demanding and request a guaran-


The title of the relevant article in which this theory was first fully developed is revealing: “Ex injuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?”, EJIL 10 (1999), 23 et seq., the question mark indicating in this case a cautious answer in the affirmative.

The central importance of these conditions requires their detailed citation:

(i) gross and egregious breaches of human rights involving loss of life of hundreds of thousands of people, and amounting to crimes against humanity, are carried out on the territory of a sovereign state, either by the central government authorities or with their connivance and support, or because the total collapse of such authorities cannot impede those atrocities;

(ii) if the crimes against humanity result from anarchy in a sovereign state, proof is necessary that the central authorities are utterly unable to put an end to those crimes; while at the same time refusing to call upon or to allow other states or international organisations to enter the territory to assist in terminating the crimes. If, on the contrary, such crimes are the work of the central authorities, it must be shown that those authorities have consistently withheld their cooperation from the United Nations or other international organizations, or have systematically refused to comply with appeals, recommendations or decisions of such organizations;

(iii) the Security Council is unable to take any coercive action to stop the massacres because of disagreement among the Permanent Members or because one or more of them exercises its veto power. Consequently, the Security Council either refrains from any action or only confines itself to deploring or condemning the massacres, plus possibly terming the situation a threat to the peace;

(iv) all peaceful avenues which may be explored consistent with the urgency of the situation to achieve a solution based on negotiation, discussion and any other means short of force have been exhausted, notwithstanding which, no solution can be agreed upon by the parties to the conflict;

(v) a group of states (not a single hegemonic Power, however strong its military, political and economic authority, nor such a Power with the support of a client state or an ally) decides to try to halt the atrocities, with the support or at least the non-opposition of the majority of Member States of the UN;

(vi) armed force is exclusively used for the limited purpose of stopping the atrocities and restoring respect for human rights, not for any goal going
Hilpold, The Duty to Protect and the Reform of the United Nations

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...tee that the motives of the intervening states are sincere, that no decision to intervene is taken carelessly, that the force applied is commensurate to the effective need and that no further aims are pursued. Only groups of states may exercise these actions – an implicit criticism against the behaviour of the United States in this field.

Although the intellectual appeal of an approach seemingly bringing order and justice in an international reality characterized by chaos and inhumanity cannot be denied, this author has already pointed out in the past\(^{36}\) that the elaboration of catalogues of criteria which should allow, if respected, for a derogation from the prohibition of the use of force, poses considerable dangers. In fact, each of these criteria has again to be interpreted, they have to be mutually weighted against and they leave considerable leeway for abuse. There is no central institution which could assess in a specific situation whether these criteria have been respected. Similar catalogues of criteria have already been developed in the past, in particular with regard to the question whether endangered groups should be allowed a right to secession in cases of extreme persecution.\(^ {37}\)

It is a small wonder that all these attempts have remained in vain. Ready-to-use recipes, schemes and models for the legal evaluation of factual situations reveal all their weaknesses in the internal legal order. They are more or less worthless in a legal system such as the international one which is characterized both by its vagueness and its complexity, its extreme fragmentation\(^{38}\) and its dependence, from an interna--

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\(^{36}\) See “Sezession und humanitäre Intervention – völkerrechtliche Instrumente zur Bewältigung innerstaatlicher Konflikte?”, Zeitschrift für Öffentliches Recht 54 (1999), 529 et seq. (584 et seq.); Hilpold, see note 18, 455 et seq.


\(^{38}\) See on this issue, for example, G. Hafner, Risks Ensuing from Fragmentation of International Law, Doc. IILC (II)/WG/LT/L.1/Add.1 (2000).
tional consensus, upon continuously remoulding international rules anew.  

Only a limited set of norms have been exempted from this continuous rewriting process in view of their paramount importance for the present international society and the defence of the cultural and ethical standards dear to it. The prohibition of the use of force is one of the most important ones. There seems to have been, in the past, a broad agreement that notwithstanding the many deficiencies surrounding the implementation of this rule and with regard to the consequences it has on the possibility to address effectively internal problems, it should not be easily given up. The Kosovo crisis did not really change this situation, even though there seems to be a broader preparedness to discuss this issue than previously. Within the framework of the discussion on the reform of the United Nations of the last years, however, an attempt to make a difference was made.

In the following it shall be examined whether further elements have arisen in recent years that would corroborate the assumption that there is an emerging new law on the prohibition of the use of force. Particular attention will be given, in this context, to the recent proposals for a reform of the United Nations. As already hinted, in the ambit of these proposals much care has been dedicated to precisely this topic – it could even be argued that this issue stood at the very centre of the reform endeavour.

III. The Call for a New Approach

Already in 1999 UN Secretary-General Kofi Annan formulated the fundamental dilemma that would keep him busy over the following years:

“It is indeed tragic that diplomacy has failed, but there are times when use of force may be legitimate in the pursuit of peace. In helping to maintain international peace and security, Chapter VIII of the United Nations Charter assigns an important role to regional organizations. But as Secretary-General I have many times pointed

out, not just in relation to Kosovo, that under the Charter the Security Council has primary responsibility for maintaining international peace and security – and this is explicitly acknowledged in the North Atlantic Treaty. Therefore the Council should be involved in any decision to resort to the use of force.

At first sight, the Secretary-General emphasizes the role the Security Council has to play in any decision to intervene. But what if the Council remains inactive or if a decision is blocked by one of the permanent members? Conditions have to be created in which such a situation becomes more unlikely to happen.

The time seemed to be propitious for bold steps towards a new future. There were important signals for a greater preparedness by the state community to undertake the “radical changes” the Secretary-General had hinted at in his “fork-in-the-road” speech, the most important of these signals being the United Nations Millennium Declaration adopted by all UN Member States in 2000. A new sense of membership to an international state community and of mutual solidarity – at least in the development context – had gained hold. In his addresses to the General Assembly in September 1999 and 2000 the Secretary-General pressed, however indirectly and vaguely, the idea of intervention:

“[..] if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?”

Later on, Kofi Annan became even more explicit:

“The sovereignty of States must no longer be used as a shield for gross violations of human rights”.

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41 A/RES/55/2 of 8 September 2000.
43 This statement was made by the Secretary-General on the occasion of his Nobel Peace Prize Lecture in Oslo in December 2003. See G. Evans, “The
On the highest level, therefore, more and more daring ideas were advanced. An important contribution to this development – at least on the academic level – has been given by two independent expert commissions, the International Commission on Intervention and State Sovereignty appointed by the Canadian Government and the already mentioned High-level Panel appointed by the Secretary-General. They implicitly understood themselves both as catalysts of these new developments and as forerunners for change. The new international climate may explain why both commissions were so sanguine about the prospects of change and about the very preparedness by the state community to embark on such a journey.

IV. The Report of the International Commission on Intervention and State Sovereignty (ICISS)

The establishment of the ICISS by the Canadian Government in September 2000 can be seen as an immediate consequence of the Kosovo intervention. The title of the Report presented in December 2001 and dealing in substance squarely with the right to humanitarian intervention is in itself revolutionary: “The Responsibility to Protect”.

If generally accepted, this new approach would turn upside-down some basic tenets of international law: it would not only imply a possibility to intervene – in itself a contested issue putting into question the fundamental concept of state sovereignty – but it would introduce an actual responsibility in this sense, i.e. an obligation. Formally, state sovereignty is safeguarded, as the primary responsibility for the protection of its people which continues to lie with the state itself. The exception to this rule appears to be, however, extremely far-reaching:

“Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.”

In substance, the concept of sovereignty is redefined and the range of matters which fall ‘essentially’ into a state’s domestic jurisdiction ac-

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Responsibility to Protect: Rethinking Humanitarian Intervention”, see under <http://www.crisisgroup.org/home/index.cfm?id§2561&l=1>.

See ICISS Report, page XI.
The Duty to Protect and the Reform of the United Nations

The authors of this Report again adopted a conditional approach where several criteria had to be fulfilled:

- Just cause (large scale loss of life or large scale “ethnic cleansing”);
- Right intention (the primary purpose of the intervention must be to halt or avert human suffering);
- Last resort (every non-military option for the prevention or peaceful resolution of the crisis has been explored, with reasonable grounds for believing lesser measures would not have succeeded);
- Proportional means (scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective);
- Reasonable prospects (there must be a reasonable chance of success in halting or averting the suffering which has justified the intervention, with the consequences of action not likely to be worse than the consequences of inaction);
- Right authority (the Security Council should bear primary responsibility for the intervention but on a subsidiary level also alternative avenues can be pursued).

Again, from a political viewpoint these criteria may appear to deserve full approbation, at least at first sight. On closer examination, however, all the contradictions we have come across before with regard to the conditional approach in general reappear. In particular, it is by no means clear that an abusive recourse to this exemption from the prohibition of the use of force can be avoided.

Of course, the attribution of a clear prerogative to intervene to the Security Council provides a far-reaching guarantee. The ICISS Report also contains interesting passages about the need for the introduction of early-warning instruments and for root cause prevention efforts. As was expected, however, these parts of the Report are held rather generally and intense further studies and discussion would be needed to give more substance to these ideas. The proposal to revitalize the “Uniting for Peace” resolution which instituted a mechanism of dubious legality within the UN system is not convincing, even though its historic


46 See para. 3.10 et seq. of the report.

47 A/RES/377 (V) of 3 November 1950.
importance in the Korean conflict of 1950 and subsequently for allowing operations in Egypt in 1956 and the Congo in 1960 cannot be denied.\textsuperscript{48}

The ICISS went clearly beyond existing international law when it proposed – as a further alternative in case of inaction by the Security Council:

“...action within area of jurisdiction by regional or sub-regional organizations under Chapter VIII of the Charter, subject to their seeking subsequent authorization from the Security Council.”\textsuperscript{49}

The authors of this Report seem to be aware of the fact that what they are proposing constitutes a violation of the UN Charter, at least according to a traditional reading of this document. At the same time it does not seem, however, that they cared much for formal issues or they were very optimistic about finding a way out of this dilemma:

“In strict terms [...] the letter of the Charter requires action by regional organizations always to be subject to prior authorization from the Security Council. But [...] there are recent cases when approval has been sought \textit{ex post facto}, or after the event (Liberia and Sierra Leone), and there may be certain leeway for future action in this regard.”\textsuperscript{50}

The suggestion that “there may be certain leeway for future action in this regard” is purely speculative. The existence of such a leeway would imply a large derogation from the prohibition of the use of force, a derogation which is nowhere in sight. If at all, the pressure for such a change could come from documents like the ICISS Report which could be interpreted in this sense more as a political document than as a legal one and, if successful, a self-fulfilling prophecy. This Report sees interventions by collective organizations as some sort of a compromise between a collective intervention authorized by the Security Council, an authorization which often cannot be obtained, and an intervention by

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\textsuperscript{48} In fact, the inactivity of the Security Council does not necessarily provide a legal justification for the General Assembly to intervene. Furthermore, in view of the composition and the way of functioning of this organ it seems rather improbable that it will operate more effectively than the Security Council.

\textsuperscript{49} ICISS Report, see note 44, page XIII. See also page 53 et seq., para. 6.31 et seq.

\textsuperscript{50} Ibid., para. 6.35. On the problem of authorization for the use of force in general see P. Picone, “Le autorizzazioni all’uso della forza tra sistema delle Nazioni Unite e Diritto Internazionale generale”, \textit{Riv. Dir. Int.} 88 (2005), 5 et seq.
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ad hoc coalitions and individual states. The second scenario is seen as dangerous not only because of the danger of abuse in the individual case but also because this could disrupt basic tenets of UN law, if the intervention proves to be successful.

The assumptions on which this approach is based can be criticized for two reasons: first, an intervention by a collective organization constitutes an unilateral act – prohibited by UN law – if it takes place without authorization by the Security Council.\(^{51}\) Second, the fears that successful interventions could engender a string of further interventions that could endanger the whole UN system appear unrealistic, especially in view of the last years’ experiences. Interventions will always remain dangerous and the Iraq conflict demonstrates that even the leading superpower is not necessarily capable of appeasing groups engaged in a civil war, even if the war takes place in a third world country. Furthermore, it has to be asked, why, for example, an unilateral intervention by NATO should be judged differently from an – equally unilateral – intervention by a group of NATO countries.\(^{52}\)

As a consequence, the verdict on this document is rather critical: it advocates a softening of the prohibition of the use of force in cases of grave breaches of human rights and it contains a conditional approach which in its substance is not new. As has been stated in literature, the most significant contribution by this Report is to be found in the conceptual field.\(^{53}\) The authors of this Report indirectly acknowledge that a very important element of the “duty to protect” is constituted by the old concept of humanitarian intervention, even though the focus has shifted. The authors deliberately avoid this term justifying this choice with the negative connotations associated with it. They refer to the “very strong opposition expressed by humanitarian agencies, humanitarian organizations and humanitarian workers towards any militariza-

\(^{51}\) See B. Simma, “NATO, the UN and the Use of Force: Legal Aspects”, *EJIL* 10 (1999), 1 et seq. (11); Hilpold, see note 18, 448.

\(^{52}\) This is not to deny the very important role regional organizations can play for the maintenance of international peace and security. See R. Burchill, “Regional organizations and the promotion of democracy as a contribution to international peace and security”, in: R. Burchill et al. (eds), *International Conflict and Security Law – Essays in Memory of Hilaire McCoubrey*, 2005, 209 et seq.

tion of the word 'humanitarian' as it imperils their own activity. Furthermore, the word “humanitarian tends to prejudge the very question in issue – that is whether the intervention is in fact defensible.”

In sum, it appears that the ICISS saw humanitarian intervention as a valuable instrument if applied under certain very restrictive conditions. At the same time the Commission was aware of the strong opposition this concept encounters in the state community and of the difficulties of making it compatible with a traditional reading of the UN Charter. It decided to change the appearance of this concept and to preserve its substance. In the final analysis, however, the new concept bore all the ambiguities which were characteristic of the former one. This meant that the UN reform discussion which drew heavily, at least initially, on the ICISS Report was also ill-fated with regard to this subject.

V. The High-Level-Panel Report

1. Interventions as an Execution of the Duty to Protect

Already at a first reading of the HLP Report it becomes evident how strongly this document has been influenced by the ICISS Report as it cites numerous findings of this Report and it seems somewhat odd that the origin of these ideas which are pivotal for the whole reform agenda was not clearly revealed.

The relevant provisions are set forth in paras 199 et seq. The HLP starts out with demands which appear to conform to international law developments:

54 See ICISS Report, see note 44, 9, para. 1.40.
55 Ibid.
56 For a comment on this report see J.I. Levitt, “The Responsibility to Protect: A Beaver without a Dam?”, *Mich. J. Int'l L.* 24 (2003), 153 et seq. for whom, however, the approach of the ICISS was not far-reaching enough. In particular he deplored that this report failed to suggest ways to encourage state authorities to act on the responsibility to protect, ibid., 175.
“We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.”

In assessing the need to take recourse to the use of military force the Security Council may take into account five basic criteria of legitimacy (seriousness of threat, proper purpose, last resort, proportional means, balance of consequences) which correspond more or less to those elaborated by the ICISS. Probably these criteria will not be very useful but they do no harm. As the scope of action by the Security Council is very broad (not to say factually unlimited) to introduce criteria of legality of such a vague nature is equivalent to a very soft self-regulation. On the other hand, the Security Council had been rather reluctant in the past to permit the use of force in cases of inner conflicts and an automatic change in this attitude is not foreseeable. Therefore, the HLP has undertaken intense efforts to render the operation of the Security Council more effective: “The task is not to find alternatives to the Security

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59 HLP Report, para. 203.
60 For this reason this author does not feel the criteria introduced would hamper the activity by the Security Council as was feared by some authors. See, for example, A.M. Slaughter, “Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform”, AJIL 99 (2005), 619 et seq. (626 et seq.): “This approach, as some commentators have already decried, sounds like a recipe for further inaction by the Council, giving members five new criteria to argue about while Rome, or Rwanda, or Darfur, burn.” Professor Slaughter believes, however, that the substantial expansion of Security Council jurisdiction, also proposed by the HLP Report, could counterbalance this effect. Professor Benedetto Conforti is generally critical towards the approach taken by the HLP in this field: “[...] ci si aspetterebbe, che, almeno nei casi estremi, interventi unilaterali [...] fossero considerati tollerabili, in conformità a quanto una parte della dottrina sostiene.” And: “Dunque, una norma emergente, che... riprodurrebbe quanto già si ricava chiaramente dalla Carta,” see B. Conforti, “Il rapporto del ‘high-level panel’ sul come rendere più efficace l'azione dell'ONU, ovvero la montagna ha partorito un topo!”, Riv. Dir. Int. 88 (2005), 149 et seq. (150).
Council as a source of authority but to make it work better than it has.”62

This part of the reform proposal by the HLP Report was intensely discussed in public. As is known, it was proposed to reform both the composition of the Security Council whereby this body should be enlarged according to different models, as well as the way of its decision taking, providing for more transparency and accountability.63 None of these proposals was accepted afterwards by the state community. As no compromise on the composition of the Security Council is in sight, it seems that the present solution is the one UN members can best live with as it is the result of a historic injustice beyond the reach of present governments.

On a whole, it can therefore be said that the duty to protect in the HLP Report remains a purely political slogan and there are no instruments in sight which would offer a realistic perspective to render this concept operative. While the ICISS Report also takes into consideration unilateral actions by regional organizations, the HLP Report remains silent in this regard. The authors of the latter Report seem to be absolutely confident about the feasibility of the institutional reform of the United Nations and, as a consequence, no greater obstacle should hinder the obeyance of the duty to protect. In this, the Report appears to be rather ingenuous.

2. The Right to Self-Defence

As already mentioned, a duty to protect exists also (and foremost) for governments with regard to their own people. The need for such a protection can also be given as a consequence of an actual or an impending international conflict in the form of acts of self-defence. In this field the HLP proposed rather daring solutions which can hardly be reconciled with existing international law. As is known, Article 51 of the UN Charter sets rather restrictive conditions for the recourse to the right to self-defence, requiring that “an armed attack occurs.” The HLP adopts, however, a totally different approach:

62 See HLP Report, 3.
63 See Y.Z. Blum, “Proposals for UN Security Council Reform”, AJIL 99 (2005), 632 et seq. and Hilpold, see note 15, 86.
“However, a threatened State, according to long established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate. The problem arises where the threat in question is not imminent but still claimed to be real: for example the acquisition, with allegedly hostile intent, of nuclear weapons-making capability.”

In reality, it is not so clear that a military reaction against an imminent threat is permissible “according to long established international law.”

In two judgments the ICJ has clearly given a restrictive interpretation to the right to self-defence: in the Nicaragua-case as well as in the Oil platforms-case the ICJ has unmistakably pointed out that recourse to self-defence presupposes an armed attack. Does this comprise also an imminent attack? On the basis of a traditional, “conservative” interpretation self-defence is permissible only after an armed attack has been launched. Accordingly, Article 51 has to be interpreted narrowly. At the same time, however, it must be mentioned that there is another school of thought that is more permissive with regard to possible reactions against an imminent threat. Taking recourse to the ambiguous, but nonetheless often cited Caroline formula, self-defence is allowed if the necessity is “instant, overwhelming, leaving no choice of means, and no moment for deliberation.”

64 See HLP Report, para. 188.
65 Case concerning Military and Paramilitary Activities in and against Nicaragua, ICJ Report 1986, 14 et seq.
67 According to the ICJ it is necessary to distinguish “the most grave forms of the use of force (those constituting an armed attack) from other less grave forms”, since “[i]n the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack”, ICJ Reports 1986, 101, para. 191 and 103, para. 195; ICJ Reports 2003, 27, para. 51.
68 See A. Randelzhofer, “Commentary to Art. 51”, in: Simma, see note 21, 803, para. 39 with further references.
70 See the letter from Daniel Webster, U.S. Secretary of State, to Henry Fox, British Minister in Washington, “Correspondence between Great Britain and the United States, respecting the Arrest and Imprisonment of Mr. Mc
This formula seems not to rule out self-defence against imminent attacks. What constitutes an “imminent attack” is, however, not clear – especially if this concept is further qualified, as often, by a reference to new arms technologies. As has been correctly pointed out, in this case what is “imminent” is no longer only a question of temporality but also the magnitude of the threat which has to be considered. In substance, such a position is not new as it has already been sustained by U.S. lawyers in the first case where nuclear weapons were supposed to be the source of an immediate threat to the security of their country.

It is more than doubtful whether in the meantime this position can be considered to be the prevailing one. While some countries repeatedly claimed the existence of such a right in the last decades, there was no...
general state practice in this sense accompanied by claims of a respective *opinio juris.* The intervention in Iraq by the “Coalition of the Willing” led by the United States met with such intense international criticism that as a consequence the prohibition of the use of force can be said to have been not only confirmed but to have even been strengthened. The damage to the reputation of the United States as a herald for international peace is enormous. The fact that the Security Council was not able to condemn these actions can obviously not be taken as evidence for an emerging new norm allowing pre-emptive measures as there would always have been a permanent member of this body to veto such a resolution.

The HLP Report places reactions against imminent dangers on a continuum leading finally to preventive wars towards which this Panel is clearly critical. Even leaving aside the fact that it might often not be possible in practice to distinguish between an imminent threat and a non-imminent or proximate threat as proposed by the HLP, the solution recommended in this Report for these latter sort of threats seems rather curious:

“[...] if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to. If it does not so choose, there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment – and to visit again the military option.”

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74 See in this sense also the ICJ in the Nicaragua case, ICJ Report 1986, 98 et seq. This is true even though the recent conflict on the Iran nuclear programme may be seen as providing further arguments in favour of the advocates of a re-definition of what constitutes “imminence” of an attack.

75 As has been correctly remarked, in this sense the position by the HLP is in its final consequence very similar to that taken by the authors of the U.S. American National Security Strategy. See I. Johnstone, “Threats, Challenges, and Change: The Secretary-General’s High-Level Panel”, *ASIL* 99 (2005), 57 et seq. (62). See also A. Cassese, “Article 51”, in: J.P. Cot et al., *La Charte des Nations Unies – Commentaire article par article*, 2005, 1329 et seq. (1342), who is also critical about the approach taken by the HLP in view of possible abuses. He proposes rather a modification of Article 51 of the Charter together with a conditional approach which should again rule out abuses. As explained above, however, the view taken here is that, in the end, such an approach is difficult to implement and cannot rule out abuse.

76 See HLP Report, para. 190.
It seems the authors of this Report assume that the Security Council operates purely on technical grounds, uninfluenced by political considerations and will authorize recourse to force – if such a step is necessary – with mathematical certainty. If the Security Council does not give such an authorization “by definition” there is time to pursue other strategies. As is known, reality is, alas, different. Even if the HLP already had in mind the reformed Security Council when describing the operating of this body the assumptions mentioned are utopian.

On a whole it can be said that the HLP Report is not suited to bring about a change of law in the field of self-defence. The HLP recognized that it would be unwise to turn away from the prohibition of the use of force in favour of a fully-fledged right to preventive self-defence. This was openly declared in the Report and its authors merit praise for adopting such a realistic perspective. Nonetheless, a tendency can be noticed to soften the prohibition of the use of force and to extend the right to self-defence, selling this new approach, however, as expression of a long-lasting development which has found broad recognition in the meantime. This may be a politically astute move; it is, however, not convincing on the legal level. Already in the past, various authors had tried to bring evidence for such a development taking recourse to customary law having come into existence before and going beyond the UN Charter law. It has, however, also been demonstrated in literature that this position is untenable as this would conflict with the wording and the system of Article 51 and could furthermore not be based on a meaningful state practice.

The HLP Report has, however, created a certain amount of uncertainty precisely by misinterpreting the existing law and by reading into

77 The words “to visit again the military option” may also cause some perplexity. It is assumed that the military option has to be examined by the Security Council and it is not up to the individual state to decide.

78 See, in this sense, in particular M.S. McDougal/ F.P. Feliciano, Law and Minimum World Public Order, 1961, 232 et seq.

79 See Y. Dinstein, War, Aggression and Self-Defence, 2005, 184 et seq. who clearly pointed out that between 1928, when the Briand-Kellogg Pact was stipulated and 1945, when the UN Charter came into force, there were no preventive wars that could have constituted state practice for such a customary law development. While the ICJ stated in the Nicaragua case that there existed a customary right to self-defence alongside the one in Article 51 of the Charter it cannot be sustained that the material content of customary law in this field would go beyond Charter law, ibid., 183. For a recent different opinion see Castel, see note 70, 24.
it a subjective political programme. As will be seen in the following, the confusion created found an immediate follow-up in the Report issued by the UN Secretary-General, Kofi Annan.

VI. The Annan Report

The Report presented by UN General-Secretary Kofi Annan in March 2005 (the Annan Report) was intended to further develop the ideas conceived by the HLP Report and in many instances also to render them more adherent to reality, to make them implementable. As far as the duty to protect is concerned, these goals have only partly been achieved.

The Secretary-General “strongly agree(s)” with the assumption contained in the HLP Report that there is an emerging norm establishing a collective responsibility to protect.80 Again, the Annan Report also does not reveal the real origin of this concept but it is more prudent than the ICISS Report when it comes to the modes of implementation:

“This responsibility lies, first and foremost, with each individual State, whose primary raison d’être and duty is to protect its population. But if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations. When such methods appear insufficient, the Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action, if so required.”81

Therefore, no unilateral actions characterized according to the traditional terminology as of humanitarian intervention should be allowed.

A little bit earlier in the Report Annan makes a distinction that appears to be more problematic:

“Imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened.”82

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80 See para. 135 of the Annan Report, see note 8.
81 Ibid.
82 Ibid., para. 124.
Here, the Secretary-General adopts the findings of the HLP on the ways a state can react to an external military threat choosing even a somewhat more daring language. As already explained above it is simply not correct to interpret the outcome of the international legal discussion in this field this way. Here, an interpretation of Article 51 of the Charter is sought that does not correspond to a textual reading of this provision and which is not corroborated by any significant state practice accompanied by a corresponding *opinio juris*.

The statements in the following paragraph are also important:

“Where threats are not imminent but latent, the Charter gives full authority to the Security Council to use military force, including preventively, to preserve international peace and security. As to genocide, ethnic cleansing and other such crimes against humanity, are they not also threats to international peace and security, against which humanity should be able to look to the Security Council for protection?”

With regard to the events mentioned in the last sentence it can really be said that there is an emerging trend to establish a respective Security Council competence, although this tendency is a cautious one, intentionally blurred by states eager to emphasize possible international repercussions of internal conflicts as a consequence of a Security Council intervention.

Generally it can be said, however, that it would be difficult to contest a Security Council’s faculty to act in these cases alleging the existence of an *ultra vires* situation. The Annan Report evidences that the Secretary-General is aware of the underlying dilemma and he chooses a pragmatic way out of it, presenting his opinion as a question to the international community. At the same time he leaves no doubt, however, that he firmly believes in such an authority of the Security Council.

In sum, with regard to the duty to protect, two main elements can be discerned in the reform proposals by the HLP and the Secretary-General:

The possibility to react against external threats has been extended considerably. While the authors of these Reports tried to sell the rele-

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83 Ibid., para. 125.
84 Hilpold, see note 61.
vant passages of their documents merely as something like a “restatement of the existing law” in reality they went far beyond. This approach has to be criticized for content and form. With regard to the material content to recognize an imminent threat as a justification for the recourse to self-defence would considerably weaken the prohibition of the use of force and it is in no way clear where self-defence ends and where a preventive war begins. With regard to the form in which this approach has been presented it is somewhat worrying to see that a totally partial view has been declared as a mainstream position by personalities who are assumed to know better or who are at least in a position to be able to procure this knowledge easily. With regard to possible reactions against internal threats both the HLP and the Secretary-General again try to develop the law progressively but in this case the status quo of the relevant international norm is correctly described and to ask for a more consequent intervention by the Security Council in the event of genocide and large-scale killings appears to be fully legitimate and in line with recent international law practice where elements operating in this direction can be noticed.

No convincing proposal has, however, been brought forward that should make sure the Security Council will act more effectively in the future. The formulation of guidelines and conditions that should direct the Security Council to this avail is a well intended gesture but even in the rather improbable case that such a catalogue should find international recognition, it would neither constitute an effective barrier against abusive interventions nor a real guarantee that the Security Council would authorize an intervention if a factual need for such an intervention is given. There is no point in trying to clarify a provision with some interpretative leeway by an array of conditions again suitable for diverging interpretations when, at the same time, the decision to authorize an intervention or not is essentially of a political nature. For the same reason proposals to hold members of the Security Council responsible for their voting in this body in case no majority is found for an intervention when grave human rights abuses occur are moot and fly

86 Johnstone, see note 75, 64, pointedly – and probably a little bit too pessimistically – remarks that “material power and hard bargaining over interests are all that matters in the Security Council, and [...] deliberation and persuasion on the basis of norms count for nothing.” Therefore, “legal quibbles” are futile.
in the face of international reality and the very nature of the UN system.\footnote{See M. Toufayan, “A Return to Communitarism? – Reacting to ‘Serious Breaches of Obligations Arising under Peremptory Norms of General International Law’ under the Law of State Responsibility and United Nations Law”, \textit{CYIL} 42 (2004), 197 et seq. (200 et seq.) who ponders whether the concept of complicity could be referred to in order to hold the respective states responsible. On the wide discretion the Security Council enjoys when it discharges its duties resulting from the Charter see also Dinstein, see note 79, 283.}

Thus, notwithstanding the far-reaching pretensions underlying these documents they do not seem to be suited to make a real difference in the attempt to establish an effective “duty to protect”.

\section*{VII. Further Developments}

As soon as the Annan Report was presented an intense international discussion began with the intention to draft a globally agreed document which should have been adopted by the General Assembly in September 2005. This discussion soon revealed that the position taken by the state community with regard to this issue differed widely from that of the drafters of the two documents mentioned.

When the President of the 59th session of the General Assembly, the above mentioned Jean Ping, tried to draft a document summarizing the various positions taken by the states little was left of the ideas advanced by the HLP and by the Secretary-General:

“We reaffirm that the relevant provisions of the Charter regarding the use of force are sufficient to address the full range of security threats and agree that the use of force should be considered an instrument of last resort. We further reaffirm the authority of the Security Council to take action to maintain and restore international peace and security, in accordance with the pertinent provisions of the Charter. We recognize the need to continue discussing principles for the use of force, identified by the Secretary-General.”\footnote{Ping Document, see note 11, para. 75 et seq.}

While the first paragraph cited reflects merely a traditional international law position which could have been formulated, say, in the 1950s, in the following paragraph a link to the present reform discussion can be found. The efforts by the Secretary-General (and, indirectly, those of
the HLP and also those of the ICISS) receive appreciation but the Ping Document does not contain any definite judgment on the relative propositions, requiring instead that the discussion continues. In the definite Outcome document of 24 October 200589 even this tenuous link is severed. The decisive paragraph reads as follows:

“We reaffirm that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security. We stress the importance of acting in accordance with the purposes and principles of the Charter.”

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At first sight, nothing is left in this area of the bold designs developed by the ICISS, by the HLP and by Secretary-General Kofi Annan.

VIII. Conclusions

Thus, the question has to be posed whether all the endeavours of the last years to reform one of the most important – and most contested – areas of UN law have proven to be futile. While a first examination of this development might suggest such a conclusion, at a closer, contextual look, a somewhat different impression emerges. In fact, the provisions on the use of force are embedded in a broad reform framework expressing a new understanding of the international community. It must be emphasized that one of the most characterizing elements of the documents presented is the attempt to furnish a holistic vision of the main problems and challenges that international society is faced with.91 Poverty, infectious diseases, environmental degradation, internal conflicts, terrorism and transnational organized crime – to mention only a few of the most urgent present day problems the international community faces – are described as mutually interlinked. This approach is not free of exaggeration but the main idea on which it rests appears to be convincing. In sum, these concepts are inspired mainly by the idea that international cooperation has to be enhanced, international institutions have to be strengthened and unilateralism has to yield to multilateralism. They constitute, therefore, a valuable antidote against the strong

89 World Summit Outcome, see the A/RES/60/1 of 16 September 2005.
90 Ibid., para. 79.
91 See extensively in this regard Hilpold, see note 6.

The HLP Report has been criticized for attributing too much importance to the role of the Security Council in the future world order foreseen in this Report.\footnote{See L. Boisson de Chazournes, “La réforme des Nations Unies: à propos des réponses aux menaces à la paix et à la sécurité internationales”, International Law Forum 7 (2005), 84 et seq. who wrote that there is a “risque de ‘sécuriser’ l’action des Nations Unies dans ses multiples domaines de compétence”, (85).} This criticism appears to be justified. The community of states is not prepared to accept a world directorial nor would such an institution be very well suited to solve the complex problems mentioned above. Both the efficiency problem – a decentralised order is much more efficient in procuring the data necessary to confront the problems mentioned – and the necessity to provide for democratic governance rules respecting at the same time the equality of states stand in the way of such an approach. A stronger international constitutional order allowing (and requiring) states to cooperate more intensively would, however, be useful. Although this aspect has also been weakened along the way from the HLP Report to the Outcome Document this basic idea is still clearly perceptible in the resolution approved by the General Assembly on 24 October 2005. Also the follow-up process characterized by the establishment both of the Peacebuilding Commission\footnote{A/RES/60/180 of 20 December 2005.} and the Human Rights Council\footnote{A/RES/60/251 of 15 March 2006.} evidences the vigour still residing in this reform movement. The fact that both institutions will give an important contribution to the implementation of the duty to protect demonstrates further the pivotal importance of this duty in the whole reform process.

\footnote{A/RES/60/180 of 20 December 2005.}
On a whole, it is not easy to give a definite answer to the question whether this reform endeavour has been a success – and not only because the reform process is still ongoing. The evaluation of the results will depend mainly on the perspective adopted. For those who expected immediate results, a fundamental change in world governance and a strengthening of central institutions responsible for a direct implementation of the duty to protect (and, subsidiarily the competence for individual states to enact this duty) the results can only be disappointing and the ongoing reform discussion unpromising. For those, however, who advocated a more gradual development the results achieved hold more promise. The global vision, the interconnection between the various problems and the clear demonstration that state sovereignty knows its limits when essential human rights issues are concerned is laying the foundations for a new international order – which, however, must always respect the fact that international law is mainly formed by states. A concept denying this fact is condemned to failure from the beginning. True, there have been times in the past when international law changed more or less abruptly and profoundly; the creation of the Holy Alliance, the coming into being of the USSR, the formation of the United Nations and the process of decolonization being examples of this. This time, however, the changes appear to be not so profound, notwithstanding the many laments about an excessive recourse to unilateralism by the only remaining superpower and about an ever-growing discrepancy between rising international human rights standards and the lack of willingness to implement them. Viewed realistically, the collective security mechanism operates quite well in consideration of the degree of development of the international society. There is much room for improvement but it is far more likely that this can be brought about by an

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96 All too often it is forgotten what the Permanent Court of International Justice stated in 1923, in its fourth Advisory Opinion on the Nationality Decrees in Tunisia and Morocco (PCIJ, Series B, No. 4, 1923, page 24): “The question whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question; it depends upon the development of international relations.” Therefore, there is no rigid distinction between “internal” and “external” questions. There is rather a “moving scale” which takes into account the evolution of international law. See G. Abi-Saab, “Some Thoughts on the Principle of Non-Intervention”, in: K. Welkens (ed.), *International Law: Theory and Practice – Essays in Honour of Eric Suy*, 1998, 225 et seq. (230). See also C.N. Gregory, “An Important Decision by the Permanent Court of International Justice”, *AJIL* 17 (1923), 298 et seq. (301).
evolutionary process than by a total remodelling of United Nations law. In fact, the UN Charter is a “living instrument” and its interpretation can and has to be adapted continuously to new needs.  

This is often missed by those interpreters who adopt a kind of a religious attitude towards the Charter: the reading of this document is closely tied to the factual realities of the 1950s and any deviation intended to make this document better correspond to present needs is condemned as dogmatic impurity.

In reality, any dogmatic “extremist” reading of the Charter does little service to the purposes for which the United Nations was founded. As it is not correct to rule out any evolution of United Nations law, so it is dangerous to simply do away with the strict prohibition of the use of force. Therefore, while it is no longer possible to simply ignore the plight of people in cases of massive human rights abuses, neither the HLP Report nor the Annan Report were suited to serve as the immediate basis for a new constitutional order of the United Nations. They have given, however, a worthy impetus for the further development of this law. The great challenge for the future will be to achieve what was recently called the “humanization of international law”, a painstaking, slow and often disillusioning process which receives far less public attention than the drafting of lofty concepts but which is far better capable of generating lasting effects.


98 See, in this sense, the brilliant comparison made by Rein Müllerson: “For some, the UN Charter seems to have acquired certain characteristics of the Holy Books – either the Bible or the Koran. One cannot change it, one has to believe in it and even swear allegiance to it, but at the same time, one can hardly live by it. However, fundamentalism in the Charter may be almost as dangerous as Biblical or Koranic fundamentalisms. Literal and non-contextual interpretation of any text – be they religious or secular texts – is bound to lead to social impasse. If in the case of holy texts such interpretation sometimes guides towards, and justifies, violence, in the case of the UN Charter, it may, on the contrary, be one of the causes of the inability to adequately respond to violence,” see R. Müllerson, “The Law of Use of Force at the Turn of the Millennium”, *Baltic Yearbook of International Law* 3 (2003), 191 et seq. (199).

99 See in this sense also N.D. White, “Self-defence, Security Council authority and Iraq”, in: Burchill, see note 52, 235 et seq. who strongly criticizes the approach taken by the National Security Strategy.

Recently it has been deplored that paralysis has set in the development of international law and that those institutions which should deal institutionally with it are stuck in technical discussions. This criticism does not, however, do sufficient justice to the complexities of a highly developed international order which is working fairly well. Of course, aspirations range still higher and many deficiencies of the international order have to be confronted. On the other hand, idealistic ideas are rarely suited for direct application. Technical groundwork and the development of great strategies are both necessary and not mutually exclusive. Therefore, the HLP Report and the Annan Report were both worthwhile contributions to the development of international law; not as blueprints for a new international constitutional order but as authoritative reminders that more care has to be dedicated to new great challenges such as the duty to protect. The hard work to implement these ideas has to be done on the ground, by committed politicians, by NGOs, by single human rights activists and not least by the disillusioned technician, not to say by the "pedantic man in his closet" as the international lawyer was once characterized.


Wrongdoing of International Civil Servants – Referral of Cases to National Authorities for Criminal Prosecution

Wolfgang Münch *

I. Importance of the Investigations Function in Secretariats of International Organizations
II. Main Areas of Wrongdoing
III. Action to Be Taken After Discovery of Wrongdoing
IV. Arguments in Support of Referrals
V. Arguments Cautioning against Referrals
VI. Final Remarks

“The most important asset of the United Nations Secretariat is the staff”.

This statement using more or less the same or similar words has recurrently been made by several Secretary-Generals of the United Nations, usually on the occasion of the general debate of the agenda item “human resources management” in the Fifth Committee (Administrative and Budgetary) of the United Nations General Assembly. As far as it is

* The views expressed in this article are personal and do not represent the views of the German Embassy Nicosia/ Cyprus or any other official German entity.

known no Member State has contradicted such an appraisal and there should be no doubt that the thrust of the statement is correct.

In recruiting staff the Secretary-General as the chief administrative officer of the organization\(^1\) has to adhere to Article 101 para. 3 of the Charter which states:

“The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.”

The constitutions of specialized agencies of the United Nations system often contain provisions similar to Article 101 para. 3 of the United Nations Charter.\(^2\) In organizations where the requirements for recruitment of staff are not spelt out in detail at the level of primary law, such as a constitution, usually staff regulations contain the legal basis for this

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1 Article 97 of the United Nations Charter.
2 WHO, article 35: “The Director-General shall appoint the staff of the Secretariat in accordance with staff regulations established by the Health Assembly. The paramount consideration in the employment of the staff shall be to assure that the efficiency, integrity and internationally representative character of the Secretariat shall be maintained at the highest level. Due regard shall be paid also to the importance of recruiting the staff on as wide a geographical basis as possible”. UNESCO, article VI para. 4: “The Director-General shall appoint the staff of the Secretariat in accordance with staff regulations to be approved by the General Conference. Subject to the paramount consideration of securing the highest standards of integrity, efficiency and technical competence, appointment to the staff shall be on as wide a geographical basis as possible”. UNIDO, article 11 para. 5 (fourth and fifth sentence): “The paramount consideration in the employment of the staff and in determining the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting staff on a wide and equitable geographical basis”. Slightly different the accentuation in the Constitution of the International Labour Organization (ILO), article 9 para. 2: “So far as is possible with due regard to the efficiency of the work of the Office, the Director-General shall select persons of different nationalities”. Noticeable also subsequent para. 3: “A certain number of these persons shall be women”.

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(e.g., Organization for Economic Co-operation and Development (OECD)).

I. Importance of the Investigations Function in Secretariats of International Organizations

However, all recruited persons are and will remain human beings, not angels and, thus, the risk of wrongdoing by staff members of the Secretariats of international organizations cannot be completely excluded. In the context of strengthening the oversight function (or even establishing it properly) in the Secretariat of the United Nations, as well as in other organizations of the United Nations family — a debate which started some 20 years ago — Member States also decided to create an investigation function.

The Office of Internal Oversight Services of the United Nations Secretariat has been established in 1994. Paragraph 5C (IV) of that resolution states:

“The Office shall investigate reports of violations of United Nations regulations, rules and pertinent administrative issuances and transmit to the Secretary-General the results of such investigations together with appropriate recommendations to guide the Secretary-General in deciding on jurisdictional or disciplinary action to be taken.”

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3 Staff Regulation 7:
“[In recruiting officials the] Secretary-General shall give primary consideration to the necessity to obtain staff of the highest standards of competence and integrity. He shall provide, so far as possible, for an equitable distribution of posts among the nationals of Members of the Organization, in particular as regards senior posts. Different from similar legal texts of United Nations system organizations the wording of regulation 7 b) has not (yet) been reformulated in terms of gender neutrality.”


5 For further details see K.T. Paschke, “Innenrevision in den Vereinten Nationen – eine neue Erfahrung”, Vereinte Nationen 44 (1996), 41 et seq.
The Secretary-General has fine-tuned the mandate of the investigations function of the Office of Internal Oversight Services in 1994. Since its inception in 1994 funding and human capital for the Office as well as the Investigations Division within the Office have been constantly increased. In the budget of the current biennium 2006-2007 of the United Nations the Investigations Division is equipped with 68 established posts and funds (regular and extra budgetary) in the overall amount of US$ 13,586,000.

The Joint Inspection Unit (JIU) of the United Nations system, the only external oversight body empowered with a system-wide mandate has been entrusted with an investigation function through the General Assembly already in 1976. According to article 5 para. 1 of its Statute Inspectors “shall have the broadest powers of investigation in all matters having a bearing on the efficiency of the services and the proper use of funds.”

However, unlike other tasks in the areas of inspection and evaluation assigned to it, the Unit has hardly made use of its investigation function since it was understaffed for a proper delivery of investigations and had to focus on the (still broad) remaining range of its mandate for a number of reasons.

Nevertheless, the Unit has not only played the role of a compassionate advocate in strengthening internal oversight functions in general. It has also specifically addressed the subject of investigative ca-

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6 Doc. ST/SGB/273 (section II.D.).
7 Doc. A/60/6 (Sect. 29).
8 Disregarding the Bretton-Woods-Institutions and IFAD.
10 See also article 6 para. 1: “Acting singly or in small groups, the Inspectors shall make on-the-spot-inquiries and investigations, some of which may be without prior notification, as and when they themselves may decide, in any of the services of the organizations.”
12 See the series of reports contained in the following documents, Accountability and Oversight in the United Nations Secretariat, Doc. A/48/420; Accountability, Management, Improvement, and Oversight in the United Nations System, Doc. A/50/503 (Part I and II); More Coherence for En-
pabilities of secretariats of international organizations in a report enti-
tled “Strengthening the Investigations Function in United Nations Sys-
tem Organizations”\(^ 13 \), which recommends, \textit{inter alia}:

- developing and adopting a common set of standards and proce-
dures for conducting investigations;
- ensuring sufficient training for managers involved in investiga-
tions;
- conducting a risk profile of organizations;
- and developing proactive investigations.

This report has been accepted quite favourably by the Chief Execu-
tives Board for Coordination as reflected in Document A/56/282/Add.
1 and later it triggered a lively discussion in various subordinate bodies
of the United Nations General Assembly as well as in a number of
meetings of legislative bodies of specialized agencies. Subsequent to the
positive comments made by the Committee for Programme and Coor-
dination\(^ 14 \) the recommendations of the report have been endorsed by
the United Nations General Assembly in 2002.\(^ 15 \)

The report further encouraged, e.g., the Conference of Investigators
of United Nations Organizations and Multilateral Financial Institutions
in Recommendation 6 to continue and to intensify inter-agency-
cooperation in different areas of investigations. This Conference has
been initiated by the Office of Internal Oversight Services in 1999 and
holds meetings, with one exception, on an annual basis. Main players of
the Conference other than the Office of Internal Oversight Services are
the sister service of the World Bank and the European Anti-Fraud-
Office (OLAF). The organizers of the Conference also deserve recogni-
tion for offering other organizations (outside the United Nations sys-
tem) the opportunity to participate and, thus, to profit from the broad
experience of bigger organizations as far as the rather delicate issue of
handling investigations is concerned. One of the recurrent agenda items
of the Conference is the issue of, if, when and under what conditions

\(^{13}\) Issued as United Nations Doc. A/56/282.
\(^{14}\) See Doc. A/57/16, paras 356 – 358.
\(^{15}\) A/RES/57/282 of 20 December 2002, Section IV.
referrals of criminal cases should be made to the national authorities of host countries.

The General Assembly Resolution mentioned above requested the Secretary-General to review the practices involving programme managers in investigative processes, with specific attention to independence, training and proper guidelines. The Secretary-General has presented his findings in Document A/58/708, a report which has been serving as a policy document for conducting investigations. In particular, the report identifies categories of high risks such as serious or complex fraud or other serious criminal acts or activities and categories of lower risks such as simple thefts or single entitlement frauds.16

The Office of Internal Oversight Services is keeping Member States informed on investigations either through individual reports (e.g. Document A/55/352, a proactive investigation of the education grant entitlements and discovered cases of fraud) and through its annual report.

The latter usually identifies major cases of investigations and provides information on the volume of recovered funds and assets as well as on managerial issues with regard to the investigation division of the Office and other pieces of information relevant to Member States. Consideration has been given to the idea of issuing on a regular basis a free-standing report on investigations only, but this idea has not (yet) materialized. Another source of information for Member States are the reports of the Board of Auditors on the audited financial statements of the United Nations and its funds and programmes and on United Nations peace-keeping operations which contain a separate sub-section on “Fraud and Presumptive Fraud”.17

The practice of specialized agencies and organizations outside the United Nations system is not uniform, but it can be stated that all of them are unified on the common denominator to do the utmost to protect their good image in world public opinion which has achieved a

16 The General Assembly welcomed the report in its resolution A/RES/59/287 of 13 April 2005 and gave the Secretary-General further guidance on specific elements such as basic investigation training or mandatory reporting by programme managers of allegations of misconduct.
much higher level of awareness than it used to be the case in the past. Headlines of United Nations Press Releases such as “Mark Malloch Brown\(^{18}\) says management has zero-tolerance policy for fraudulent behaviour, 8 staff suspended while investigation continues”,\(^{19}\) reflect the sensitivity prevailing among Member States against wrongdoing as perceived by the Secretary-General of the United Nations.

Some Heads of organizations invite Member States to special briefings if cases of suspicion of criminal acts occur (in particular, when the local media started to attach interest to the issue) or they address the Heads of Permanent Missions in a personal letter. The Annual Report of the Office of Institutional Integrity of the Inter-American Development Bank (IDB) is a very illustrative example of detailed information provided to Member States including some facts on the number of referrals of specific cases to the authorities of Member States.\(^{20}\)

II. Main Areas of Wrongdoing

What are the main areas of criminal activities that can be observed among a minority of international civil servants? In essence, these are fraud and embezzlement, theft and bribery.

As far as fraud to the detriment of an organization is concerned, some cases are spectacular and trigger much interest such as the one of a senior staff member of the United Nations Interim Administration Mission in Kosovo (UNMIK) who misappropriated a seven-digit amount of US$.\(^{21}\) More frequent are cases of so-called entitlement frauds; when staff members apply for reimbursement of claims in amounts which are higher than justified in legal terms or even totally unfounded (for example: abuse of education grant by blowing up the tuition fees for staff members’ children). These cases can occur in collusion with third parties and in combination with other criminal acts such as falsification or manipulation of documents or alteration of cheques.

\(^{18}\) At the time Chief of Cabinet of the Secretary-General, now Deputy Secretary-General of the United Nations.

\(^{19}\) Doc. SC/8645.

\(^{20}\) The Report can be accessed on the Bank’s Internet site available at: <http://www.iadb.org/integrity/oiir05>.

\(^{21}\) For further details see 9th annual report of the Office of Internal Oversight Services contained in Doc. A/58/364, preface and para. 66.
Similar cases of fraud have been observed in the context of clearances of missions or relocation of staff members from one duty station to another. What is also worth mentioning in this context is also the almost “classical” fraudulent abuse of telephone facilities. According to the statements of the Board of Auditors the summary of cases of fraud or presumptive fraud during the biennium 2002-2003 involves 14 cases amounting to US$ 707,304.

The second cluster of criminal acts are cases of theft. Investigators report that duty stations in the field, in particular in certain peacekeeping operations are prone to that type of delinquency. There is a rather simple explanation for that phenomenon: it is the shortage of important goods which are relevant for the staff members’ own elementary needs (for example: building material for fixing an apartment) or which can be easily sold on the black market and, thus, be converted into profits (gasoline, sometimes also food stuff). Nevertheless, cases of theft can also occur at Headquarters. The report of the Board of Auditors for the biennium ended 31 December 2003, contains some information on stolen laser-jet printer toner cartridges at the United Nations Office at Nairobi.

The third cluster of wrongdoing are cases of bribery, very often in the context of infringements of procurement regulations and rules. The reasons for the increase in that type of delinquency can be found, in essence, in the following: first of all, the oversight function is taken much more seriously by Heads of organizations than in old times. Second, as a result of largely increased engagement of the United Nations in peacekeeping, the purchase of equipment is breaking all records of United Nations history. According to the report of the Board of Auditors on budgetary and administrative aspects of the financing of United Nations peace-keeping operations the overall amount of peace-keeping budgets for the period from 1 July 2004 to 30 June 2005 stands at US$ 25

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22 In the report on implementation of decisions of the 2005 World Summit outcome the Secretary-General mentions an increase of fraud cases in recent years in the Office of the United Nations High Commissioner for Refugees, Doc A/60/568, para. 25(a).
25 According to Regulation 2.13 of the Financial Regulations of the United Nations (published in Doc. ST/SGB/2003/7) the Secretary-General shall submit twice a year to the General Assembly for informational purposes a
The relevant document is dated 22 April 2005 and neither contains any costs with regard to the new peace-keeping operation in Sudan (United Nations Mission in Sudan - UNMIS) nor smaller items such as the peace-keeping support account. If those additional cost elements were to be considered the overall amount would rise beyond the 5 billion threshold. In a recent report the Secretary-General informs Member States that procurement at Headquarters and in peace-keeping missions has significantly increased from US$ 1.010 million to US$ 1.774 million over the last two years as a direct result of the unprecedented surge in peace-keeping.

It is worth noting that the Secretary-General, following the advice of the Office of Internal Oversight Services, launched the idea at the time of the negotiations on the Convention against Corruption, that international civil servants also be included in the texts imposing sanctions on bribery and embezzlement and that international organizations as well as State Parties be allowed to have stolen assets returned.

The Convention initiated by the United Nations General Assembly was opened for signature in Merida/Mexico on 9 December 2003 and entered into force on 14 December 2005.

14th December has henceforth been designated as International Anti-Corruption Day. The Convention is, indeed, applicable, if an international civil servant becomes the target of an act of bribery. However, in the reverse case, when the international civil servant assumes the
role of a briber the Convention only requests the State Party to consider how to handle such a case in its domestic legislation.\textsuperscript{31} Thus, the good intention of the Secretary-General has not been fully met.

Other cases of criminal activities such as sexual exploitation, abuse or harassment trigger a particularly high degree of attention in the media (all the more, if a senior official or even a top official is involved), but are not that frequent among staff members. Unfortunately, it has to be admitted that they do exist and cause a considerable degree of work to the Investigations Division of the Office of Internal Oversight Services. The Secretary-General has taken special measures of protection from such acts of criminality.\textsuperscript{32}

Finally, it is also worth mentioning in this context that the Secretary-General has established an Ethics Office implementing a decision of the General Assembly which was taken at the World Summit 2005.\textsuperscript{33} Whereas the terms of reference of the Ethics Office go far beyond the pure prevention of criminal acts committed by staff members, the raison-d’etre of the Office ought to be seen as part of the overall endeavour of securing integrity within the Secretariat of the United Nations and creating an atmosphere in which any thought directed at wrongdoing cannot fall on fruitful soil.\textsuperscript{34}

\textsuperscript{31} Article 16 para. 2 states: “Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.” The full text of the Convention can be accessed electronically on the website of the United Nations Office on Drugs and Crime (UNODC) available at: <http://www.unodc.org>.


\textsuperscript{33} A/RES/60/1of 16 September 2005, para. 161 (d).

\textsuperscript{34} For further details about the Office see Doc. A/60/568 and Doc. ST/SGB/2005/22.
III. Action to Be Taken After Discovery of Wrongdoing

Once a case of wrongdoing has been discovered in a Secretariat, the initial questions which arise usually are: what has to be done to safeguard the financial interests of the organization? What steps are required in the interest of damage containment? What disciplinary measures can be applied against the staff member concerned?

Staff Rule 110.3 of the United Nations provides the following list of disciplinary measures (which corresponds by and large also to the legal situation and practice in other international organizations):

(a) Written censure by the Secretary-General;
(b) Loss of one or more steps in grade;
(c) Deferment, for a special period of eligibility for within-grade increment;
(d) Suspension without pay;
(e) Fine;
(f) Demotion;
(g) Separation from service, with or without notice or compensation in lieu thereof;
(h) Summary dismissal.

The list does not include written or oral reprimands by supervisors which are similar to letters of caution but are regarded not as disciplinary, but as managerial measures.

Next to the issue of application of disciplinary measures the question arises what has to be done to recover assets of the organization and to compensate financial losses resulting from staff members’ wrongdoing. Closely related to the latter is the question of referral of cases to the national judiciary of the country where the criminal act has been committed.

Staff members with a long record of years of service and retirees of the United Nations Secretariat occasionally report the anecdote that in old times the worst case scenario which could have happened if some-

35 Published in Doc. ST/SGB/2002/1.
36 A compilation of disciplinary measures taken by the Secretary-General and cases of criminal behaviour covering the period 1 January 2004 – 30 June 2005 is published in Doc. A/60/315.
one was identified as a criminal act was summary dismissal. The anecdote, although falling under the category of tavern gossiping and being somewhere in between poetry and reality, sheds some light on the ethical and managerial conditions in a Secretariat how they should not be, if an organization wants to convince its stakeholders that assessed and voluntary contributions are well invested in the interest of the individual Member State and the entire membership.

IV. Arguments in Support of Referrals

National authorities can only act upon wrongdoing by international civil servants, if the Head of the organization initiates such course of action. Are referrals to national authorities of the host country appropriate? In principle: yes. The affirmative response to the aforementioned question can be based on the following (not exhaustive) reflections:

1. It is a pure matter of justice to submit an international civil servant, again in principle, to the same legal treatment as any other individual after having committed a criminal act. If the suspect enjoys diplomatic immunity (in organizations of the United Nations system usually at the level of P-5 and above\textsuperscript{37}), the Head of the organization has to waive it. It is recalled that diplomatic privileges and immunities solely exist in the interest of the organization, not to the personal benefit of the individual staff member. World public opinion no longer tolerates a lax attitude which leaves cases of wrongdoing to be settled within the framework of administrative and disciplinary rules. There must be no safe haven for offenders.

2. National authorities and law courts have possibilities to contain damage which may not be (or definitively are not) at the disposal of secretariats of international organizations. Heads of international organizations can put subordinate staff members on special leave and prevent them from entering the premises of the organization, but they cannot arrest them. Thus, a delinquent might still be in a position to destroy pieces of evidence or to exercise pressure on witnesses. Furthermore, access to the proceeds of a criminal act such

\textsuperscript{37} Main exception, the United States, here the diplomatic status is only granted at the level of an Assistant Secretary-General and above.
as fraud can be a complicated issue, only national authorities can freeze assets, seize proceeds and stop any transfer of money abroad.

3. Furthermore, a staff member can easily escape any disciplinary measure taken by the organization by resignation from service (Staff Regulation 9.2). National prosecution remains, in that situation, the only means of sanctioning his or her wrongdoing.

4. Another important argument in support of the current appraisal is the organizations perspective to recover stolen or embezzled funds. Once a staff member has been convicted, the organization is using colloquial language, in a more comfortable legal position for a successful recovery. When judgements of criminal courts gain legal force, it requires a lot of advocatory imagination to challenge the claims of an organization against his staff member who has turned out not to be blessed with a high standard of integrity. It should be noted that the organizations of the United Nations system have no access to the entitlements of staff members accrued in the United Nations Pension Fund.38

V. Arguments Cautioning against Referrals

However, as mentioned before, the response to the question raised is "yes, in principle".

It cannot be an unlimited, but it must be a “qualified yes”. Different from OLAF international organizations with a broad membership (not necessarily a universal one, but all the more, if it is universal) must be given a certain degree of discretion in handling criminal acts committed by its own staff.

In accordance with article 10 (2) of Regulation (EC) No. 1073/1999 of the European Parliament and of the Council of 25 May 1999:

“... the Director of the Office shall forward to the judicial authorities of the Member State concerned the information obtained by the Office during internal investigations into matters liable to result in criminal proceedings. Subject to the requirements of the investigation, he shall simultaneously inform the Member State concerned.”

38 The Secretary-General of the United Nations referred 32 cases to national authorities within the period from 1 January 2004 to 30 June 2005, cf. Doc. A/60/315, para. 39.
Such an automatism appears to be acceptable notwithstanding some doubts in cases of a trivial nature within the supranational entity European Community in which all members have reached a high degree of economic, social and also legal cohesion and homogeneity as it is manifested in legal instruments such as the European arrest warrant or in the EU-Convention on Simplified Extradition.39

Heads of international organizations can have good, even compelling reasons of non-referral. These reasons can either be based in the sphere of their own internal affairs and interests or be related to the host country to which a case would have to be referred. As to the former it might not be opportune to bring a case in all details to the attention of authorities of the host country because the organization would be obliged to deliver pieces of information of strict confidentiality. In doing so the overall damage to the organization could be much higher than the fact that a non-honourable staff member is lucky enough to escape his or her criminal judge. Furthermore, an organization could run the risk of suffering immaterial damage as the result of bad publicity that a referral could engender.

Press releases stating “XY newspaper claims fraud in organization Z” ought to be avoided from the viewpoint of the Head of an organization, in particular, if a small issue is at stake. A similar reflection applies to the uncertainty of the outcome of a criminal procedure. What would be the public reaction, if an accused international civil servant is acquitted by a national law court? What would be the consequences for the organization in such a case as far as its perspectives are concerned to recover stolen or embezzled funds? Although the United Nations Administrative Tribunal (UNAT) has ruled that acquittal in a national court is not a sufficient basis for a successful appeal by a staff member against summary dismissal,40 an acquittal would not improve the “legal ammunition” at the disposal of the organization. It must remain at the discretion of the Head of an organization to decide whether it is acceptable or not to incur risks of the aforementioned nature.

The reason for non referrals can also be related to the political situation in the host country. Plenty of United Nations activities, in particular those under “Chapter VI and a half” of the Charter, i.e. peace-

39 Published in OJEC No 78, 30 March 1995.
40 UNAT judgement No. 436 (Case No. 457, Wiedl against: The Secretary-General of the United Nations, 9 November 1988).
keeping operations, take place on territories where public order is seriously disturbed or where it has collapsed completely. In cases of a failed state the question of referral simply does not arise. There are also cases of countries where a good measure of political and administrative stability exists, but the justice system does not function as it should, procedures take too long, law courts are extremely understaffed, judges may be tainted with the image of being corrupt and court orders could be bought. Frustrated investigators have experienced the referral of a number of criminal acts, mainly fraud, to the authorities of the host country of the duty station concerned, but all cases were abandoned due to lack of progress.

Such an experience is not only discouraging, but should also be seen from a financial and managerial stance. Preparing files for presentation to national authorities of the host country, preparing testimony before its law courts requires a lot of work occupying staff members’ workforce. If there is a high risk that the administrative workload of an organization will be in vain or out of proportion in comparison to the gravity of a criminal act, the Head of an organization must be given the liberty to judge in consultation with the Office of Legal Affairs what would be the best course of action. Regardless from the “quality” of the functioning of criminal justice in host countries, the Head of an organization has to accept that certain countries refuse to take cases of “petty crime”.

The most important and also non insurmountable obstacle to referrals leaving no power of discretion to the Head of an organization is the lack of respect of human rights on part of the host country. Strengthening human rights and bringing them to validity worldwide is one of the major aims of the United Nations Charter as enshrined in the second preambular paragraph and Arts 1, 13, 55, 56, and 62 para. 2. Since its inception the United Nations as well as regional international organizations and also non governmental organizations have invested enormous effort aiming at the realization of that goal. The recent creation of a Human Rights Council whose establishment was agreed on by the 2005 World Summit and which held its first session in Geneva in June 2006,
as well as the renewal of the commitment of all Member States to the value and significance of human rights\footnote{A / R E S / 6 0 / 1 , see above, paras 121 et seq.} are cornerstones of this struggle. The practical consequence for the original question therefore has to be: wherever and whenever there are clear grounds for the assumption that the respect of human rights is doubtful, referrals to national authorities are out of question.

Host countries whose human rights record is open to question as established in the Universal Declaration of Human Rights and the Covenants as well as reflected in related resolutions of the United Nations General Assembly (even if they are not legally binding \textit{strictu sensu}) must be excluded from exercising jurisdiction over international civil servants. In particular, if there is no guarantee of an independent and impartial judiciary, no perspective of a due process, if the execution of criminal judgements exposes the convicted to horrible conditions of detention, the risk of becoming the victim of torture or any type of humiliation no referral must take place. Although the issue is not part of generally accepted international law referrals should also be out of question if the convicted is exposed to the risk of capital punishment.

If the Head of an organization decides not to refer the case to the authorities of the host country, there is still room for reflecting whether the suspected (expatriate) staff member can be relocated to the previous or another duty station and be handed to national authorities there. This would make sense, if the criminal act which had been committed elsewhere falls under criminal law of the state to which the staff member would be relocated. However, it would require careful consideration whether all administrative efforts and costs of relocation were justified in view of the gravidity by the criminal act.

\section*{VI. Final Remarks}

The aforementioned reflections also apply to persons who work for an international organization without having the status of staff members (e.g. consultants, United Nations volunteers). If those people are involved in acts of wrongdoing, the financial and immaterial interests of
an organization are affected in the same way or at least nearly in the same way as if the criminal act had been committed by a staff member.

However, in cases of wrongdoing committed by blue helmets, the Secretary-General has no legal instruments at his disposal, but only moral ones. Blue helmets are integrated into the military forces of the troop contributor. If they become suspected of criminal acts unfortunately this has happened occasionally (e.g. cases of sexual molestation of civilians,\textsuperscript{44} paedophilia, driving under influence of alcohol, theft\textsuperscript{45}), it is up to the military justice of the troop contributor to investigate those issues in cooperation with the Office of Internal Oversight Services, eventually indict and bring the case to sentence. Any other solution is not imaginable since no troop contributor is likely to be prepared to accept that other authorities than its own exercise criminal jurisdiction over its military forces.

Nevertheless, Member States of the United Nations are aware of the problem as can be seen in the most recent resolution of the Security Council extending the mandate of the United Nations Peace-Keeper Force in Cyprus (UNFICYP) by Resolution 1687 in June 2006 which states is para. 6:

\textit{The Security Council}

welcomes the efforts being undertaken by UNFICYP to implement the Secretary-General’s zero tolerance policy on sexual exploitation

\textsuperscript{44} On cases in the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), see the results of the investigations of the Office of Internal Oversight Services contained in Doc. A/59/661. As to the international press, see Neue Züricher Zeitung of 15 February and 13 September 2005. Also noteworthy the Bulletin of the Secretary-General in this respect cf. Doc. ST/SGB/2003/13.

\textsuperscript{45} The report of the Board of Auditors on United Nations Peace-keeping Operations for the period 1 July 2003 to 30 June 2004 is mentioning the case of siphoning and reselling of gasoline at the United Nations Mission in Sierra Leone (UNAMSIL), Doc. A/59/5 Vol. II, para. 345. In addition a number of cases of fraud obviously happened at UNAMSIL as is evidenced in A/RES/60/279 of 30 June 2006, para. 6, on financing UNAMSIL: \textit{“The General Assembly .... Notes with concern the cases of fraud and presumptive fraud identified by the Mission, and requests the Secretary-General to report to the General Assembly at its sixty-first session on the matters, including investigations undertaken in this regard and actions taken regarding proven cases, in accordance with established procedures, as well as efforts to recover any lost funds.”}
and abuse and to ensure full compliance of its personnel with the United Nations code of conduct, requests the Secretary-General to continue to take all necessary action in this regard and to keep the Security Council informed, and urges troop-contributing countries to take appropriate preventive action including the contact of pre-deployment awareness training, and to take disciplinary action and other action to ensure full accountability in cases of such conduct involving their personnel.”

I. Introduction

In 1962, President John F. Kennedy, speaking at Rice University, warned:

"We set sail on this new sea because there is new knowledge to be gained, and new rights to be won, and they must be won and used for the progress of all people. For space science, like nuclear science and all technology, has no conscience of its own. Whether it will become a force for good or ill depends on man, and only if the United States occupies a position of pre-eminence can we help decide whether this new ocean will be a sea of peace or a new terrifying theater of war. I do not say that we should or will go unprotected against the hostile misuse of space any more than we go unprotected against the hostile use of land or sea, but I do say that space can be explored and mastered without feeding the fires of war, without re-

* The views expressed herein are those of the author in his personal capacity and should not be construed as the official position of either the Federal Republic of Germany or the United States.

A. von Bogdandy and R. Wolfrum, (eds.),
peating the mistakes that man has made in extending his writ around this globe of ours.”

Yet, just four decades later, General Lance Lord, then Commander of the United States Air Force’s Space Command, would proclaim:

“Space superiority is the future of warfare. We cannot win a war without controlling the high ground, and the high ground is space.”

For better or worse, space has become integral to 21st century warfare. Consider the United States military space infrastructure. Commanded by a four-star general, the United States Strategic Command manages US military space operations. Over 3,500 personnel man its headquarters, which controls an operating budget of nearly one-half billion dollars. The organization oversees space operations by each of the individual services, the bulk of which are conducted by the Air Force’s 39,000-strong Space Command. Although the Department of Defense’s overall space spending is difficult to calculate because it does not appear as a separate line item in the annual budget, the Congressional Research Service estimates it as in the 20 billion dollar range and climbing. To place this figure into perspective, it exceeds the total defense budget of every country in the European Union except France, Germany, and the United Kingdom.

This should come as little surprise to those familiar with contemporary warfare. Today, space-based systems enable precision navigation; provide real-time weather data; make possible instantaneous global communications; gather intelligence and conduct surveillance and reconnaissance; and warn of missile attacks. Military space activities certainly demonstrated their centrality to 21st century warfare during Operation Iraqi Freedom (OIF). For instance, all secure communications between Coalition forces were transmitted through space, space sys-

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1 President John F. Kennedy, Address at Rice University on the Space Effort, 12 September 1962, available at <www.rice.edu/fondren/woodson/speech.html>.
tems detected 26 rocket launches from Iraq, and the Predator UAVs (Unmanned Aerial Vehicles) that rendered much of the tactical battle space transparent relied on space platforms for data transmission.

Space-based assets proved especially useful in facilitating precision attacks against Iraqi forces. As an example, the upgraded MILSTAR satellite communications system transmitted the Air Tasking Order (ATO) in six seconds rather than the hour that was previously required. This allowed Coalition Forces to be instantly responsive to a dynamic battlefield, where target information is often perishable. Furthermore, precision weapons often rely on satellites for navigation data. Noteworthy in this regard is the Joint Direct Attack Munition (JDAM), which uses data from Global Position System satellites for guidance to the target. Because they are relatively inexpensive, JDAMs dramatically increase the percentage of precision strikes possible. During the high intensity phase of OIF (19 March - 18 April 2003), for instance, United States forces employed over 6,000 JDAMs. During that period, Coalition forces also mounted 156 attacks on “Time Sensitive Targets” and 686 against “Dynamic Targets.” The former encompassed fleeting terrorist, leadership, or weapons of mass destruction objectives, whereas the latter included other highly mobile vital targets. Space systems made it possible to strike the targets with aircraft that were airborne and often already tasked against other targets.\(^7\)

The integration of space-based assets into ground, air, and sea warfare will inevitably continue apace, both vertically, as new combat systems dependent on space capabilities are fielded, and horizontally, as other states enter the space age militarily. In the future, space may also become a line of communication, with systems such as the Hypersonic Space Vehicle traversing space with personnel and material onboard.\(^8\) Ultimately, space may well become a field of battle, with attacks conducted into, from, and within space. That prospect is envisioned in the 2004 US National Military Strategy, which warns that “[a]dversaries threaten the United States throughout a complex battle space, extending


from critical regions overseas to the homeland and spanning the global commons of international airspace, waters, space and cyberspace” and cautions that the United States must secure “space approaches” to its territory.\(^9\) The February 2006 Department of Defense *Quadrennial Defense Review*, intended to “determine and express the defense strategy of the United States and establish a defense program for the next 20 years,”\(^10\) foresees space as a battlefield with even greater specificity. In particular, it notes that China will likely seek counter-space capability.\(^11\) It goes on to predict, however, that:

“The United States should continue to enjoy an advantage in space capabilities across all mission areas. This advantage will be maintained by staying at least one technology generation ahead of any foreign or commercial space power. The Department will continue to develop responsive space capabilities in order to keep access to space unfettered, reliable and secure. Survivability of space capabilities will be assured by improving space situational awareness and protection, and through other space control measures.”\(^12\)

Despite current American preeminence, other nations are increasingly fielding military space systems. Notable in this regard is an initiative launched by the European Union and European Space Agency, *Galileo*. *Galileo* will consist of 30 satellites performing roughly the same functions as the Global Positioning System and should be fully operating in 2008. Also of note is the French military space program. The French have placed remote sensing (HELIOS and PLEIADES), electronic-intelligence gathering (ESSIAM), and communications (SYRACUSE) satellites into space.\(^13\) Of course, the Russians have had a

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\(^10\) Ibid., 10.

\(^11\) 10 United States Code 118, which legislatively mandates preparation of the *Quadrennial Defense Review*.


\(^13\) Ibid., 55-56.

comprehensive military space program for decades, albeit one that is cash-starved.\textsuperscript{15}

Globalization has even reached space. Today, almost 70 nations are involved in space operations to some extent, often through the lease of commercial services.\textsuperscript{16} As an example, the Federal Republic of Yugoslavia leased a transponder contained in EUTELSAT, the European Telecommunications Satellite, to broadcast propaganda during its 1999 conflict with NATO.\textsuperscript{17} And in 2006, Brazil, China, France, India, Israel, Italy, Japan, Pakistan, Russia, Ukraine, United Kingdom, United States, and the European Space Agency possess advanced space launch capability.\textsuperscript{18} The “space faring” club is growing.

This article explores the relationship between military space operations and international law, including international humanitarian law. As the United States dominates the field, its space operations paradigm serves as the template for analysis. The article begins by examining the nature of space operations to enable placement of the law into context. This is an essential task, for international law, if it is to remain meaningful over time, it must be interpreted in light of the environment to which it applies. This is especially true in the case of humanitarian law, no part of which came into force in contemplation of space warfare. The article then moves to the handful of space law treaties to determine the extent to which they may limit military space operations. It concludes with a discussion of the applicability of humanitarian law to war in space, and to those aspects thereof most likely to come into play during any such conflict.

\textsuperscript{15} For a description, see Federation of American Scientists, “Russia and Military Space Projects”, available at <www.fas.org/spp/guide/russia/military/index.html>.


\textsuperscript{18} Center for Nonproliferation Studies, “Countries with Advanced launch Capabilities”, available at <cns.miis.edu/research/space/spfrnat.htm>.
II. The Nature of Military Space Operations

Space offers unique advantages to the war fighter. Among them, global access is preeminent. Because space is borderless, there are no normative barriers impeding access to any point within space. Thus, space represents the apogee of what combat commanders have sought for centuries, “the high ground.” The extent to, and period during, which air and terrestrial activity can be observed from space depends on an array of factors: sensitivity and/or power of the sensing system, weather on earth, number of satellites performing the function, type of orbit, and so forth. However, at least in principle, from space there is no point on the earth’s surface or in the airspace lying above it that is immune from space observation. Should space-based weapons be developed, the same exposure would apply to earth-based targets.

Space also offers persistency of coverage. Unlike aircraft or ground vehicles, spacecraft are unencumbered by earthly features such as terrain or atmospheric density. Instead, orbital mechanics determine their flight parameters. As a result, spacecraft can move at extremely high speeds and orbit the earth for long periods, years in some cases.

There are limitations. Orbits are predictable, which allows the enemy to engage in unobserved activity between passes. Depending on the nature of the orbit, a particular point of interest might be in the satellite’s field of view for just a few minutes. Only geosynchronous orbits, i.e., those that mirror the earth’s revolution, allow satellites to remain over a specified location on earth. Therefore, it is often neces-

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19 For a discussion of these characteristics, see Joint Chiefs of Staff, Joint Doctrine for Space Operations, Joint Publication 3-14 of 9 August 2002, at I-3 – I-4.

20 There are five types or orbits. Low earth orbit is the lowest and offers the best opportunity for high-resolution imagery, but has a smaller field of view and missions are typically shorter due to atmospheric drag. It is used for manned flight, reconnaissance, and communications. Medium earth orbit, which is higher and has a longer dwell time, is used for navigation systems such as GPS. Polar orbits fly over the poles, which can provide coverage of the entire earth. They are useful for weather observation and reconnaissance, including that of troop movements. Highly elliptical orbits offer the largest field of view on the side of the earth from which the satellite travels farthest. They are used in communications and intelligence, surveillance, and reconnaissance (ISR) missions. Finally, geosynchronous earth orbits have orbital periods equal to that of the earth, thereby allowing a satellite to remain over a single point of interest. For this reason, they are
sary to employ a constellation of satellites to maintain continuous coverage, as is the case with the Global Positioning System.

A further limitation of satellites is their vulnerability. Although few states possess the capability to attack satellites directly while spaceborne, the ground-based systems and facilities on which they rely may be targeted to neutralize them, either through classic kinetic attack or information warfare, such as computer network attack. Of course, signals to and from satellites may be jammed, altered, or monitored. Satellites are also held back by launch and maintenance hurdles. It typically takes well over a month to launch a satellite, thereby limiting their responsiveness. Once space-borne, satellites and other spacecraft are difficult to replenish, maintain, or repair.

United States joint (i.e., all military services) doctrine categorizes military space activities into one of four “mission areas”: space control, space force enhancement, space force application, and space support.\(^{21}\) Space control includes “combat, combat support, and combat service support operations to ensure freedom of action in space for the United States and its allies and, when directed, deny an adversary freedom of action in space.”\(^{22}\) Military jargon aside, space control missions ensure you have access to space and that the enemy does not. They encompass such activities as monitoring space, protecting friendly space-based systems, and preventing the adversary’s use of space for detrimental purposes.

Although the distinction does not appear in joint doctrine, the United States Air Force further subdivides space control into offense and defensive components.\(^{23}\) The former seek to hinder the enemy’s ability to exploit space by targeting (with either lethal or non-lethal means) its space systems, ground-based space assets, space personnel, data links, or space services provided them by third parties. Methods include the use of deception, disruption, denial, degradation, and destruction, known as the “5Ds”. Deception involves manipulating, distorting, or

used for communications, weather, and ISR. Some satellites operate in constellations, i.e., in groups. This occurs when a single satellite is insufficient for coverage. An example is the GPS constellation, which ensures constant GPS coverage everywhere.

\(^{21}\) Joint Publication 3-14, see note 19, Chapter IV.
falsifying information, such that the enemy will act in a manner contrary to its best interests. Disruption is temporarily impairing a space activity, whereas denial is temporarily eliminating a particular space capability. Typically, deception, disruption, and denial do not cause physical damage. Degradation and destruction typically do. Degradation is the permanent impairment of a space system’s capability, whereas destruction is permanently eliminating capability.

Defensive counter space operations, which act to preserve friendly space capabilities, may be active or passive. Active measures detect, track, identify, characterize, intercept, or negate threats. Passive measures hinder enemy efforts to affect your operations. Examples include encrypting data or hardening facilities against attack. For policy and legal reasons, the United States has an expressed preference for passive measures.24 That said, the United States would not take interference with its space systems lightly, even during peacetime. As noted in a Secretary of Defense Memorandum setting forth space policy:

“Purposeful interference with US space systems will be viewed as an infringement on [US] sovereign rights. The US may take all appropriate self-defense measures, including, if directed by the [President or Secretary of Defense], the use of force, to respond to such an infringement on US rights.”25

Space force enhancement missions augment operations in other arenas of conflict by sharpening the war fighter’s situational awareness or directly contributing to ground, sea, or air operations. Joint doctrine subdivides force enhancement into five general categories: intelligence, surveillance, and reconnaissance (ISR)26; integrated tactical warning and attack assessment; environmental monitoring; communications; and position, velocity, time, and navigation. The first represents the traditional

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26 Intelligence is “the product resulting from the collection, processing, integration, analysis, evaluation, and interpretation of available information concerning foreign countries or areas.” Surveillance is the “systematic observation of aerospace, surface, or subsurface areas, places, persons, or things, by visual, aural, electronic, photographic, or other means.” Reconnaissance is “a mission undertaken to obtain, by visual observation or other detection methods, information about the activities and resources of an enemy or potential enemy, or to secure data concerning the meteorological, hydrographic, or geographic characteristics of a particular area,” DoD Dictionary, see note 22.
role for space-based systems. It involves such critical tasks as searching for and monitoring enemy position and strength (order of battle), warning of impending attack, and assessing the results of friendly strikes (Battle Damage Assessment – BDA). Integrated tactical warning and attack assessment refer to detection of enemy missile activity or nuclear detonation, whereas environmental monitoring encompasses collection of data on meteorological, oceanographic, and space environmental factors of relevance to military operations. Space-based communications are the key to effective network-centric warfare, in which friendly forces leverage information technology to operate synergistically. The final category – position, velocity, time, and navigation – employs space-based systems to boost the effectiveness of non-space-based military operations, particularly precision in attacks.

The space force application mission area presently exists only as a notional activity. In space force application, spaced-based systems (or systems traveling through space) target ground, sea, and air-based targets. Currently, no state fields a space force application capability. However, the fact that this mission area finds its way into both joint and Air Force doctrine is telling. Indeed, the current Strategic Master Plan for Air Force Space Command specifically discusses the mission, setting timelines for funded development of two potential space weapons capable craft, the Common Aero Vehicle (CAV) and the Space Operations Vehicle (SOV). The CAV is an unpowered, highly maneuverable hypersonic glide vehicle that would be carried into space by, e.g., a SOV. Once in space, the CAV would dispense conventional weapons or other items, such as sensors, against targets. Because of its location and maneuverability, it would be especially useful against mobile and other time-sensitive targets. The SOV will provide spacelift by transporting CAVs, satellites, and other payloads to and from space.

28 Accuracy is the relative ability of a weapon to strike an aim point, i.e., the point the attacker wants the weapon to impact. Precision is the ability to create desired effects with minimal collateral damage. Restated, precision is the ability to correctly identify targets in a timely fashion and to strike those targets very accurately.
29 Air Force Space Command, Strategic Master Plan: FY 06 and Beyond of 1 October 2003, 27-29.
Also indicative of the likelihood of space becoming a field of battle is the United States Air Force’s *Transformation Flight Plan*, the organization’s roadmap for responding to “new national security realities.”

Space occupies a prominent place in an appendix listing programs and future systems concepts that the Air Force finds key to its transformation. Some nearly defy imagination. The Evolutionary Air and Space Global Laser Engagement (EAGLE) Airship Relay Mirrors system will employ space-based mirrors to project laser beams fired by terrestrial, airborne or space-based lasers at varying frequencies and powers. A Hypervelocity Rod Bundles (“Rods from God”) system would launch rods of depleted uranium or tungsten weighing up to 100 kilos from space against terrestrial targets. The Space-based Radio Frequency Energy Weapon would consist of a constellation of satellites capable of transmitting radio frequencies against electronic targets such as a command and control system, with effects ranging from disruption to destruction. The final mission area, space support, is of *de minimus* relevance to this study as it poses few issues of international law. It encompasses the launch, deployment, maintenance, sustainment, and recovery of space craft.

Before turning to the law governing military space activities, it should be noted that commercial space systems provide extensive services to the military. For instance, foreign governments purchase between 40 and 80 per cent of the commercially available remote sensing high-resolution imagery. Even the United States is increasingly turning to commercial operators to provide space services. During air operations against the Federal Republic of Yugoslavia in 1999, for instance, commercial satellites provided 60 per cent of satellite communications capability. This *de facto* reliance became policy the same year with the Department of Defense’s “Space Policy”. That document, still in effect as of May 2006, provided “[a]quisition of national security-unique systems shall not be authorized, in general, unless suitable and adaptable commercial alternatives are not available.”

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31 Ibid. at app. D.
33 Transformation 2003, see note 30, 61.
III. Treaty Law Governing Operations in Space

Space law is unique, in great part because space exploration began a mere half-century ago with launch of the Soviet Union’s Sputnik I in 1957. Since then, space activities have not blossomed to the point where state practice has generated a robust body of customary international law. Rather, the accepted body of customary law principles regarding space is limited to the free use of space by all states, a prohibition on claims of sovereignty over space, free exploration of space, and, perhaps, the obligation to rescue astronauts in distress. Only these principles evidence the consensus, and absence of objection or contrary practice by “specially affected” states, necessary to imbue them with customary character. Each principle is also contained in one of the space treaties to which all major space faring states are party. Thus, they are binding as matters of both customary law and lex scripta.

Before turning to the core treaties governing space, it is necessary to delineate the parameters of the area. In other words, where does airspace end and space begin? This question is crucial, for airspace is sovereign territory of the sub adjacent state. That state may deny entry for any reason or no reason at all, and place any conditions it wishes on transit in or through its airspace. International law acknowledges very few exceptions to this principle.

Unfortunately, no express treaty law provision delineates the boundary of space. The United States armed forces have adopted a functional approach, defining space in terms of aerodynamic parameters: “terrestrial-based forces generally operate below an altitude of roughly 100 kilometers, whereas space-based forces operate above this...”

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38 One example is the right of transit passage through an international strait. LOSC, see note 37, article 38.
altitude where the effects of drag and lift are negligible." Similarly, the United Kingdom’s military notes that while views on the “precise vertical and horizontal extent of airspace” vary, “[f]or practical purposes, it can be said that the upper limit to a state’s rights in airspace is above the highest altitude at which an aircraft can fly and below the lowest possible perigee of an earth satellite in orbit. The result is that anything in orbit can safely be regarded as in outer space.” Adopting a functional approach, one may say that space is the point above the earth where space objects can maintain some sort of orbit, whereas airspace is the area beneath space in which air-breathing engines can function.

Despite agreement over where space lies, the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS), a committee of 67 states that deals with space law (except that involving military uses), has developed five core space law treaties. Together, they form the corpus juris spatialis. Each is discussed below, although the reader is cautioned that during an armed conflict, international agreements incompatible with a state of international armed conflict are generally suspended as between belligerents.

The 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty) (hereinafter OST), with 98 States Parties and 27 Signatory States as of 1 January 2006, is the keystone treaty of space law. The OST sets forth two of the customary princi-
ples cited above. Most significant from a military perspective is that
codified in article I, which provides that space is “free for exploration
and use by all States without discrimination of any kind, on a basis of
equality and in accordance with international law, and there shall be
free access to all areas of celestial bodies.” It is this principle which le-
gitimizes the use of satellites to perform communications, surveillance,
and other functions without authorization from the sub adjacent state,
even during peacetime. Article II of OST codifies the 2nd customary
principle, that “outer space, including the Moon and other celestial
bodies, is not subject to national appropriation by claim of sovereignty,
by means of use or occupation, or by any other means.”

Several other provisions of the OST bear on military or military re-
lated activities in space, although the precise applicability of the treaty
during an armed conflict would be determined on a case-by-case basis
in light of such matters as whether those involved are opposing bellig-
erents, the consistency of the particular provision with a state of armed
conflict, and so forth. Among the most controversial is the treaty’s pre-
ambular language recognizing mankind’s interest in using space for
“peaceful purposes.” A long-standing debate continues over the term
“peaceful” (which also appears elsewhere in the agreement). Some
commentators suggest that it should be interpreted as “non-military.”
Most space-faring nations take the position that “peaceful” means
“non-aggressive or non-hostile.” For instance, the United States asserts
that:

“[u]nder National Space Policy ‘peaceful purposes’ allow defense
and intelligence-related activities in pursuit of national security and
other goals. Permitted is the use of offensive space forces, either in a
counterspace or space-to-ground role, in national or collective self-
defense under Article 51 of the United Nations Charter or when the use
of force is authorized by the United Nations Security Council.”

Widespread state practice since the dawn of the space age supports
the United States position. Today, space is used regularly for military

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Uses of Outer Space, A/RES/1802 (XVII) of 14 December 1962; Declara-
tion of Legal Principles Governing Activities of States in the Exploration
and Use of Outer Space, A/RES/1962 (XVIII) of 13 December 1963; Inter-
national Co-operation in the Peaceful Uses of Outer Space, A/RES/1963
(XVIII) of 13 December 1963.

44 OST, see above, article I.
45 Ibid., article II.
46 AFDD 2-2, see note 17, 35.
purposes ranging from intelligence imaging to communications, usually without protest. Even ill-equipped armed forces rely on such commercially available space-dependent products as mobile phones and GPS locators. In light of such state practice, the continuing insistence by some commentators that space is reserved for non-military purposes is curious. Additional support can be found in the fact that under the 1982 Law of the Sea Convention, the high seas are also “reserved for peaceful purposes.”\textsuperscript{47} Obviously, given that most coastal nations have navies, and have had for millennia, any assertion that this provision banned military activities at sea would be absurd. Why the OST would be interpreted differently is unclear at best.

A related issue is space weaponization, a possibility envisaged with regard to both the counter space and space force application mission areas. The UN Conference on Disarmament has been addressing space weaponization for two decades and in the last 10 years the General Assembly has passed almost a dozen resolutions urging against an arms race in space.\textsuperscript{48}

In this regard, article III of the OST provides:

“States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the Moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding.”

Note that the article prohibits only activities in violation of international law. It would not ban the use of weapons from or against space-based assets if the use in question was lawful under \textit{jus ad bellum} exceptions to the use of force prohibition, such as action pursuant to Security Council mandate and self-defense, and otherwise comported with international humanitarian law.

Further, the OST obligations must be interpreted in light of the UN Charter because Charter obligations take precedence over obligations or rights contained in other treaties, even those that post-date the Charter.\textsuperscript{49} Consider Article 41 of the Charter, by which the Security Council

\textsuperscript{47} LOSC, see note 37, article 88.
\textsuperscript{48} Available at the UN Office for Outer Space Affairs website: \textlangle}www.oosa.unvienna.org/SpaceLaw/gares/index.html\textrangle.
\textsuperscript{49} “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any
may authorize non-forceful measures to resolve threats to the peace, breaches of the peace, or acts of aggression. Such measures expressly include interruption of “radio, and other means of communications,” a function increasingly provided with the assistance of satellites. The Security Council may also, under Article 42, authorize forceful measures. Although the text mentions only “action by air, sea, or land forces,” it would make no sense to limit the Council’s authority to those areas, particularly since the Charter was drafted before the first space flight. Rather, the Security Council may authorize military action in space as on earth or in the atmosphere. Indeed, since Member States are obligated to accept and carry out decisions of the Security Council, a state must comply with a decision of the Security Council even if it authorized action that would otherwise violate the OST. Thus, any use of force in space pursuant to a Security Council mandate would undeniably be lawful.

Finally, article III’s reference to “international peace and security” is significant in light of use of the same term in Article 1(1) of the Charter. As noted by Rüdiger Wolfrum, the reference to “security” in Article 1 constituted recognition of the legitimacy of “activity that is necessary for maintaining the conditions of peace.” The fact that peace can be maintained through “effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of peace” supports this interpretation.

Article IV of the OST contains two specific prohibitions on weaponization of space:

“States Parties to the Treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds

other international agreement, their obligations under the present Charter shall prevail,” UN Charter, Article 103. The general principle that subsequent treaties on the same subject matter prevail over their predecessors (except where provided to the contrary in the later treaty) is subject of the Vienna Convention on the Law of Treaties, article 30, UNTS Vol. 1155 No. 18232.

50 “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” UN Charter, Article 25.


52 UN Charter, Article 1(1).
of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner. The Moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the Moon and other celestial bodies shall also not be prohibited.”

Although the term *outer space* includes celestial bodies, when celestial bodies are referred to in the treaty, the norm in question does not extend to space generally. It cannot be otherwise, for both the United States and Soviet Union had sent military satellites into orbit before the OST was negotiated. Therefore, with the exception of weapons of mass destruction, article IV prohibits only military entities, weapons testing, and exercises on celestial bodies, including the moon. It does not prohibit placing conventional weapons or military space stations into orbit or space-based exercises or weapons testing.

Nor are the WMD restrictions all encompassing. Note, for example, that the OST does not prohibit firing intercontinental ballistic missiles or other WMD systems through space since they are not in orbit, based on a celestial body, or otherwise stationed in space. At least by the terms of the article, the OST would likewise not prohibit the use of WMD in space, although the issue of whether this is a fair interpreta-

53 Reviewing the negotiating record of the treaty, Christol indicates the omission of “outer space” was intentional. C. Christol, *The Modern International Law of Outer Space*, 1982, 24.
54 The US National Reconnaissance Office’s CORONA photo reconnaissance satellites began operation in 1960, three years later than the Soviets SPUTNIK I entered orbit.
55 During the negotiations, both the United States and Soviet Union emphasized that omission of the term “outer space” from the second paragraph was an intentional rejection of an absolute ban on military activities in space; the limitations were restricted to celestial bodies. Treaty on Outer Space: Hearings before the Senate Committee on Foreign Relations, 90th Cong., 22, 59 (1967) (statement of the US Ambassador to the UN); Summary Record of the UN Committee on the Peaceful Uses of Outer Space (COPUOS), 1966 Doc. A/AC.105/C.2/SR.66, page 6 (statement of the Soviet Permanent Representative to the UN).
tion of the article is on-going. The article speaks only of placement, thereby leaving open the option of launching weapons of mass destruction from earth against space or through space against terrestrial targets. Of course, other applicable law, such as international humanitarian law’s principle of proportionality, would limit or bar use in certain circumstances.

If States Parties to the OST conduct military space activities, they must, pursuant to article IX, do so in a fashion that accommodates the interests and activities of other states. Specifically, states must act with “due regard to the corresponding interests of all other States Parties to the Treaty.” Moreover, a state that “has reason to believe that an activity or experiment planned by it or its nationals in outer space, including the Moon and other celestial bodies, would cause potentially harmful interference with activities of other States Parties in the peaceful exploration and use of outer space” must conduct “appropriate” prior consultations. As an example, and assuming application of this treaty provision during armed conflict, a belligerent disadvantaged by a multinational consortium’s satellite that generated both peaceful use imagery (e.g., weather) and imagery useful to an opposing belligerent (e.g., troop positions) would have to consult with states owning the satellite before acting to neutralize it. Once it had consulted in good faith, even if unsuccessful in negotiating an acceptable solution, it could take action, so long as that action was conducted with due regard to the activities of other states.

Because the OST fails to define the term harmful interference, states enjoy a degree of discretion in deciding whether their activities require prior consultation. Similarly, the appropriateness of a notification is case-specific. In particular, national security space activities often necessitate secrecy. The notification required in such cases would differ from, for instance, those required for purely commercial activities. The one obvious exception to the notification and consultation requirement would be interference with enemy space systems of military utility. Such systems constitute military objectives and may be attacked and destroyed. Additionally, they do not meet article IX’s peaceful criterion.

57 OST, see note 43, article IX.
58 Ibid.
With regard to military activities in space, mention should be made of article VI:

“States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the Moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty. When activities are carried on in outer space, including the Moon and other celestial bodies, by an international organization, responsibility for compliance with this Treaty shall be borne both by the international organization and by the States Parties to the Treaty participating in such organization.”

This article amounts to a form of state responsibility unique to space law. States are always responsible for the actions of their governmental entities in space.59 For instance, the United States shoulders legal responsibility for the actions of the US Strategic Command and its service components, as well as those of the National Aeronautical and Space Agency (NASA). In most cases they would also be responsible for the actions of governmental contractors or others acting under their direction.60 By the OST, however, states bear responsibility for space activities carried out by private companies or individuals.

During international armed conflict, the article may affect application of neutrality law.61 It is well-established that a neutral state violates

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59 International Law Commission, Articles of State Responsibility, article 4.1: “The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.”

60 Ibid. article 8: “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”

its duty of “impartiality and abstention” by assisting a belligerent, for example through the provision of military supplies and equipment. Applied to space, non-neutral service could include, as an illustration, providing satellite imagery to one side of the conflict.

But under the law of neutrality, states need not put an end to private trade between its nationals (or companies incorporated or registered in the state) and any of the belligerents. Article VI arguably transmutes this established principle with regard to space activities because pursuant to its terms states bear express international responsibility for both governmental and non-governmental activities. This certainly applies to any activities they license or to which they otherwise officially consent.

The neutral state concerned would be obliged to take steps to terminate any “non-neutral” service by non-governmental entities. If it does not, the opposing belligerent acquires a right to do so itself, although it must first demand that the neutral comply with its duty to put an end to the non-neutral activities. Further, the aggrieved belligerent may take only the minimum (but sufficient) actions necessary. The classic historical example occurred during the 1991 Gulf War, when the United States pressured other space powers to deny the Iraqis satellite imagery. Eventually, the United States purchased all available imagery to keep it from them. Doing so went beyond the United States legal obligations, for there is self-evidently no duty to enrich those providing non-neutral service.

Communications satellites may represent an exception to this rule. By the terms of the 1907 Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, “[a] neutral Power is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or wireless telegraphy apparatus belonging to it or to companies or private individuals” (article 8). When it does, it must apply the measures impartially. If the provision represents customary international law, neutral states and private entities are required thereunder to make equivalent satellite service available to all belligerents on the same terms. This rule would extend to satellites owned and operated by international consortia, for individual states do not avoid responsibility by virtue of multinational ownership. 

63 Convention (V), arts 8-9, 18 October 1907, 36 Stat. 2310, 1 Bevans 654.
Albeit viewed as an expression of then-existing customary international law in 1907, Hague V’s status as such today is debatable.\footnote{See discussion in A. Roberts/ R. Guelff, Documents on the Laws of War, 2000, 85-87.} To complicate matters, the treaty, by title and preambular language, applies “in Case of War on Land.” A separate Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War, addresses neutrality in the event of war at sea, thereby demonstrating that Hague V was intentionally limited by medium. Therefore, even if the treaty provision is customary, it is highly questionable whether space activities occurring would be covered. Of course, in the 21st century, the effect of the UN Charter on the law of neutrality must be considered. In the event the Security Council mandated enforcement actions against a particular state pursuant to Chapter VII of the Charter, Article 25 would obligate all Member States to refrain from providing it assistance.\footnote{The article obligates Member States to accept and carry out the decision of the Council; this obligation certainly extends to a prohibition on providing target states of an enforcement action assistance.}

The 1968 Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space (hereinafter Rescue Agreement)\footnote{UNTS Vol. 672 No. 9574, 19 U.S.T. 7570, T.I.A.S. No. 6599.} with its 88 States Parties and 25 Signatory States (and 1 state which has accepted its rights and obligations) as of 1 January 2006, expands on the OST’s requirements to assist astronauts in distress.\footnote{OST, see note 43, article V.} It imposes a number of obligations. Those that learn of an astronaut in distress must immediately notify the launching state and UN Secretary-General,\footnote{Rescue Agreement, see note 66, article 1. If the state cannot identify the astronaut or notify the launching state, it must make a public announcement.} and the state in which they land must rescue them.\footnote{Ibid., article 2.} In a location over which no state exercises sovereignty, such as international waters, any state “in a position to do so” must effect the rescue,\footnote{Ibid., article 3.} a duty somewhat analogous to the law of the sea obligation to aid mariners in distress.\footnote{LOSC, see note 37, article 98.} Astronauts must be unconditionally returned upon rescue.\footnote{Rescue Agreement, see note 66, article 4.} Space objects are treated somewhat differently. The state
within which they land must take whatever steps are “practicable” to recover space objects if the launching state so requests.\(^\text{73}\)

An armed conflict would suspend the Rescue Agreement as between belligerents.\(^\text{74}\) They may capture or destroy the enemy’s space objects and target or capture astronauts qualifying as combatants. Captured combatant astronauts would be prisoners of war, held until the “cessation of active hostilities.”\(^\text{75}\)

The 1972 *Convention on International Liability for Damage Caused by Space Objects* (hereinafter Liability Convention)\(^\text{76}\) has 83 States Parties and 25 Signatory States, and 3 states have accepted its rights and obligations as of 1 January 2006. It expands on the OST provisions regarding state responsibility.\(^\text{77}\) The Liability Convention provides that launch states are absolutely liable for damages caused on earth or to aircraft in flight as a result of their space activities,\(^\text{78}\) although not when the state suffering damage has itself acted with gross negligence or intent.\(^\text{79}\) In outer space, liability only attaches in cases of negligence.\(^\text{80}\)

States may make claims on their own behalf or on behalf of nationals; a Claims Commission generally adjudicates those not settled within a year.\(^\text{81}\) There has been but one case invoking the convention. In 1978, a nuclear powered Soviet maritime surveillance satellite, Cosmos 954, fell from orbit into Canada, spreading radioactivity across a large area.

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\(^{73}\) Ibid., article 5.

\(^{74}\) Although one space law expert has suggested that perhaps its operation would only be suspended *vis-à-vis* military space activities. M. Bourbonnière, “National Security Law in Outer Space: The Interface of Exploration and Security”, *Journal of Air Law and Commerce* 70 (2005), 3 et seq. (20).

\(^{75}\) *Geneva Convention (III) Relative to the Treatment of Prisoners of War*, 12 August 1949, article 118; 6 U.S.T. 3316, 3320, UNTS Vol. 75 No. 972.

\(^{76}\) 24 U.S.T. 2389, UNTS Vol. 961 No. 13810.

\(^{77}\) OST, see note 43, arts VI and VII.

\(^{78}\) Liability Convention, see note 76, article II. However, controversy exists over the operation of the provisions in practice. For instance, there is disagreement whether a state would be liable for an aviation accident resulting from flawed satellite generated navigational signals. See discussion Bourbonnière, see note 74, 23.

\(^{79}\) Liability Convention, see note 76, article VI. For an argument that this provision anticipated the conduct of hostilities in space, see Ramey, see note 35, 135.

\(^{80}\) Liability Convention, see note 76, article III.

\(^{81}\) Ibid., arts VIII, IX, XIV and XV.
Three years later, Canada and the Soviet Union signed a protocol by which the Soviet Union paid a three million dollar settlement, without acknowledging legal liability.82

Some commentators have suggested that the absolute liability provision of the convention could require compensation for space-based attacks against ground or air-based targets.83 Such assertions are misguided. Belligerents generally incur no liability for lawful attacks on military objectives; in other words, the convention’s liability provisions are suspended as between belligerents.84 Of course, belligerents are liable for damage caused in violation of international humanitarian law, a *lex specialis* principle articulated in article 3 of the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land.85 The Convention is universally recognized as customary in nature.

The 1975 *Convention on the Registration of Objects Launched into Outer Space* (Registration Convention)86 with 46 States Parties, 4 Signatory States and 2 states which have accepted its rights and obligations as of 1 January 2006, requires states to maintain a national registry of objects they launch into space. They must also notify the United Nations, as soon as practicable, of launch information.87 Further, when one of its objects is returning from space, the launch state must provide notice “to the greatest extent feasible and as soon as practicable” when its objects return from space.88 The *feasible* and *practicable* language provides

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83 Informal working paper by allied judge advocate, on file with author. See also Ramey, see note 35, 90.
84 Supporting this position is an argument that the limits on liability expressly cited in the Liability Convention are merely illustrative. Other recognized international law bases for avoiding liability, such as consent, self-defense, counter-measures, force majeure, duress, and necessity, also apply. Bourbonnière, see note 74, 22.
85 Convention (IV) respecting the Laws and Customs of War on Land, 18 October 1907, 36 Stat. 2295.
87 The practice of registration commenced in 1961 with the establishment of the United Nations Registry of Launching, established pursuant to A/RES/1721 (XVI) B of 20 December 1961.
88 Registration Convention, see note 86, article IV.
launch states with considerable discretion as to the timing and content of military launch notification.

The 1979 Agreement on the Activities of States on the Moon and Other Celestial Bodies (Moon Treaty)\(^9^9\) is the final core space law treaty. It most militarily significant provision is article 3:

“3.2: Any threat or use of force or any other hostile act or threat of hostile act on the Moon is prohibited. It is likewise prohibited to use the Moon in order to commit any such act or to engage in any such threat in relation to the Earth, the Moon, spacecraft [and] the personnel of spacecraft or man-made space-objects.

3.3: States Parties shall not place in orbit around, or other trajectory to or around the moon objects carrying nuclear weapons or any other kinds of weapons of mass destruction or place or use such weapons on or in the Moon.

3.4: The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military maneuvers on the Moon [is prohibited].”

With 12 States Parties and 4 Signatory States as of 1 January 2006, it is of only limited influence on military space activities. Indeed, the sole space power that is Party to the instrument is France.

Several other treaties place assorted limits on military space operations. Of particular importance are treaty regimes bearing on nuclear weapons. The Limited Test Ban Treaty bans nuclear explosions in space.\(^9^0\) That the prohibition is inapplicable to the use of nuclear weapons during armed conflict is apparent from its preambular language, which speaks of the “aim” (an aspirational norm) of the Parties and focuses in a substantive part on the testing of nuclear weapons.\(^9^1\) The related Comprehensive Nuclear Test Ban Treaty prohibits states from carrying “out any nuclear weapon test explosion, or any other nuclear explosion” and obliges them “to prohibit and prevent any such nuclear explosion at any place under its jurisdiction or control.” It is not in

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\(^8^9\) A/RES/34/68 of 5 December 1979.


\(^9^1\) No mention is made of use, ibid., preamble.
force and neither China nor the United States have ratified the agreement.\textsuperscript{92}

The Strategic Arms Reduction Treaty (I) between the United States and the Soviet Union forbids them from producing, testing, or deploying “systems, including missiles, for placing nuclear weapons or any other kind of weapons of mass destruction into Earth orbit or a fraction of an earth orbit.”\textsuperscript{93} Moreover, interfering with National Technical Means of Verification is prohibited.\textsuperscript{94} This later point is important, for by the terms of the agreement, space assets that only monitor nuclear forces of the other side cannot be targeted or otherwise disrupted. A number of bilateral agreements with Russia similarly mandate confidence-building measures. Examples include notification requirements and non-interference with early warning or arms-control verification assets.\textsuperscript{95} Finally, in 2001 the United States withdrew from the 1972 Anti-Ballistic Missile Treaty, an important space-related move because


\textsuperscript{94} NTM are typically satellites, ibid. article IX.2.

\textsuperscript{95} Examples of others include the Agreement on Measures to Improve the US-USSR Direct Communications Link, 30 September 1971, UNTS Vol. 806 No. 6839 (updated the Hotline Agreement of 1963, which since 1973 is conducted through satellite communications); Memorandum of Agreement between the Government of the United States and Government of the Russian Federation on the Establishment of a Joint Center for the Exchange of Data from Early Warning Systems and Notifications of Missile Launches, 4 June 2000; Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War and the Agreement Between the United States of America and the Union of Soviet Socialist Republics on the Prevention of Nuclear War, 30 September 1971, UNTS Vol. 807 No. 11509, and 22 June 1973, U.S.T. 1478 respectively, which requires notification by missile warning systems of a launch of unidentified objects or indications of interference with such systems, as well as launch of missiles passing beyond national boundaries; Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on Notifications of Launches of Intercontinental Ballistic Missile and Submarine-Launched Ballistic Missile, 31 May 1988, \textit{ILM} 27 (1988), 1200.
the treaty had prohibited, inter alia, developing, testing, or deploying space-based ABM systems or components.96

The radio frequency spectrum, including frequencies used by space-based assets, is governed by the ITU.97 The organization’s responsibilities include, inter alia, assigning frequencies and geosynchronous belt orbital positions. Pursuant to article 45 of its Constitution, radio station operations may not cause harmful interference with other radio services or communications.98 Article 48.1 provides that “members retain their entire freedom with regard to military radio installations.” Despite the exemption, most states abide by ITU guidelines as a matter of policy when conducting their military operations.99 The organization’s constitution also cites the right of states to block or otherwise limit telecommunications transmissions that impact its national security or violate its laws. When it does so, the state must immediately notify the ITU of the measures it has taken, unless notification would affect its security.100

In the past, some intergovernmental space organizations, such as the International Telecommunications Satellite Organization (INTELSAT) and multinational space corporations, such as the International Maritime Satellite Organization (INMARSAT) restricted military use of their systems.101 Now privatized, both organizations advertise the mili-

98 Unlike the Outer Space Treaty, the ITU Constitution (in an annex) defines harmful interference as: “interference which endangers the functioning of a radionavigation service or of other safety services or seriously degrades, obstructs or repeatedly interrupts a radiocommunication service operating in accordance with the radio Regulations.” Annex, Definition of Certain Terms Used in this Constitution, the Convention and the Administrative Regulations of the International Telecommunication Union.
99 For instance, the United States has adopted a “due regard” standard for its own. Department of Defense, Management and Use of the Radio Frequency Spectrum, DoD Directive 4650.1, 8 June 2004, para. 4.3.3.
100 ITU Constitution, see note 97, article 34.
101 The INTELSAT Agreement provided it may be used for “specialized” telecommunications services, but excluded “military purposes” from this definition, Agreement Relating to the International Telecommunications Satellite Organization (INTELSAT), 20 August 1971, article III, 23 U.S.T. 3813. The INMARSAT Agreement stated that the organization “shall act exclu-
tary applications of their systems. Profit seems to also have motivated the French, who, despite opposition to Operation Iraqi Freedom, did not restrict Coalition access to SPOT satellite imagery data.¹⁰²

IV. International Humanitarian Law

International humanitarian law applies wherever armed conflict occurs, except as otherwise specifically provided (e.g., an IHL treaty addressing naval warfare). With regard to military space activities during armed conflict, most IHL issues surround the conduct of hostilities. The foundation of the normative architecture governing how hostilities may occur consists of two treaties, the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land and the 1977 Additional Protocol I to the 1949 Geneva Conventions.¹⁰³

The International Court of Justice has characterized the Hague Convention’s provisions as customary in nature, such that they “are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.”¹⁰⁴ Be that as it may, the treaty

¹⁰² Waldrop, see note 32, 209-210.
¹⁰³ Regulations respecting the Laws and Customs of War on Land, Annex to Convention (IV) respecting the Laws and Customs of War on Land, 18 October 1907, 36 Stat. 2295; Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, UNTS Vol. 1125 No. 17512, ILM 16 (1977), 1391 et seq.
¹⁰⁴ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, para. 79. In its 2004 opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the Court reiterated this view; Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, para. 89. In 1945, the International Military Tribunal had declared that norms set forth in the Regulations annexed to Hague Convention IV “were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war;” International Military Tribunal, Trial of
governs only land warfare, as is evident from the instrument’s title. Companion treaties addressed war at sea,\textsuperscript{105} and war in the air was left almost completely unregulated. Thus, despite its centrality to IHL, Hague IV does not apply to armed conflict in space.

Additional Protocol I enjoys slightly more direct applicability to space conflict. The treaty’s reach is set out in article 49.3, which provides that the provisions on general protection against effects of hostilities (including rules governing targeting) “apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.”

According to the Official ICRC Commentary, the provision limits applicability of the Protocol to attacks against land targets or those that would affect the civilian population on land.\textsuperscript{106} It might be suggested that the Protocol is completely inapplicable to space warfare. After all, the space age was well underway by the time the Protocols were being negotiated and, had the drafters intended to address conflict in space, they could easily have done so (or at least raised the issue for debate).

The suggestion goes too far. No indication exists that the Protocol drafters intentionally excluded space from the \textit{land, air or sea} phraseology. Rather, the most reasonable interpretation is that the Protocol encompasses space-based attacks against land targets. It would also extend...
to attacks against space-based assets (whatever the source) that would affect the civilian population (for instance, by interfering with emergency response communications).

Despite the paucity of directly applicable treaty law, customary IHL principles would serve to fill much of the *lex scripta* void *vis-à-vis* warfare to, through, and from space. Near universal concurrence exists that customary principles such as distinction apply regardless of the situs of battle. There is little reason to distinguish their extension to space warfare from applicability to other forms of combat (air-to-air, air-to-sea, sea-to-sea, and sea-to-air) for which there are few written norms.

As with land, sea, or air-based targets, those in space (or those attacked from space) must qualify as a military objective. Military objectives are “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”\(^\text{107}\)

All military satellites are military objectives by virtue of the “nature” criterion. This is true even as to those that also serve civilian purposes, such as the GPS constellation. Civilian space-based assets qualify as military objectives pursuant to the “use” criterion if they serve military purposes (“dual-use”). Many do. Examples include commercial communications, navigation, remote-sensing, and weather satellites providing contracted services to the military. Of course, attacks against space-based assets qualifying under either criterion must comport with other aspects of IHL, most notably the principle of proportionality and the precautions in attack requirements discussed below.

The two remaining criteria are more difficult to apply with certainty in the space context. “Purpose” refers to the “intended future use of an object.”\(^\text{108}\) Of course, it is often difficult to determine when the enemy intends to convert a civilian object to military use. Nevertheless, once the intention matures, the object becomes target able as a matter of law.

It is essential to emphasize that it is impermissible to attack a civilian object merely because of its potential value to the enemy. In the space context, for instance, destroying commercial satellites in the absence of reliable intelligence that the enemy intends to acquire their imagery for

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\(^\text{107}\) Protocol I, see note 103, article 52.2. See also J. Henckaerts/ L. Doswald-Beck, *Customary International Humanitarian Law Study*, 2005, at Rule 8 [hereinafter CIHLS].

\(^\text{108}\) Commentary, see note 106, para. 2022.
military purposes would violate IHL. On the other hand, if a contract for future acquisition of the products has been executed, the purpose criterion will have been met. The dilemma with space systems lies in the fact that their product or function may be immediately of use to the armed forces without preparatory steps. Indeed, conversion to military use may involve nothing more than delivery of imagery to the armed forces or programming the satellite to handle military data. Thus, intent may not become discernable until the space object qualifies as a military objective through use.

By the last criterion, “location”, “objects which by their nature have no military function but which, by virtue of their location, make an effective contribution to military action” are military objectives. The classic example is the mountain pass through which the enemy will attack. Perhaps the single-most distinguishing characteristic of space is its location; it represents the ultimate high ground from which the enemy may be observed and attacked. Thus, it constitutes a lucrative military objective by virtue of location. A belligerent wishing to deprive an enemy of its use might, for instance, place space debris into a particular orbit or cause an explosion at a specific point in space to deprive the enemy of use at a certain moment (e.g., when they want to secretly reposition forces). Although unlawful in peacetime as interfering with the free use of space, during conflict such actions might well be lawful under the more permissive IHL regime.

One caveat regarding combat operations involving space is that IHL only prohibits “attacks” against civilians and civilian objects. “Attacks” is a legal term of art defined as “acts of violence against the adversary, whether in offence or in defence.” It includes non-kinetic operations that cause damage or destruction to civilian objects or injury to, or death of, civilians. Operations directed against civilians or civilian objects which result in consequences short of this standard, such as inconvenience or non-injurious hardship, would not constitute an attack and, therefore, not be prohibited in IHL. The classic example is psychological warfare, which has for centuries targeted the enemy’s population.

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110 Protocol I, see note 103, article 49.1
This distinction is especially relevant in space warfare. For instance, operations directed against space sensors are likely to be non-kinetic because of, *inter alia*, the risks posed by space debris to civilian, neutral, or friendly assets in orbit. Moreover, at least in contemporary warfare, potential attackers possess greater capability to jam, block, distort, alter, or otherwise neutralize a space sensor’s product or function than to physically damage or destroy the satellite. Indeed, with the advent of information warfare operations, particularly computer network attack, satellite operations have become especially vulnerable.\(^{112}\) As long as the consequences, direct or indirect, of the operation in question do not reach the attack threshold, it will comport with the IHL principle of distinction.

Attacks must not only be limited to military objectives, they must comply with the proportionality principle. This principle prohibits “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”\(^{113}\)

With regard to attacks from space against terrestrial targets, there is no significant difference from those originating elsewhere. That said, the proportionality principle is of particular relevance to potential attacks into space. Many space systems are used for both civilian and military purposes. Such dual-use entities constitute legitimate military objectives, but, because they are used in part for civilian purposes, collateral damage to the civilian aspects of the system will likely result from an attack. This is the damage that will be assessed for excessive-ness *vis-à-vis* the military advantage that the attacker anticipated gaining. On the other hand, the absence of civilian objects or civilians in

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\(^{113}\) Protocol I, see note 103, arts 51.5 (b), 57.2 (a)(iii), and 57.2 (b). See also CIHLS, see note 107, ch. 4.
close proximity to potential targets means there is typically little risk of collateral damage to space objects other than the target itself, although there is some risk of causing space debris (or causing the targeted system to drift out of control) that may subsequently damage other systems in orbit.

The United States has considered the issue of collateral damage to civilian objects and incidental injury to civilians caused during space-related combat operations. In its Transformation Flight Plan, the Air Force adopted an incremental approach to negating enemy space capabilities, one expressly designed to minimize collateral damage and incidental injury.

The Joint Force Commander will generally approach these space negation options (deception, disruption, denial, degradation, destruction) in ascending order. The wide and increasing existence of multinational space system ventures (involving a host of state and non-state actors) creates the need to limit collateral damage to the greatest extent possible. Additionally, the Joint Force Commander must minimize hazards to navigation created by space debris that impacts all spacefaring activity. Finally, strategic deterrence is enhanced by both the ability to achieve precision effects (enhancing credibility) as well as providing the option to escalate conflict should an adversary take courses of action counter to United Nations vital interests.\(^{114}\)

The reverse situation, where military space assets perform civilian services, presents similar proportionality issues. Operation of the GPS system by the USAF Space Command provides the ideal example.\(^{115}\) It is a system of extraordinary importance to the 21st century high-tech warrior, offering, as it does, everything from positional data used by Special Forces behind enemy lines to guidance for weapons such as the

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\(^{115}\) Although operated by the Air Force, it is managed by the Interagency GPS Executive Board, which is chaired jointly by the Departments of Defense and Transportation. The system offers two levels of service, standard Positioning Service (SPS) and Precise Positioning Service (PPS). In May 2000, the United States decided not to exercise its ability to degrade the quality of the SPS signal through “selective availability;” White House Press Release, Statement by the President regarding the United States Decision to Stop Degrading Global Positioning System Accuracy, 1 May 2000, available at <www.navcen.uscg.gov/gps/selective_availability.htm>. Measures such as encryption are taken to ensure the integrity of, and access to, the PPS signal. The Europeans are developing their own navigational satellite system, “Galileo.”
Yet, the civilian community is equally dependent on the system. GPS transmits navigational signals relied upon for activities as diverse as merchant shipping and avalanche rescue. There is absolutely no doubt that loss of the GPS signal would place civilian lives and property at great risk. Such consequences, even though resulting from an attack on a military objective, must be considered in the required proportionality analysis.

Somewhat more complicated is a situation involving a space asset owned and operated by a belligerent on which civilians (including foreign civilians) rely, but which is of value to the enemy. Again GPS is the archetypal example. Could the United States shut down aspects of the GPS system to deny an adversary use thereof if the impact on the civilian population would arguably be excessive to the resulting concrete and direct military advantage?

This is a very different question than that of the acceptability of the enemy’s attack on the system. The answer lies in the term “attack,” for the proportionality principle applies only to operations that qualify as such (“an attack which may be expected to ...”). A belligerent cannot attack its own systems as that term is understood in IHL. Additionally, there is no requirement in IHL to operate any system for the benefit of a civilian population, one’s own or the enemy’s. This general principle certainly extends to space-based assets.

To summarize, attacks may only be conducted against military objectives and they must comply with the principle of proportionality. A further IHL requirement is the taking of precautions to avoid mistaken attacks and to minimize collateral damage to civilian objects and incidental injury to civilians. One specific mandate is to “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing,” harm to civilian and civilian objects. In strikes against space-based assets, the primary concern in this regard is, as suggested above, creation of space debris. As a result, an attacker might be required to employ a soft kill technique, such as computer network attack, in lieu of kinetic means if the former would

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116 There is, of course, a duty not to “attack, destroy, remove or render useless objects indispensable to the survival of the civilian populations,” but this provision is generally interpreted as intentionally denying basic subsistence items such as food, water, clothing, and shelter to the civilian population generally; Commentary, see note 106, paras 2098-2107.

117 Protocol I, see note 103, article 57. See also CIHLS, see note 107, ch. 5.

118 Protocol I, see note 103, article 57.2 (a)(ii).
result in less collateral damage while yielding a similar military advantage. Recall that the United States has adopted this approach in its space policy.

The precautions in attack obligations also include doing “everything feasible to verify that the objectives to be attacked are [not] … civilian objects.” Of particular note in making possible compliance with this obligation is the Registration Convention, for it creates a degree of transparency as to the identity and nature of space-based objects.

To comply with the requisite precautionary duties, an attacker must carefully select targets. Specifically, “when a choice is possible between several military objectives for obtaining similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.” As an example, if a satellite can be reliably neutralized through a strike on a ground-based control node in a remote area, it would not be permissible to attack the satellite kinetically and thereby create dangerous space debris. Much like attacks against terrestrial targets, space warfare necessitates deconstructing space systems to make such determinations.

Beyond the general principles, a number of specific IHL provisions may reach certain space operations. For instance, under customary law, special protection is arguably extended to scientific entities. Many space activities would qualify as such. The environment also enjoys special protection under Additional Protocol I, which prohibits employment of “methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.” For example, a nuclear explosion in space could result in severe damage to the ozone layer or changes to the ionosphere, with disastrous consequences on earth.

Perfidy is forbidden by both Additional Protocol I and customary law. “Acts inviting the confidence of an adversary to lead him to believe

119 Ibid., article 57.2 (a)(i).
120 Ibid., article 57.3.
122 Protocol I, see note 103, article 35.3. See the related provision at article 55.1. For a discussion of these articles, see M. Schmitt, “Green War: An Assessment of the Environmental Law of International Armed Conflict”, Yale J. Int’l L. 22 (1997), 1 et seq. See also CIHLS, see note 107, ch. 14.
that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence” amount to perfidy.\textsuperscript{123} The Additional Protocol characterizes feigning civilian status as perfidious. Although it might seem difficult to feign civilian status in space, recall the Registration Convention. Registration of a military satellite as civilian would constitute perfidy if the satellite was used to facilitate attacking the enemy by, for instance, providing data on the target’s location.\textsuperscript{124}

International law places limits on various forms of weaponry that might be employed into, from, or through space. Since the limits typically are not customary, they apply primarily to State Parties. “Military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party” are forbidden by the \textit{Environmental Modification Convention}.\textsuperscript{125} The Convention on Conventional Weapons’ Protocol IV on Blinding Laser Weapons, applied in the space warfare environment, bars State Parties from employing space-based laser specifically designed to cause permanent blindness.\textsuperscript{126}

A particularly topical subject in contemporary IHL analysis is direct participation by civilians in hostilities. It is a topic especially pertinent in the space context because military space commands employ huge numbers of civilians to conduct their operations. Further, civilian space companies provide services that the armed forces often rely on to conduct combat operations.

\begin{itemize}
\item\textsuperscript{123} Protocol I, see note 103, article 37.1. See also CIHLS, see note 107, ch. 18.
\item\textsuperscript{124} An “Understanding Relating to Article II” sets forth a non-exhaustive list of phenomena that could be generated by environmental modification techniques. Included (in addition to earthquakes, tsunamis, changes in weather patterns, climate patterns, and ocean currents) are changes in the state of the ozone layer and changes in the state of the ionosphere; Report of the Conference of the Committee on Disarmament, Doc. A/31/27 (1976), GAOR, 31st Sess., Suppl. No. 27, 91, 92.
\item\textsuperscript{125} The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 18 May 1977, article I.1, 31 U.S.T. 333, UNTS Vol. 1108 No. 17119. Environmental modification techniques include “any technique for changing – through the deliberate manipulation of natural processes – the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space,” ibid., article II.
\end{itemize}
Given the nature of military space operations, civilians who might be involved therein usually act far from the “field” of battle where there is only a slight risk of being captured by the enemy. Therefore, the controversies over prisoner of war and detainee status that have surfaced during recent conflicts are unlikely to surface with respect to space operations. That said, a significant question is whether such civilians may be directly targeted. The expertise that is required to conduct space operations, and the difficulty of training and replacing space operators, makes them attractive targets.

Article 51.3 of Additional Protocol I provides that “civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.” As the article appears in the section dealing with immunity of civilians from attack, the provision means that civilians who directly participate in hostilities may be attacked. Since they are directly targetable, civilians who are so participating do not count as incidentally injured civilians in the proportionality assessment.

The quandary lies in determining what types of actions constitute direct participation. According to the ICRC’s official Commentary, “[d]irect participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the

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127 The few in the vicinity of the battlefield would likely have been properly authorized to “accompany the armed forces,” thereby entitling them to prisoner of war status under Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949, article 4A(4), 6 U.S.T. 3316, 3320, UNTS Vol. 75 No. 972. Moreover, in the unlikely event of capture, a civilian directly participating in space hostilities could not be punished as a war criminal for his or her actions. Although a detailed analysis is beyond the scope of this article, suffice it to say that the mere fact that a civilian directly participates in hostilities does not constitute a war crime. Absent commission of a separate war crime, a civilian directly participating may only be tried by a domestic tribunal enjoying personal and subject matter jurisdiction. On direct participation, see M.N. Schmitt, “Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees”, Chi. J. Int’l L. 6 (2005), 511 et seq. On the topic, see also M. Schmitt, “Direct Participation in Hostilities and 21st Century Armed Conflict”, in: H. Fischer et al (eds), Crisis Management and Humanitarian Protection, 2004, 505.

128 This provision is also customary in nature. See CIHLS, see note 107, Rule 6.
time and place where the activity takes place.”\textsuperscript{129} It further describes direct participation as “acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces.”\textsuperscript{130}

The application of these standards in practice is the source of much debate in the IHL community, so much that the International Committee of the Red Cross and the TMC Asser Institute are jointly sponsoring a multi-year project in an attempt to find common ground. In the author’s view, the best approach is to require the confluence of three factors: “but for” causation (the consequences would not have occurred but for the act), causal proximity to the foreseeable consequences of the act, and a \textit{mens rea} of intent. Stated in narrative form,

“the civilian must have engaged in an action that he or she knew would harm (or otherwise disadvantage) the enemy in a relatively direct and immediate way. The participation must have been part of the process by which a particular use of force was rendered possible, either through preparation or execution. It is not necessary that the individual foresaw the eventual result of the operation, but only that he or she knew their participation was indispensable to a discrete hostile act or series of related acts.”\textsuperscript{131}

Ultimately, it is the criticality of the act(s) in question to the direct application of violence against the enemy that determines its status as direct participation.

Using this standard, most space operations conducted by civilians do not constitute direct participation. Consider a civilian programming an imagery satellite. He or she has little idea as to what is being imaged and how the product will be used. The programmer may have no idea whatsoever that the imagery will be used to conduct attacks. Along the same lines, a civilian operating or maintaining the GPS system is not directly participating, even though he or she may realize modern weaponry often relies on GPS signals. The link between the activity and the application of force is too attenuated. Of course, direct participation in space hostilities may occur. For instance, a civilian operating a system that conducts offensive operations to, through, or from space would undeniably be directly participating.

\textsuperscript{129} Commentary, see note 106, para. 1678.
\textsuperscript{130} Ibid., para. 1942.
\textsuperscript{131} Schmitt, Humanitarian Law, see note 127, 534.
V. Concluding Thought

Historically, military space operations have tended to be somewhat benign, thereby raising very few contentious legal issues. They have typically consisted of space control (passive defensive counter space missions), space support, and space force enhancement missions. Space warfare remains purely notional.

That will change. In future wars, it is inevitable that war will migrate to space. In particular, offensive and active defensive forms of space control, as well as space force application, are likely to become an increasingly prominent feature of conflict, especially as a growing number of states (and perhaps violent non-state actors) come to rely heavily on space assets to conduct terrestrial military operations. This reality will in-turn challenge the existing international legal architecture governing military operations in space, an architecture originally intended for space exploration and commercial exploitation. International humanitarian law, which was designed exclusively for terrestrial warfare, will also be sorely tested. The resiliency of the applicable law in the face of the challenges on the immediate horizon has yet to be determined.
Harmonizing Trade in Agriculture and Human Rights: Options for the Integration of the Right to Food into the Agreement on Agriculture

Kerstin Mechlem ¹

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¹ The author would like to thank Jamie Morrison, Economist, Commodities and Trade Division, FAO, for his helpful comments on an earlier draft of this paper. All errors remain the author’s responsibility. The views expressed in this article are personal and do not represent the views of FAO.

I. Introduction

Food is life and livelihood; a commodity and a right. As a right it is one of the least realized as the persistently high figures on hunger and malnutrition show.

852 million people were undernourished worldwide in 2000-2002: 815 million in developing countries, 28 million in countries in transition and 9 million in industrialized countries. This sad picture becomes even worse if one adds the two billion that suffer from micronutrient deficiencies, the so-called “hidden hunger”, with its devastating effects on mental and physical capacity, health and life expectancy.

Of the world’s poor and food insecure, two-thirds live in rural areas of developing countries and depend on agriculture for their immediate livelihoods and future prospects. Appropriate agricultural policies, including agricultural trade policies, are an essential component of a much wider bundle of measures necessary to realize their right to food. Since

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3 UN Millennium Project, Halving Hunger: It Can Be Done, Summary version of the report of the Task Force on Hunger, 2005, 3.
4 IFAD, Rural Poverty Report 2001 – The Challenge of Ending Rural Poverty, 2001, 1; FAO, The State of Food and Agriculture 2005 – Agricultural Trade and Poverty: Can Trade Work for the Poor?, 2005, 61. Agriculture’s importance is greatest where undernourishment is most prevalent. While throughout the developing world agriculture accounts for around 9 percent of GDP and more than half of total employment, these figures rise to 30 percent and nearly 70 percent, respectively, in countries where more than 34 percent of the population are undernourished. FAO, The State of the Food Insecurity in the World 2003, 16.
5 In Least Developed Countries (LDCs) the poverty rate for rural households reaches almost 82 percent; World Bank, Global Economic Prospects, 2004, 106.
1995, the Agreement on Agriculture (AoA)\(^6\) establishes important parameters for such policies and economic growth by initiating a process of liberalization which consists of increasing market access, and reducing domestic support and export subsidies.

More than ten years after the entry into force of the AoA and towards the end of the Doha Round negotiations, the positive and negative implications of the AoA for the right to food can be assessed and some criteria may be established, which a revised AoA should meet in order to be conducive to the realization of this important right. Such a call for coherence is justified by the fact that all WTO Members are bound by both trade and human rights law. In particular, almost all WTO Members have ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), which contains the most important codification of the right to food (article 11). Therefore, the normative content and theoretical framework of obligations developed in the context of article 11 ICESCR will be the standard used to gauge the repercussions of agricultural liberalization on the right to food. The right to food thereby works as a threshold against which to test the AoA in two ways: first, it provides an ethical and legal justification for claims to modify the current regulation of international trade in agriculture. Second, it serves to determine the boundaries of permissible policy options.

The paper will proceed as follows: the first section will set out the linkages between trade in agriculture, poverty reduction and the right to food (II.). Next, the normative content of the right to food and states’ obligations will be presented (III.). The following part (IV.) will deal with the legal architecture of the AoA and of the Marrakesh Ministerial Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries (Marrakesh Decision).\(^7\) It will analyse the right to food implications of these two instruments and assess the experiences made resulting from their implementation from a right to food perspective. Both the effects upon developing countries and the question whether countries have retained sufficient space to adopt right to food policies will be addressed. In addition, some first recommendations will be interspersed on how the right to food could be given

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\(^6\) Agreement on Agriculture (AoA) in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, 15 April 1994, UNTS Vol. 1867 No. 31874, page 410.

\(^7\) UNTS Vol. 1867 No. 31874, page 60.
greater weight. The last part (V.) will – against the backdrop of the current debate about trade and human rights – explore four ways of making agricultural trade rules more supportive of the right to food: by inserting the right explicitly in the new agreement, by interpreting existing or future rules to take account of the right, by invoking the right as an exception to a trade obligation, and, most promisingly, by shaping a new AoA to conform to the right to food. Some conclusions and recommendations will follow.

Limitations of space demand omission of a number of issues: the SPS\(^8\) and TBT Agreements\(^9\) will not be dealt with, although they are relevant to the right to food due to their effects on food safety and market access. The same applies to the intellectual property protection requirements of the TRIPS Agreement and their consequences for farmers' access to key agricultural inputs such as seeds.\(^10\) As a matter of fact, almost all WTO Agreements have some indirect effects via their implications for economic growth, employment and income generation. The special case of cotton, which could serve as a case in point for some of the arguments made here, will not be addressed either. The most important drawback, however, is the fact that not sufficient attention can be paid to the differences that exist between developing countries. Indeed, in a number of respects it is no longer possible to speak of developing countries as such in the context of trade negotiations as they are a heterogeneous group in terms of their current trade policies, their level of agricultural development, and the importance of the agricultural sector in the economy. The interests of competitive export nations like Brazil, for instance, differ both from those of the 79 African, Caribbean and Pacific (ACP) states, which have enjoyed preferential access to the EC market and fear that increasing market access in general will erode these preferences, and from those of net food-importing developing countries with underdeveloped agricultural sectors.

\(^8\) Agreement on the Application of Sanitary and Phytosanitary Measures, UNTS Vol. 1867 No. 31874, page 493.

\(^9\) Agreement on Technical Barriers to Trade, UNTS Vol. 1868 No. 31874, page 120.

II. The Linkages between Trade in Agriculture, Poverty Reduction and Food Security

Agriculture produces food, fibres, flowers, renewable energy and raw materials for industrial production. It underpins food security, including in times of contingencies,\textsuperscript{11} foreign exchange earnings, rural development, employment generation, the viability of rural communities, the preservation of agrobiodiversity and of certain landscapes (e.g., terraced paddy fields), and the upholding of cultural heritage, traditional lifestyles, customs and values (multifunctionality of agriculture).\textsuperscript{12} It typically represents the basic economic activity on which other economic activities are subsequently built; growth in agriculture can have disproportionately positive impacts.\textsuperscript{13} Given the concentration of the poor in the agricultural sector, growth in agriculture and increases in productivity are critical to reducing poverty and to realizing the right to food in developing countries.\textsuperscript{14}

\textsuperscript{11} Contingencies can be caused by political reasons (wars, trade embargoes), technical reasons (radioactive fallouts), natural events (floods, droughts, plant and animal diseases, earth quakes), long term declines in the productive capacity of agriculture due to increasing water scarcity, desertification, soil erosion or climate change, or problems of affordability (e.g., caused by currency devaluations).

\textsuperscript{12} OECD (ed.), \textit{Multifunctionality – Towards an Analytical Framework}, 2001. The other side of the coin are negative effects such as soil erosion, chemical residual, nutrient leaching, greenhouse gas emissions and problems with animal welfare.

\textsuperscript{13} D. Byerlee/ X. Diaol/ C. Jackson, \textit{Agriculture, Rural Development, and Pro-poor Growth – Country Experiences in the Post-Reform Era}, World Bank Agriculture and Rural Development Discussion Paper 21, 2005, viii. The contribution of agriculture to growth declines with the transformation of an agricultural economy to an urban-based non-agricultural economy, although even in middle-income countries agriculture continues to “pull beyond its weight”; ibid.

\textsuperscript{14} Overall growth does, of course, not translate automatically into better realization of socio-economic rights (see, e.g., UNDP (ed.), \textit{Human Development Report 1999}, 1999), nor declining growth rates as such constitute human rights violations. Economic growth plays, however, an essential role in reducing poverty and realizing socio-economic rights.
In 2002, food accounted for approximately seven percent of merchandise trade.\textsuperscript{15} Generally, involvement in trade leads to higher rates of economic growth,\textsuperscript{16} and engagement in trade in agriculture is associated with less hunger, not more.\textsuperscript{17} The proportions of undernourished people and underweight children tend to be lower in countries where agricultural trade is large in proportion to agricultural production.\textsuperscript{18} However, there are no automatic correlations. Developing countries with similar levels of agricultural trade show very different amounts of hunger and poverty, which suggests that the impact of agricultural trade on food security is mediated by factors such as markets, natural resource endowments, human capacity, institutions and policies, and the degree of equity with which benefits are distributed.\textsuperscript{19} If trade policy is to contribute to food security, it needs to be embedded in a coherent and well-sequenced national development strategy and complemented by appropriate pro-poor companion policies. In particular, sequencing is important: as such policies take time to yield results, they are only effective if they are set in motion before trade or agricultural reforms, which may harm low-income, food-insecure households.\textsuperscript{20} Such policies may include improving the productivity and competitiveness of the sector by removing penalizing tariffs on agricultural inputs, such as machinery, fertilizers and pesticides; providing agricultural extension services; improving public investment in roads and infrastructure, education and health, research and development; removing obstacles to private investment including increasing access to credit; creating non-agricultural employment and long-term institutional development; and, in some

\begin{itemize}
\item \textsuperscript{15} C. Breining-Kaufmann, “The Right to Food and Trade in Agriculture”, in: T. Cottier/ J. Pauwelyn/ E. Bürgi Bonanomí (eds), Human Rights and International Trade, 2005, 341 et seq.
\item \textsuperscript{16} FAO, The State of the Food Insecurity in the World 2003, see note 4, 16; on trade and development a number of important reports have been published during the last years, amongst them are: FAO, The State of Food and Agriculture, see note 4; UNDP, Making Global Trade Work for the Poor, 2003; UNCTAD, Least Developed Countries Report 2004; WTO, World Trade Report 2004.
\item \textsuperscript{17} Countries, where more than 15 percent of the population goes hungry import less than 10 percent of their food, compared to more than 25 percent in more food secure countries; FAO, The State of the Food Insecurity in the World 2003, see note 4, 18.
\item \textsuperscript{18} Ibid.
\item \textsuperscript{19} Cf., Ibid.
\item \textsuperscript{20} FAO, The State of Food and Agriculture, see note 4, (84 et seq.), (96).
\end{itemize}
cases, facilitating socially acceptable transitions out of agriculture in the medium to long term.\textsuperscript{21}

Economic modelling exercises have shown that further liberalization of trade in agriculture can yield welfare gains at the global level for most, but not all, individual countries. While there is agreement on the overall direction, specific forecasts need to be taken with caution as there are limitations to the degree to which real change caused by complex agricultural trade policy reforms can be predicted.\textsuperscript{22} Recently, benefit estimates have become smaller and less significant, in large part due to better modelling and data.\textsuperscript{23} From a right to food point of view it is problematic that estimates typically refer to aggregates and say little about the distributional effects amongst and within individual countries. Experience suggests that the within-country distributional impact finds those affected negatively at the bottom of the economic pyramid.\textsuperscript{24} If these losses, which are typically suffered by a large number of

\textsuperscript{21} Byerlee et al., see note 13, 40; Vietnam is an example of a country where agricultural trade stimulated economic growth and food security. In the 1980s, Vietnam introduced a national economic reform program that gave farmers control over land, allowed them to increase sales to the market and reduced agricultural taxation. Exports benefited from enhanced market access while the domestic sector continued to benefit from subsidies and border protection against imports. A poverty eradication campaign targeted investments in rural infrastructure. As a result, Vietnam’s agricultural output grew by 6 percent per year and agricultural exports grew even faster so that in the 1990s the country generated a large agricultural trade surplus. At the same time, the percentage of undernourished people fell by 8 percent. Mozambique, in contrast, shows how liberalization that is not accompanied by appropriate policies can have detrimental effects on food security. Mozambique removed a ban on raw cashew exports. While about a million cashew farmers received higher prices for their products, at least half the higher prices went to traders and did not stimulate an increase in production. At the same time, Mozambican processing plants lost their assured access to raw cashews and closed down putting 7000 people out of work. FAO, \textit{The State of the Food Insecurity in the World 2003}, see note 4, 18 et seq.


\textsuperscript{23} Ibid.

\textsuperscript{24} FAO, \textit{Trade Policy Technical Notes on Issues Related to the WTO Negotiations on Agriculture, No. 14, Considerations in the Reform of Agricultural
poor people, are offset by overall gains at the national level, liberalization might still look desirable at first glance. Unless, safety nets and other mechanisms which help those negatively affected to find alternative ways of gaining a living are in place, such in-country redistribution can lead to human rights violations.

Amongst countries, the highest benefits of further liberalization are expected to accrue to OECD countries where markets are most distorted. For developing countries, the potential gains would be smaller in absolute terms, but larger relative to gross domestic product because agriculture constitutes a comparatively large share of their economies. Their food security would mainly improve when higher prices for agricultural commodities translate into higher wages and more jobs in non-agricultural sectors, and provide incentives for investment. They would benefit from market liberalization in OECD countries, but also from their own reform policies in agriculture. The realization of potential benefits is, however, neither automatic nor universal. As developing countries are a very heterogeneous group, a one-size fits all approach to trade liberalization will neither affect all of them in a similar, nor indeed in a positive way.

A particular concern is market access: if countries reduce tariffs local products might be displaced by imports. If the displacement concerns products that are mainly grown by small-scale and subsistence farmers, the incomes of the rural poor might plummet with devastating consequences for their food security. In countries with large numbers of subsistence farmers, such as India or Kenya, it is unlikely that sufficient opportunities would be available in the short or medium term in other sectors to absorb these displaced farmers. Such transitions need appropriate companion policies (see above) which, as historical experience shows, take decades or longer to bear fruit. Countries therefore need to avoid opening their agriculture sectors to international competition too extensively and too quickly, as this is likely to hinder rather than enhance their growth prospects, and in turn their ability to reduce poverty and food insecurity. It is increasingly argued that countries with

25 FAO, *The State of Food and Agriculture*, see note 4, 79.
underdeveloped agriculture sectors would benefit from some border protection for a defined period during which productivity enhancing investments are made in order to make their agriculture sectors more competitive and to prevent them being undermined by cheaper imports, in particular where this would lead to unemployment and impoverishment of small-scale and subsistence farmers. State intervention might have a role to play in such circumstances, as much as it did in the now more advanced economies when they too were at earlier stages of development. Such flexibility can be of particular relevance for import-competing food staple sectors, where the majority of the rural poor operate and which are critical to the development of agricultural and wider rural growth. The Special Products and the Special Safeguard Mechanism that will form part of a revised AoA have the potential to accommodate such concerns (see under V. 3. d. bb.).

III. The Right to Food

The right to food has been recognized as a human right in numerous binding and non-binding legal instruments since the Universal Declaration of Human Rights (UDHR) in 1948. The ICESCR contains in article 11 (1), which is based on article 25 (1) of the UDHR, the most important codification of the right to food:

28 Such policies should not be confused with protectionist policies in pursuit of food self-sufficiency objectives. FAO, Trade Policy Technical Notes on Issues Related to the WTO Negotiations on Agriculture, No. 14, see note 24. See below the discussion of Special Products.

29 Ibid.

30 Ibid.

31 See, FAO, Extracts from International and Regional Instruments and Declarations, and Other Authoritative Texts Addressing the Right to Food, Legislative Study No. 68, 1999.


33 Other codifications of the right to food, or aspects of it, can be found in article 12 (2) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 1979, A/RES/34/180 of 18 December 1979; article 24 (2) (c) and (e), as well as article 27 (3) of the Convention on the Rights of the Child (CRC) of 1989, A/RES/44/25 of 22 November 1989; and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa of 2003, adopted at the 2nd. Ordinary Sess. of the Assembly of the Union, Maputo, Doc.
“States Parties ... recognize the right of everyone to an adequate standard of living ... including adequate food.”

In its General Comment No. 12 the Committee on Economic, Social and Cultural Rights (CESCR), the supervisory mechanism of the ICESCR, defined the right to food as realized when every individual “alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement.” It implies the “availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture [and] the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights” (emphasis added).

Under the ICESCR, states have to use all appropriate means to progressively realize the right to food (article 2 (1)). A commonly used analytical framework of states’ human rights obligations, originally developed by Eide and now adopted by the CESCR and other human rights actors, distinguishes between three types of obligations, viz. the

CAB/LEG/66.6. Among non-binding instruments, see the 1992 World Declaration on Nutrition; the 1996 Rome Declaration on World Food Security, and Plan of Action; the 2002 Declaration of the World Food Summit Five Years Later; the 2002 Plan of Implementation of the World Summit on Sustainable Development; and, in particular, the 2004 Voluntary Guidelines for the Progressive Realization of the Right to Adequate Food.

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obligations to respect, protect, and fulfil. The obligation to respect requires states to refrain from interfering directly or indirectly with the enjoyment of the right to food. They must refrain from denying or limiting access to food or interfering arbitrarily with existing arrangements, e.g., by destroying functioning market systems. The obligation to protect requires states to take measures to ensure that third parties such as individuals, groups, corporations or other private entities do not interfere in any way with the enjoyment of the right. States must enact and enforce effective legislation and take other measures – such as food safety measures – to control and restrain third party activities. The obligation to fulfil means that states have to take positive measures to facilitate and provide for individuals’ enjoyment of their rights. They must develop comprehensive national right to food strategies and policies, repeal legislation that impairs the progressive realization of the right, and enact necessary laws. In short, to facilitate the realization of the right to food means to create an enabling framework in which as many individuals as possible can provide for their own food. Finally, states have the obligation to provide directly for the fulfilment of the right of those individuals who are unable, for reasons beyond their control, to realize their rights themselves like orphans or disabled people. Food safety nets and food interventions targeted towards vulnerable groups fall within the “provide” dimension. Additional state obligations stem from cross-cutting human rights principles, which comprise participation, non-discrimination, and the right to a remedy for rights violations. The ICESCR does not prescribe any specific economic system and was drafted deliberately so as to accommodate a variety of approaches. An internationally liberalized market economy shaped in a human rights conforming manner can hence offer an appropriate framework to realize the right to food.

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38 This framework of obligations is increasingly used by UN and regional human rights actors, academia and national courts, in particular for economic, social and cultural rights.
39 CESC, General Comment No. 12, see note 35, para. 15.
40 Ibid.
41 Ibid.
42 Ibid.
43 CESC, General Comment No. 3 Concerning the Nature of States Parties’ Obligations (Art. 2, para. 1 of the Covenant), para. 8, reprinted in Doc. HRI/GEN/1/Rev. 7 of 12 May 2003, 127; Craven, see note 36, 123 et seq.
Human rights law foresees, centrally, the responsibility of each state to realize the rights of individuals under its jurisdiction. Besides this domestic side, a much vaguer international dimension exists. According to article 28 of the UDHR:

“[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in th[e] Declaration can be fully realized.”

With respect to the right to food, article 11 (2) ICESCR lays down that:

“States Parties ... recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed: (a) To improve methods of production, conservation and distribution of food ... (b) [t]aking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.”

In the spirit of Article 56 of the UN Charter, and using the analytical framework set out above, the CESCR interpreted the ICESCR (arts. 11 (2), 2 (1) and 23) as containing obligations to cooperate internationally, so as to take steps to respect, protect and facilitate the right to food in other countries, and to provide the necessary aid, including food aid, when required. In addition, states should ensure that the right to food is given due attention in international agreements. The failure of a state to take into account its international legal obligations regarding the right to food when entering into agreements with other states or with international organizations amounts to a violation. The extent of such obligations, which are variably called extraterritorial, transnational or international ones, remains ill-defined but is currently widely debated.

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44 It should be noted that in General Comment No. 12, see note 35, the CESCR uses the term “international obligations” and the softer language of “international commitments” interchangeably.
45 Ibid., para. 36.
46 Ibid., para. 19.
The most recent elaboration of steps conducive to the realization of the right to food can be found in the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (Voluntary Guidelines) which were adopted by the FAO Council in 2004.\textsuperscript{48} They set out a kaleidoscope of recommendations for food specific (e.g. food availability, safety and nutrition) and non-food specific measures (e.g. good governance, education, safety nets, access to resources, and legal and institutional frameworks) necessary to realize the right to food. National and international trade are amongst the issues addressed (see under V. II.). However, as the Voluntary Guidelines leave open where suggestions for sound policies end and obligations begin, they will not be used as a basis for the subsequent analysis.

IV. The Agreement on Agriculture and the Marrakesh Decision: Implementation Experiences Viewed from a Right to Food Perspective

1. The Background to and the Objective of the Agreement on Agriculture

The GATT contained many exceptions for trade in agriculture which led to severe trade distortions.\textsuperscript{49} A number of the major exporting states came close to ignoring GATT requirements altogether, up to the point of refusing even to implement GATT panel decisions.\textsuperscript{50} World market prices were depressed and unstable, access to markets limited, and export competition unfair.

In 1986, the Punta del Este Ministerial Declaration, which launched the Uruguay Round, put agriculture at the heart of the negotiations and declared that “there is an urgent need to bring more discipline and predictability to world agricultural trade by correcting and preventing restrictions and distortions including those related to structural surpluses so as to reduce the uncertainty, imbalances and instability in world agricultural markets.”\textsuperscript{51} The entry into force of the AoA in 1995 was the

\textsuperscript{49} For the regulation of agriculture under the GATT, see J. McMahon, “The Agreement on Agriculture”, in: P. Macrory/ A. Appleton/ M. Plummer (eds), \textit{The World Trade Organization: Legal, Economic and Political Analysis}, Vol. 1, 2005, 189 et seq.

\textsuperscript{50} M. J. Trebilcock/ R. Howse, \textit{The Regulation of International Trade}, 1999, 247. See also M.G. Desta, \textit{The Law of International Trade in Agricultural Products: From GATT 1947 to the WTO Agreement on Agriculture}, 2002; and Breining-Kaufmann, see note 15, 344. O’Connor points out that there was also relatively little case law and suggests that this was due to the fact that many countries with comparative advantage in agricultural production were not GATT contracting parties; that many countries had their own programmes in place and did not want to promote jurisprudence that could come back to haunt them; and that Governments did not take international action because they agreed on the need to manage domestic production and supply; B. O’Connor, “Book Review: The Law of International Trade in Agricultural Products: From GATT 1947 to the WTO Agreement on Agriculture”, \textit{JIEL} 6 (2003), 535 et seq. (537 et seq.).

\textsuperscript{51} GATT, Ministerial Declaration on the Uruguay Round of Multilateral Trade Negotiations, adopted in Punta del Este, Uruguay, on 20 September 1986, \textit{ILM} 25 (1986), 1623 et seq.
first step towards subjecting agricultural trade to a rules-based system and to initiating a process of trade liberalization.\textsuperscript{52} The long-term objective of the AoA, as set out in its preamble, is “to establish a fair and market-oriented agricultural trading system”\textsuperscript{53} through “substantial progressive reductions in agricultural support and protection.”\textsuperscript{54} The AoA’s goal is to be achieved via commitments in three areas, the three pillars of the AoA: increasing market access, reducing trade-distorting domestic support, and reducing export subsidies. In order to avoid creating a level playing field of unequal players, obligations in these disciplines incorporate special and differential treatment for developing countries (article 15 AoA). The implementation period was six years starting in 1995.\textsuperscript{55} As the AoA is only the beginning of the liberalization process, it foresees new negotiations beginning one year before the end of the implementation period (article 20 AoA). These difficult and sticky negotiations form part of the current Doha Round agriculture (see under V. (3) (d)).

\section*{2. Market Access}

The first pillar of the AoA is to increase market access. Access of foreign products to domestic markets can be impeded by tariffs or non-tariff barriers such as quotas, minimum import prices, or discretionary import licensing.\textsuperscript{56} Such barriers serve to protect domestic producers.

\textsuperscript{52} The AoA is an integral part of the WTO Agreements. It is annexed to the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, UNTS Vol. 1867 No. 31874, page 410. Article 2 together with Annex 1 of the AoA specify that the AoA applies to all products listed in Chapters 1 through 24 of the Harmonised System less fish and fish products, plus certain other specified items. Dealing with agriculture in a separate agreement was explained with the need to treat agriculture differently and separately because of its unique role in securing food, rural livelihoods and lifestyles, biodiversity, environmental services, and cultural practices.

\textsuperscript{53} AoA, Preamble, para. 2.

\textsuperscript{54} Ibid., para. 3.

\textsuperscript{55} Article 1 (f) AoA. For the “Peace Clause”, article 13, which limits the possibility of disputes, a period of nine-years was agreed.

\textsuperscript{56} See article 4 (2), footnote 1, AoA, for a list of non-tariff barriers. Despite the fact that already the GATT prohibited, with few exceptions, non-tariff barriers, an abundance of such measures was widely used, often in violation
against imports of subsidized, or for other reasons cheaper, commodities, generate governmental revenue, or enforce internal health, technical, and other regulations. They raise the cost of food for consumers, but even in developing countries urban consumers, who may be affected negatively by such higher food prices in the short term, are ultimately most interested in the income earning opportunities which a healthier agricultural economy may provide as a result of more remunerative prices.\(^{57}\)

WTO Members committed to improve market access in two ways: through “tarification”, i.e. the conversion of all non-tariff trade barriers, except those for health and safety reasons, into tariffs,\(^{58}\) and through binding these tariffs against future increases and subjecting them to tariff reductions.\(^{59}\)

Tarification introduced a systemic change.\(^{60}\) It was intended to make agricultural protection more transparent, and reductions easier to negotiate.\(^{61}\) However, the actual conversion of non-tariff barriers into their tariff equivalents was left to countries themselves which led to a

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\(^{57}\) The picture is more complicated in the rural areas where the net food production/consumption status varies widely across households and it is much less clear whether “net consuming” households would be negatively affected by higher food prices.

\(^{58}\) Article 4 (2) AoA. According to footnote 1 to article 4 (2) non-tariff measures to be converted into tariffs include “quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties.” As for the scope of this provision, see Report of the GATT Panel, Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products, Doc. WT/DS207/R, paras 7.17-7.102 (2002). Details of the tarification process are not contained in the AoA itself but in the so-called Modalities Agreement, Modalities for the Establishment of Specific Binding Commitments under the Reform Programme, Doc. MTN.GNG/MA/W/24 of 20 December 1993.

\(^{59}\) Article 4 (1) AoA.

\(^{60}\) Breining-Kaufmann, see note 15, 344.

\(^{61}\) McMahon, see note 49, 203.
phenomenon called “dirty tariffication.” Tariff equivalents were often established at much higher levels than their corresponding non-tariff barriers leading to artificially high levels of tariffs from which to start reductions. It reduced the impact of the reform process so that, for example, the U.S. and the EC have de facto not significantly increased access to their markets. To dispel fears that, as a result of tariffication, market access could decrease, “current access commitments” and “minimum access opportunities” were agreed upon to guarantee that historic levels of imports would not be adversely affected.63 Both measures are given effect by tariff rate quotas at low or minimal duty rates.64 Annex 5 to the AoA permits, under stringent conditions and subject to minimum access opportunities, to exempt products that are the predominant staple in the traditional diet of a developing country from the tariffication obligation of article 4 (2) AoA.

The tariff reduction obligation required developed countries to reduce their tariffs on average by 36 percent over the six-year implementation period; for developing members the average was 24 percent over a ten-year period, in line with the principle of special and differential treatment.65 A minimum reduction of fifteen per cent per tariff line for developed countries and ten percent for developing countries was established. Least developed members have no reduction commitments, but had to bind their tariffs. The agreed reductions were averages so some countries made large reductions in tariffs that were already low (e.g. a 50 percent reduction by dropping a tariff from 2 percent to 1 percent) or in areas of low sensitivity. In sensitive product areas, or with

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62 According to Annex 3, para. 2 of the Modalities Agreement, tariff equivalents are to be fixed using the actual difference between internal and external prices.

63 Desta, see note 56, 12.

64 Ibid. Tariff rate quotas or tariff quotas refers to lower tariff rates for specified quantities and higher (sometimes much higher) rates for quantities that exceed the quota. Their purpose is to ensure that quantities imported before tariffication could continue to be imported, and to guarantee that some quantities were charged duty rates that were not prohibitive; WTO, Understanding the WTO: The Agreements, available at: <http://www.wto.org/English/thewto_e/whatis_e/tif_e/agrm3_e.htm>.

65 Tariff reduction commitments were recorded for each member in its national schedule of concessions annexed to the Uruguay Round Protocol that forms an integral part of the Final Act; McMahon, see note 49, 205.
respect to products of particular interest to developing countries, tariffs were often reduced only minimally.\textsuperscript{66}

High tariffs on developing country export products such as cotton, sugar, cereals and horticulture, co-exist with tariff peaks and higher and more complex tariffs for developing country products than temperate zone products. These imbalances are compounded by the fact that average agricultural tariffs remain much higher than tariffs for non-agricultural products. This fact works to the detriment of developing countries, which rely more on agricultural exports than on exports of manufactured goods.\textsuperscript{67} Another “strikingly antidevelopment”\textsuperscript{68} phenomenon is tariff escalation. “Tariff escalation” refers to tariffs that rise with the degree of processing, i.e., higher tariffs are imposed on semi-processed and fully processed raw materials than on primary or less processed forms of the same products. Tariff escalation protects the processing industry of the importing country.\textsuperscript{69} It works systematically against the efforts of producers in developing countries to diversify into the rapidly growing markets for value-added processed products\textsuperscript{70} and penalizes investors in developing countries who seek to add value to production for export.\textsuperscript{71}

In sum, despite the implementation of the AoA commitments, developing countries’ access to OECD agricultural markets remains severely curtailed. At the same time, developing countries are under obligations to open their own markets. Limited developing country access coupled with OECD domestic support and export subsidies prevents developing countries from realizing their comparative advantages in agriculture and, as alternatives are often lacking, locks them into poverty, with serious repercussions for the degree with which notably economic and social rights can be realized. Such a result is not only contrary to

\textsuperscript{66} World Bank, see note 5, 117.

\textsuperscript{67} Ibid., 118. The protection facing developing country exporters in agriculture is four to seven times higher than in manufactures in the North and two to three times higher in developing countries. Ibid., xvi.

\textsuperscript{68} Ibid., 123 et seq.

\textsuperscript{69} FAO, \textit{The State of the Food Insecurity in the World 2003}, see note 4, 20.

\textsuperscript{70} World Bank, see note 5, xvi et seq.

\textsuperscript{71} Ibid., 123 et seq.
the spirit of the WTO undertaking, but also to the promise of article 28 UDHR according to which everybody is entitled to an international order in which his or her rights can be fully realized.

Only some developing countries benefit from the current high tariffs, namely those enjoying preferential access arrangements to OECD markets (e.g. under the EC’s Cotonou Partnership Agreement or the Caribbean Basin Initiative of the United States). Increasing access for all countries through the lowering of the most-favoured nation tariff will erode these benefits. For these countries, special compensatory measures need to be taken in order to avoid causing hardship affecting the realization of human rights.

All countries are, in principle, prohibited from introducing new measures to protect their markets. During the AoA negotiations concerns were raised that increasing market access could lead to import surges of particularly low-priced products harming domestic production. To allay such concerns, WTO Members developed a special safeguard provision (article 5 AoA). Special agricultural safeguard measures (SSG) take the form of an additional tariff which may be applied when the volume of imports exceeds a specified trigger level or the price of imports falls below a specified trigger price. Access to the SSG was, however, made conditional on the tariffication of non-tariff barriers which most developing countries historically did not use. Only 39 WTO Members, amongst them 22 developing countries, have reserved the right to use the special safeguard option on hundreds of products. Between 1995 and 2001 as few as 10 members, including six developing countries, have triggered it.

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72 In order to have recourse to the special safeguard provision, a member must have designated the product in question in its Schedule using the symbol SSG (article 5 (1) AoA). For details of the designations, see Committee on Agriculture, Special Agricultural Safeguard, Background Paper by the Secretariat, Doc. G/AG/NG/S/9 of 6 June 2000.

73 These duties are subject to less stringent conditions than those set by GATT article XIX and the Agreement on Safeguards (UNTS Vol. 1869 No. 31874, page 154). Notably, there is no need to prove injury, Desta, see note 50, 87. FAO, Trade Policy Briefs on Issues Related to the WTO Negotiations on Agriculture, No. 9 A Special Safeguard Mechanism for Developing Countries, available at: <ftp://ftp.fao.org/docrep/fao/008/j5425e/j5425e01.pdf>, 1.

74 The EC is counted as one. WTO, Special Agricultural Safeguard, Background Paper by the Secretariat: Revision, Doc. G/AG/NG/S/9/Rev.1 of 19 February 2002, para. 3 and Table 1.
tries triggered the SSG in only 1 percent of the cases in which they could have applied it, which reflects the fact that the SSG is overly complicated and inflexible. Countries that have no access to the SSG have instead resorted to raising applied tariffs up to the limit set by WTO bound rates. Those that have bound rates at zero levels enjoy, however, no flexibility at all and may be forced to open their markets to their detriment.

Indeed, since the mid-1990s import surges linked to trade liberalization, particularly of basic foodstuffs, have increasingly occurred. They undermined the viability of domestic markets, displaced local production and have caused human rights concerns particularly in countries where small-scale farmers predominate but safety nets are lacking to buffer negative effects. As these consequences were foreseeable, the lack of a safeguard mechanism to which all members can resort to is an example of a violation of the obligation to take human rights into account when concluding new international treaties. A new and better accessible safeguard mechanism for developing countries is currently under discussion.

75 FAO, see note 73, 1.
76 Many developing countries generally apply low tariffs and therefore still have substantial room to raise tariffs up to their bound levels. For an overview of the differences between bound and applied tariffs in 23 countries, see, FAO, WTO Agreement on Agriculture: The Implementation Experience – Developing Country Case Studies, 2003, 11 et seq.
77 Capacity to resort to general trade remedy measures such as anti-dumping, countervailing and emergency safeguards is often lacking, ibid.; IGWG, Right to Food Principles and International Trade Agreements, Information Paper, FAO Doc. IGWG RT/FG/INF 5, para. 35 et seq.
79 IGWG, see note 77, para. 35; FAO, WTO Agreement on Agriculture Implementation Experience: Developing Country Studies, 2003, available at: <www.fao.org/trade>. Several national and international civil society organizations have also documented cases of import surges based on field work. See also Some Trade Policy Issues Relating to Trends in Agricultural Imports in the Context of Food Security, Doc. CCP/03/10, 64th Sess. of the Committee on Commodity Problems, 18-21 March 2003, FAO, Rome.
3. Domestic Support

The second pillar of the AoA is the commitment to reduce trade-distorting domestic support measures (article 6 AoA).\footnote{The term “domestic support” in the AoA refers to subsidies provided to agricultural producers regardless of whether their products are exported, i.e., to domestic subsidies; Desta, see note 56, 25. For details on domestic support, see McMahon, note 49, 207 et seq. While in the WTO in general domestic subsidies are disciplined by the Agreement on Subsidies and Countervailing Measures (UNTS Vol. 1869 No. 31874, page 14), the regulation of agricultural domestic support is left mainly to the AoA.} Amongst the three pillars of the AoA, the provisions of this pillar have the most far-reaching effects on countries’ flexibility to design agricultural and food security policies. Domestic support ranges from direct budgetary transfers to other forms of market price support such as minimum artificial market prices.\footnote{At the same time, the artificially high prices make imports, and even re-imports of subsidised exports, attractive so that import restrictions are often needed to accompany domestic support measures, ibid., 26.} While direct support measures aim at guaranteeing certain levels of income, other forms of domestic support were originally implemented to stimulate domestic growth. Domestic support often leads to excess production at artificially high prices which, because of its elevated prices, can only be exported with the help of export subsidies, or as food aid.\footnote{FAO, The State of the Food Insecurity in the World 2003, see note 4, 21.} The EC, for example, had become the world’s second largest sugar exporter despite the fact that its production costs were more than double those in many developing countries.\footnote{World Bank, Global Economic Prospects, see note 5, 127.} At the same time, world market prices of sugar were below the costs of even the most efficient producers.\footnote{The Aggregate Measurement of Support (AMS) is defined as “the annual level of support, expressed in monetary terms, provided for an agricultural activity.” McMahon, note 49, 207 et seq.}

The AoA establishes various categories of domestic support measures and foresees different commitments for each. Its basic approach is that all market price support, non-exempt direct payments and other non-exempt measures are to be reduced. They fall in the residual category of “Amber Box” measures. 35 countries (counting the EC as one) provided such support during the 1986–1988 base period. They had to calculate their Base Total Aggregate Measurement of Support (Base Total AMS)\footnote{The Aggregate Measurement of Support (AMS) is defined as “the annual level of support, expressed in monetary terms, provided for an agricultural activity.” McMahon, note 49, 207 et seq.} and to reduce it by 20 percent during the six-year implement
mentation period in the case of developed countries; and 13.3 percent over ten years in the case of developing ones. Least developed countries (LDCs)\textsuperscript{86} had to bind their support levels, but have no reduction obligations. The reduction commitment applies sector-wide and is not product-specific. Countries can therefore legally increase product-specific Amber Box support to any level provided the aggregate limit is respected.\textsuperscript{87} The AoA prohibits the introduction of new Amber Box measures. This restriction \textit{de facto} favours those countries that have already used them and which can continue to do so within the limits of their reduction commitments.

Article 6 AoA exempts a number of domestic support measures from the reduction commitments: these are \textit{de minimis} exemptions, developing country exemptions, the Blue and the Green Box.

\textit{De minimis exception:} all members may provide product specific support (e.g., price support for rice or cotton) up to a \textit{de minimis} threshold, which is for developed countries 5 percent and for developing countries 10 percent of the total value of production of the agricultural product per year. An additional 5, respectively 10, percent of the value of total agricultural production may be granted for non-product specific support (e.g., for fertilizers, seeds, etc.).\textsuperscript{88} This exemption has proved to be of little use to developing countries as most of them have

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\textsuperscript{86} LDCs are those LDCs recognized by the Economic and Social Council of the United Nations.

\textsuperscript{87} Desta, see note 56, 28.

\textsuperscript{88} Article 6 (4) AoA.
been able to use only a small part of the 10 percent limit due to lack of financial resources.\footnote{IGWG, see note 77, para. 30. India is the only developing country that comes anywhere close to its limits on domestic support.}

**Developing country exceptions:** recognizing that encouraging agricultural and rural development is an integral part of the development programmes of developing countries, article 6 (2) AoA exempts for these countries certain measures from the calculation of the total AMS. The two most important exceptions are investment subsidies which are generally available to agriculture in developing countries as well as agricultural input subsidies generally available to low-income or resource-poor producers.\footnote{IGWG, see note 77, para. 31.}

This flexibility provided under article 6 (2) AoA has, however, been little used.\footnote{C. Gonzales, “Institutionalizing Inequality: the WTO Agreement on Agriculture, Food Security, and Developing Countries”, Columbia Journal of Environmental Law 27 (2002), 438 et seq. (457).}

**Blue Box:** the next category of support measures are the so-called Blue Box measures which were included at the instigation of the EC. Those are direct payments provided under production-limiting programmes such as compensation payments or U.S. deficiency payments, both of which pay farmers the difference between a government target price for agricultural commodities and the corresponding market price.\footnote{To be exempted, payments under such production-limiting programmes must be based on fixed area and yields, or made on 85 percent or less of the base level of production, or, in the case of livestock payments, be made on a fixed number of head, article 6 (5) AoA.}

They constitute a half-way house between highly trade and production distorting Amber Box measures and those categorized as Green Box measures which are the least trade and production distorting. Blue Box measures are excluded from the reduction commitments (article 6 (5) AoA).\footnote{Czech Republic, Estonia, EC (15), Iceland, Japan Norway, Slovenia, Slovakia and the U.S.; Desta, see note 56, 29.}

Nine OECD countries have used Blue Box measures between 1995 and 2003.\footnote{McMahon, see note 49, 209.} Although the Blue Box allows clearly market distorting support, its acceptance was necessary to secure an overall agreement on the AoA\footnote{McMahon, see note 49, 209.} – as the lesser evil compared to no
regulation of trade in agriculture. As the overwhelming majority of WTO Members cannot use Blue Box measures, there is strong pressure to reduce or abolish them.

**Green Box**: finally, the Green Box exempts a number of policies from the reduction commitment. These measures must meet the fundamental requirement of not having any trade distorting or production effects, or at least keep them to the “most minimal” standard used by the AoA. They must also be provided through publicly-funded government programmes, not involve transfers from consumers and not have the effect of providing price support to producers. Twelve specific types of policies are listed under which support can be provided without limits. Amongst them are measures which are highly relevant to the development of the rural sector in developing countries, namely, investments in research, pest and disease control, training, extension, advisory, inspection, marketing and promotion, and infrastructural services such as electricity, roads, market and port facilities etc.

In addition, some typical elements of food security policies are covered, such as domestic food aid, income safety-net programmes, public stockholding for food security purposes, and direct payments for relief from natural disasters. These exceptions allow countries to meet their obligation to take measures to support domestically vulnerable groups, including those harmed by trade liberalization measures, and those that cannot provide for their own needs. They need to be available in parallel to long-term investments in the agricultural sector.

Food safety nets, in the terminology of the AoA called “domestic food aid,” are an indispensable component of any program to realize

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96 Annex 2 AoA. For comprehensive information about Green Box measures reported by WTO Members, see Committee on Agriculture, Special Session, Green Box Measures: Note by the Secretariat, Doc. TN/AG/S/10 of 8 November 2004.

97 Annex 2 (1) AoA.

98 Ibid.


100 Cf. Voluntary Guidelines 16.7 and 14.

Mechlem, Trade in Agriculture and the Right to Food

the right to food. They are permitted under the AoA (Annex 2 (4)) if eligibility to receive support is subject to clearly-defined criteria related to nutritional objectives. Aid may be provided in-kind (food), or cash (cash support or coupons) to allow eligible recipients to buy food either at market or at subsidized prices. Food purchases by the government shall be made at current market prices and the financing and administration of the aid shall be transparent. The provision of foodstuffs at subsidized prices with the objective of meeting food requirements of urban and rural poor in developing countries on a regular basis at reasonable prices is explicitly considered to be in conformity with the AoA (Annex 2 (4) note 6 AoA). Whether in-kind or cash support is more appropriate depends on a number of policy parameters. Targeted employment programmes qualify, as well as “the provision of means to allow eligible recipients to buy food either at market or at subsidized prices” (Annex 2 (4) AoA).

Green Box measures are also necessary in order to support small-scale farmers, in particular in marginalized areas. The underlying principle of international trade to move production to where it is most efficient and to use economies of scale tends to lead to a consolidation of farms as competitive pressures begin to build up following trade liberalization. While productivity and competitiveness increase, farm labourers tend to become displaced and marginalized, creating hardship that involves typically small farmers and food-insecure population groups. States need to respond to such developments with support mechanisms that may require trade offs between growth and poverty

102 Annex 2, para. 4 AoA defines domestic food aid outlays as “expenditures (or revenue foregone) in relation to the provision of domestic food aid to sections of the population in need.”

103 This requirement is in line with right to food principles as it ensures allocation according to need and based on clear criteria, and allows recipients who were unjustly denied access to such programs to challenge decisions.

104 See note 6 to Annex 2, para. 4 AoA.


107 Ibid., 25. In addition, farmers in more favoured areas with better access to markets tend to gain the most from liberalized trade. Byerlee et al., see note 13, 24.

108 FAO, see note 106, 25.
Suitable response mechanisms comprise employment programmes, targeted food subsidies, food price stabilization programmes, support of less favourable areas where poverty is often greatest, and measures to provide employment generation in other sectors.

Amongst the precautions to take against emergencies is food stockholding, which is another measure permitted under the AoA (Annex 2 (3)). Food stockholding for stabilizing domestic prices is no longer common. In contrast, maintaining food stocks for emergencies is a standard measure. It helps countries to fulfil the obligation to provide food in cases of emergencies. The AoA places no limits on such stockholding, as all expenditures (including government aid to private storage) in relation to the accumulation and holding of stocks which form part of a food security programme, fall in the Green Box category as long as they correspond to predetermined targets related solely to food security (Annex 2 (3) AoA). Developing countries can acquire and release stocks of foodstuffs for food security purposes at administered prices, provided that the difference between the acquisition price and the external reference price is counted as a trade-distorting subsidy in the AMS. As most developing countries only use a fraction of their 10 percent de minimis flexibility, this requirement does not pose a constraint.

Finally, if developing countries want to introduce export prohibitions or restrictions on foodstuffs in order to prevent or relieve critical shortages of foodstuffs, article 12 AoA exempts them from the obligations to consider the effects of such measures on importing members’ food security, to notify the Committee on Agriculture, and to consult with any other member having a substantial interest as an importer upon request.

Eleven years of experience with the AoA have shown that the obligation to reduce domestic support has been of limited effect only. Over 90 percent of all domestic support is concentrated in developed coun-

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109 Byerlee et al., see note 13, 40.
110 Ibid.
111 IGWG, see note 77, para. 37.
112 Ibid.
113 IGWG, see note 77, para. 38.
114 The measures need to be in accordance with article XI (2) (a) of GATT 1994. These exceptions do not apply to a developing country which is a net-food exporter of the specific foodstuff concerned, article 12 (2) AoA.
tries and over 60 percent of it is excluded from reduction commitments under the AoA.\textsuperscript{115} The basic commitment to reduce trade distorting domestic support is hollowed out by numerous exceptions.\textsuperscript{116} Since the mid-1990s support has shifted from non-exempt measures to exempt ones (box shifting).\textsuperscript{117} Europe, the U.S., and other wealthier countries continue to support agricultural producers with more than US$ 250 billion every year resulting in huge surpluses, which are often sold on world markets at less than half their cost of production,\textsuperscript{118} putting developing country farmers out of business.

The general approach to allow domestic support of “early users”, subject to reduction commitments, stands in uneasy contrast to the prohibition to introduce any new support to develop domestic agriculture which affects most developing countries. In addition, macroeconomic reforms under World Bank and International Monetary Fund structural adjustment programmes have restricted investments in agriculture and required liberalization of agricultural sectors even beyond AoA requirements.\textsuperscript{119} The combined effects of these approaches may pose obstacles to economic development and impede the better realization of the right to food. Therefore, greater coherence should be sought between the WTO obligations and the policies of international financial institutions.\textsuperscript{120}

Apart from these structural imbalances, studies on the AoA and food security demonstrated that the AoA leaves policy space to implement certain food security policies, to comply with the obligations to provide for the right to food and to pay special attention to vulnerable groups. There is also room to develop domestic agriculture. The main constraints these countries face are lack of funding\textsuperscript{121} and institutional

\textsuperscript{115} OECD, \textit{The Uruguay Round Agreement on Agriculture: An Evaluation of its Implementation in OECD Countries}, 2001, 8.

\textsuperscript{116} Desta, see note 56, 27.


\textsuperscript{120} IGWG, see note 77, para. 34.

\textsuperscript{121} Foreign direct investors largely bypass agriculture; FAO, see note 118, 26.
capability, and to some extent, inadequate interest in their agricultural sectors.\footnote{122}

4. Export Subsidies

The third pillar of the AoA is the commitment to reduce export subsidies, i.e., subsidies contingent upon export performance.\footnote{123} Export subsidies, are often regarded as the most contentious, and, particularly from the perspective of developing countries, the most harmful trade policy instrument.\footnote{124} Potentially more competitive developing country exporters cannot compete with subsidized low-priced OECD commodities, leading in the long-term to the neglect of much needed investment in agriculture.\footnote{125} Export subsidies depress world market prices and, coupled with the opening of markets, can cause import surges which displace domestic production. In Kenya for instance, in the 1990s, a sudden soar in imports of milk powder displaced 70 percent of the domestic processed milk production.\footnote{126}

Developed countries account for the vast majority of export subsidies with the EC alone providing 90 percent.\footnote{127} Subsidies for products such as meat, dairy products and cereals remain high, causing depression and destabilization of world market prices.\footnote{128} Developing countries which lack financial resources, cannot offer similar support to their producers.

\footnote{122} IGWG, see note 77.
\footnote{123} Article 1 (e) AoA. The term “subsidy” is not defined in the AoA. The Agreement on Subsidies and Countervailing Measures (UNTS Vol. 1869 No. 31874, page 14) defines “subsidy” as a financial contribution made by a government or any public body conferring a benefit on the recipient (article 1).
\footnote{124} Desta, see note 56, 23.
\footnote{125} World Bank, Global Economic Prospects, see note 5, xvii.
\footnote{128} FAO, The State of the Food Insecurity in the World 2003, see 4, 21.
Under the AoA, each member undertakes not to provide export subsidies otherwise than in conformity with the AoA and with the commitment specified in its Schedule (article 8 AoA). Six types of export subsidies are subject to reduction commitments which relate both to expenditure on subsidies and quantity exported. For developed countries obligations are higher and implementation periods shorter than for developing countries, while least developed members are not required to undertake any reductions. Twenty-five WTO Members have scheduled export subsidy reduction commitments with respect to different products. Countries that had not provided export subsidies, namely the vast majority of developing countries, are prohibited from introducing export subsidies, which creates structural imbalances similar to those highlighted under domestic support. Article 10 (1) AoA prohibits the utilization of non-listed export subsidies in a manner that results or may result in the circumvention of the export subsidy commitments undertaken in article 9 (1). In addition, members commit to undertake to work towards the development of internationally agreed disciplines for export credits, export credit guarantees, or insurance programmes. All three are measures for which the AoA foresees no reduction commitments but which are widely used, partly to compensate for declines of those subsidies regulated by the AoA. The U.S. is the main provider of export credits, and mainly due to its opposition, progress in the negotiations about their reduction has been slow.

Although export subsidy use has declined significantly over the past decade from about 7.5 billion US$ in 1995 to about 3 billion US$ in

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129 Under the Modalities Agreement, developed countries are required to reduce their expenditure on export subsidies to a level 36 percent below the levels existing in the 1986-1990 base period and to reduce the quantities benefiting from export subsidies by 21 percent, both over a six year implementation period; Modalities Agreement, Annex 8. For developing countries the equivalent figures are 24 percent and 14 percent and the period is ten years; McMahon, see note 49, 211.

130 Australia, Brazil, Bulgaria, Canada, Columbia, Cyprus, Czech Republic, European Communities, Hungary, Iceland, Indonesia, Israel, Mexico, New Zealand, Norway, Panama, Poland, Romania, Slovak Republic, South Africa, Switzerland-Lichtenstein, Turkey, United States, Uruguay and Venezuela. See WTO (ed.), Background Paper by the Secretariat, Doc. TN/AG/S/8 of 9 April 2002, para. 4 (cited in Desta, see note 56, 22).

131 Article 3 (3) AoA, Desta, see note 56, 22; Gonzales, see note 92, 456.

132 Gonzales, ibid., 465.

133 Desta, see note 56, 24.
2000, the limitations of export subsidies under the AoA have not yet been sufficient to meet the legitimate concern of developing countries not to be harmed by cheap, subsidized goods.

On the positive side, the AoA allows developing countries to grant marketing cost subsidies and internal transport subsidies, provided that they are not applied in a way that circumvents other export subsidy commitments (article 9 (4) AoA). It also allows unlimited amounts of food aid as long as they are not tied directly or indirectly to commercial exports of agricultural products to recipient countries, accord with the FAO Principles of Surplus Disposal and Consultative Obligations, and are provided to the extent possible in fully grant form or on terms no less concessional than those provided for in the 1986 Food Aid Convention (article 10 (4) AoA). Transactions that are claimed to fall under food aid but do not meet these requirements are considered export subsidies and limited by the AoA. Historically, food aid is firmly rooted in surplus disposal and the distinction between legitimate food aid and disguised commercial export subsidies that circumvent export subsidy restrictions remains difficult. Food aid has been a contentious issue, with countries regularly raising concerns over other countries’ food aid transactions and, in particular, the EC regarding

134 FAO, Trade Policy Briefs, see note 127, 1.
135 Article IV of the 1986 Food Aid Convention.
137 FAO, Committee on Commodity Problems, A Historical Background on Food Aid and Key Milestones, Sixty-Fifth Session, Rome, Italy, 11-13 April 2005, FAO Doc. CCP 05/CRS.6, para. 2.
138 World Bank, Global Economic Prospects, see note 5, 137.
U.S. food aid practices as means of circumventing export subsidy restrictions.140

5. The Marrakesh Decision

For some countries, the high amount of OECD domestic support and export subsidies has worked to their advantage. LDCs and net food-importing developing countries (NFIDCs) have traditionally benefited from cheap, subsidized, foodstuffs from the major industrialized nations. For this short-term benefit, however, they often paid the long-term price of preventing their own agricultural growth and rendering their agriculture non-competitive. During the negotiations of the AoA, it became clear that these countries could suffer, at least during a transition period, from the expected rise in world food prices coupled with a decline in food aid motivated by support reductions in OECD countries. It was accepted that they would need temporary assistance to make the necessary adjustments to deal with higher priced imports, and eventually to export.141 In response, the Marrakesh Decision was adopted, which constitutes a specific application of the principle of special and differential treatment.142 According to article 16 AoA, devel-

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140 See, Desta, see note 139, 468.
141 Some net food importers have, however, high tariff walls and can offset all or most of the increases in global prices by lowering tariffs. World Bank, Global Economic Prospects, see note 5, 138. Net food importing and least developed countries that import temperate zone commodities for which prices are expected to rise will be worse off as they typically do not export temperate zone commodities but developing country products for which prices are likely to rise far less. Such countries are expected to profit more from liberalized trade with each other than from access to OECD markets. It should be noted in this context, that some project that the negative effects of price changes on low-income net importers will be only small and manageable, ibid., 105.
142 See note 7. Besides the 50 least-developed countries as recognized by ECOSOC, the list of NFIDC includes Barbados, Botswana, Côte d’Ivoire, Cuba, Dominica, Dominican Republic, Egypt, Gabon, Honduras, Jamaica, Jordan, Kenya, Mauritius, Mongolia, Morocco, Namibia, Pakistan, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Senegal, Sri Lanka, Trinidad and Tobago, Tunisia and Venezuela, Doc. G/AG/5/Rev. 8 of 22 March 2005. For the criteria, see Decision by the Committee on Agriculture, Doc. G/AG/3 of 24 November 1995.
oped country members shall take such action as is provided for within the Marrakesh Decision.

WTO Members agreed upon four mechanisms. The first concerns food aid. Members decided to review the level of food aid established by the Committee on Food Aid under the Food Aid Convention and to initiate negotiations to establish a level of food aid commitments necessary to meet the legitimate interests of developing countries. In addition, they committed to adopting guidelines on increasing the proportion of food aid that is provided in fully grant form and/or on appropriate concessional terms. Second, ministers undertook to give full consideration in their aid programmes to requests for technical and financial assistance to improve agricultural productivity and infrastructure. Third, they ensured that any future agreement relating to agricultural export credit markets (as mandated under article 10 AoA) will make provision for differential treatment; and, finally, they agreed to enable countries experiencing short-term difficulties in financing their normal level of commercial imports to draw on the resources of international financial institutions under existing or new facilities.\textsuperscript{143}

Between 1995 and 1999, LDCs and NFIDC indeed experienced increases in food bills and reductions in food aid, which they had difficulties dealing with, in part due to the poor implementation of the Marrakesh Decision.\textsuperscript{144} With respect to the first commitment, a new Food Aid Convention was concluded. It neither increased the level of com-

\textsuperscript{143} Marrakesh Decision, see note 7, paras 3 and 4. The Marrakesh Decision was to be reviewed regularly by the Ministerial Conference and the Committee on Agriculture; Marrakesh Decision, para. 5. See also WTO Committee on Agriculture, Actions Taken Within the Framework of the Decision as Notified by Members, Doc. G/AG/NG/S/4 of 27 April 2000.

\textsuperscript{144} There are three reasons for the unsatisfactory implementation of the Marrakesh Decision: first, the Decision has no operational mechanism for carrying out the support measures specified in it; second, there has been no attempt within the WTO framework to estimate systematically the impact of the implementation of the AoA on LDCs and net-food-importing developing countries; and third, there have been few country-specific impact studies of the AoA during the WTO’s monitoring of the Decision. UNCTAD, \textit{Impact of the Reform Process in Agriculture on LDCs and Net Food-Importing Developing Countries and Ways to Address Their Concerns in Multilateral Trade Negotiations}, Doc. TD/B/COM.1/EM.11/2 and Corr.1 of 23 June 2000, paras. 25 et seq.
mitments, nor was aid distributed according to want. The WFP pointed out that only half of global food aid during the 1990s was actually targeted at those who needed it. Due to the fact that food aid is measured in monetary terms rather than in tonnage, food aid availability is inversely proportional to need: when prices are high and aid most required, availability is low. Conversely, when prices are low, more food aid is obtainable. The Marrakesh Decision avoids addressing the double edged sword of food aid. Food aid can harm as much as help and adequate disciplines are needed in order to avoid negative effects (see under V. 3. d. dd.).

In relation to the second commitment, it is unclear whether requests for technical and financial assistance to improve agricultural productivity and infrastructure have been received. In any case, the volume and share of aid directed to agriculture has fallen to less than half the levels of the 1980s resulting in a large and growing investment gap between countries where the prevalence of hunger is high and those that have managed to reduce hunger. Assistance to agriculture is also not related to need. With respect to export credits, the third commitment, little overall progress has been made until present, so that the question of special and differential treatment has not yet been fully addressed.

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145 Food Aid Convention, 1999, available at: <http://untreaty.un.org/English/notpubl/19-41c-eng.htm>. Under the new Convention, which entered into force in July 1999 with an initial three-year duration (which was prolonged subsequently), the list of products which can be supplied was broadened beyond cereals and pulses to include edible oil, skimmed milk powder, sugar, seeds and other products important in relief. The total wheat equivalent value of commitments remains approximately unchanged at 5.35 million tons; FAO, Food Outlook No. 4, 1999, 22.


149 FAO, The State of Food Insecurity in the World 2005, see note 118, 26 et seq.

150 Countries where fewer than 5 percent of the population go hungry, receive three times the amount of assistance per agricultural worker than countries where more than 35 percent of the population suffer from hunger, ibid., 27.
Regarding the fourth commitment concerning finance facilities, in 2002, the Inter-Agency Panel on Short-Term Difficulties in Financing Normal Levels of Commercial Imports of Basic Foodstuffs recommended, *inter alia*, exploring the feasibility of an inter-agency *ex-ante* financing mechanism.\(^{151}\) Little progress has been made since then.\(^{152}\) When world food prices are high concessionary financing could ensure that LDCs and NFIDCs could purchase food at reasonable prices in the international market. An *ex-ante* mechanism, as recommended by the Panel, would be preferable to an *ex-post* revolving fund as *ex-post* financing cannot support food imports in times of need.\(^{153}\) Given the lack of progress on the Marrakesh Decision, the Doha WTO Ministerial Conference included it amongst the implementation issues in 2001.\(^{154}\)

Despite its weak implementation, the Marrakesh Decision is important because of the fact that it calls for “a level of food aid commitments sufficient to meet the *legitimate* needs of developing countries during the reform program” (emphasis added).\(^{155}\) The fact that the needs of developing countries that are adversely affected by the liberalization process are recognized as legitimate is noteworthy. The Marrakesh Decision thereby acknowledges that the joint undertaking of increasing welfare through trade liberalization is coupled with the rise of legitimate needs for assistance of those countries that are harmed by the process. The Marrakesh Decision hence validates, in the specific context of the liberalization process in agriculture, claims of a redistributive nature.\(^{156}\)

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\(^{152}\) Doc. IGWG, see note 77, para. 42.

\(^{153}\) Inter-Agency Panel, see note 151, 44.


\(^{155}\) Para. 3 (a).

\(^{156}\) While some human rights actors seem to promote obligations that entail development assistance (see the CESCR’s obligation to *fulfil* the right to
They are established as a corollary to countries’ acceptance, as part and parcel of a wider process, of rules that hurt them at least in the short-term. It is, of course, open to debate what “legitimate needs” are. Given the common commitment of all WTO Member States to human rights, it is submitted that at least the level of food aid necessary to avert marked decreases in the realization of the right to food would be legitimate. The Marrakesh Decision thereby gives concrete meaning to the general obligation to cooperate, detailing that this would involve preventing deteriorations of the level of rights’ realization. It is an example of the kind of meaning that can be given to the obligation to cooperate “taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need” (article 11 (2) (b) ICESCR). However, the imbalance between the obligations of the AoA that are binding upon countries even if to their detriment, and the weak commitments of the Marrakech Decision to address negative impacts, are yet another piece of evidence that cooperation obligations under international law remain vague, ill defined and without much effect.

6. Assessment

Despite the disciplines imposed by the AoA, agriculture remains one of the most distorted areas of international trade. As one commentator puts it, “agriculture still stands alone as the sector where export subsidies are expressly and generously – albeit selectively – permitted under WTO law; where three digit tariffs are rather common; where significant additional duties can be introduced in the name of ‘safeguard measures’ regardless of injury considerations and in the most unpredictable of ways; where a proven trade-distortive and injurious domes-

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157 This interpretation is based on an application of article 31 (3) (c) VCLT.
158 OECD, The Uruguay Round Agreement on Agriculture: An Evaluation of Its Implementation in OECD Countries, 2001, 5. The lack of true liberalization is partly due to the fact that support levels were historically high during the base periods from which reductions were to be made. World Bank, Global Economic Prospects, see note 5, 118. See also, Breining-Kaufmann, note 15, 366 et seq.
tic support programme may escape any challenge, etc.” Some suggest that market protection may have even increased due to dirty tariffication.

The AoA reflects economic and political power distribution, is strikingly asymmetrical and works systematically against developing countries and the world’s poor. It has not yielded the benefits promised by economic simulation models. It remains open to debate whether this fact is due to less than expected cuts in support and protection, or to limitations of the models in estimating net benefits. By making much needed economic growth in agriculture in developing countries more difficult, the *de facto* imbalances in rights and obligations between developing and developed countries have negative implications for the realization of human rights. The fact that the AoA leaves some policy space to adopt food security policies can only partly counterbalance these more indirect but powerful effects. In this context it should be noted that historically in OECD countries protectionist policies have led to significant increases in agricultural productivity, which in turn raises the question whether similar policies could have a role to play in

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159 Desta, see note 56, 8.


161 World Bank, *Global Economic Prospects*, see note 5, 118. Diverse views are expressed on the merits and shortcomings of the AoA. Gonzales criticizes it as “systematically [favouring] agricultural producers in industrialized countries at the expense of farmers in developing countries” and thereby institutionalizing inequality and increasing “food insecurity by exacerbating rural poverty” in developing countries and hampering their ability to adopt appropriate measures to address the problem. Gonzales, see note 92, 438 and 476. According to Murphy the focus of the AoA on reducing trade barriers is too limited and ignores the lack of power for millions of people to purchase their food on the market, their dietary preferences, the importance of agriculture in providing livelihoods, and important ecological considerations, including agrobiodiversity. S. Murphy, “Structural Distortions in World Agricultural Markets: Do WTO Rules Support Sustainable Agriculture?”, *Columbia Journal of Environmental Law* 27 (2002), 605 et seq. (609 et seq.). Desta views the regulation of trade in agriculture as “an embodiment of sheer hypocrisy in global economic relations,” Desta, see note 56, 33. See also Dommen who argues that the Uruguay Agreements in general are weighted in favour of the rich and do not necessarily reflect the interests of the poorest countries and their inhabitants, C. Dommen, “Trade and Human Rights: Towards Coherence”, *Sur – International Journal on Human Rights* 2 (2005), 7 et seq. (10).
some developing countries where increased agricultural productivity is seen as being important.

Some areas of tension have also emerged. Human rights problems occur when food secure countries become food insecure, or when vulnerable groups within a country pay a disproportionate price for liberalization while benefits accrue to others. The AoA has not been able to avoid such consequences as cases of import surges testify. Nor has the Marrakesh Decision, on the inter-state plane, been sufficiently implemented to buffer negative effects. In light of the fact that without the AoA market distortions would be even greater, the AoA must, however, be credited for constituting an important first step towards the establishment of a rules-based system for trade in agriculture. Cases like EC Sugar and US Cotton show that developing countries can now successfully challenge other members’ support measures in contravention of the AoA. The reforms initiated by the AoA have the potential to make positive contributions to agricultural development and the realization of the right to food and therefore should be continued subject to the inclusion of certain human rights safeguards.

V. Raising the Right to Food Profile in the Regulation of Trade in Agriculture

1. The Starting-Point: Two Concurrent Regimes

On the basis of the preceding overview of the current regulation of international trade in agriculture, the next section will discuss how right

\[162\] Trebilcock/ Howse, see note 50, 268.
to food concerns could be strengthened in the revised AoA and what options WTO Members have to let human rights trump trade obligations. The results of the on-going agricultural negotiations of the Doha Round will be taken into account until the Hong Kong Ministerial Conference of December 2005.

States Parties to the WTO have obligations under two concurrent regimes: the human rights regime and the international trade system. All WTO State Parties are bound by customary human rights law, have accepted the UDHR, and have at least ratified one human rights treaty. The majority is party to the ICESCR. Therefore, they need to ensure that human rights are given adequate weight in their trade dealings.

The objectives of both regimes are, in principle, compatible. The AoA endeavours to establish a “fair” agricultural trading system. Only a trading system that is in harmony with other universally shared values such as the promotion and protection of human rights which are regarded as inherent and inalienable to the human being can be regarded as fair. This thesis is supported by the Agreement Establishing the World Trade Organization which foresees that members’ relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living. This objective is, in language and spirit, close to the “adequate standard of living” envisaged in article 11 (1) ICESCR.

A crucial difference between the two regimes is, however, that the WTO system seeks to raise aggregate standards of living, while human rights are concerned with the individual. They emphasize the need to particularly promote and protect the rights of the poorest and most vulnerable, i.e., of those whose rights are least realized. They require ensuring that interests of society as a whole are pursued in a manner that guarantees certain minimum standards for each individual. If aggregated standards of living are raised, this often makes everybody better off. There are, however, no automatic correlations as welfare gains can accrue to some while others become poorer depending on the dis-

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165 All State Parties to WTO Agreements have ratified at least one human rights treaty; Report of the High Commissioner, see note 146, para. 10 (as of 2002).


Mechlem, Trade in Agriculture and the Right to Food

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distribution of benefits. Therefore, at the level of abstract objectives, the liberalization of trade in agriculture and the right to food are complementary and international trade can even support the realization of the right. Yet, conflicts and tensions may arise at implementation level. To avoid the latter, human rights safeguards need to be in place.

There are several options how the right to food could be given stronger effect within the AoA. The first would be by inserting a specific reference to human rights or the right to food into the AoA. The second is to interpret trade rules, including exception clauses, taking the right to food into account. The third is to invoke the right to food directly as a justification for non-compliance with AoA rules in case of a conflict of obligations. The fourth, which is the most promising and indispensable, is to shape trade rules in a manner conducive to the realization of the right to food – an approach partly touched upon in the foregoing sections. These four avenues are not mutually exclusive but complementary. After an overview of the debate about trade and human rights, they will be discussed in turn.

2. The Status Quo of the Debate

A number of human rights bodies have addressed the relationship and tensions between trade and human rights in general, or trade in agriculture and the right to food in particular.168 They unanimously share the basic tenet that trade is a means not an end and that the promotion and protection of human rights should be the objective and primary purpose of trade.169

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168 The High Commissioner for Human Rights published a detailed analysis of the human rights concerns raised by the AoA and formulated recommendations, Report of the High Commissioner, see note 146.

Therefore, the international trade system should be organized so that the projected welfare gains can be reached while appropriate safeguards against human rights violations are in place. According to the High Commissioner for Human Rights, a human rights approach to WTO rules would mean balancing the economic aspects of trade liberalization with a social dimension. Human rights should frame world trade so that it becomes a motor for realizing rights. This approach is consistent with the commitment in the Vienna Declaration of the World Conference on Human Rights that human rights are "the first responsibility of Governments." Concerns have also been raised: the Subcommittee on the Promotion and Protection of Human Rights described the WTO as a "veritable nightmare" for developing countries and the impact of liberalization of trade in agricultural products as detrimental for the right to food for members of vulnerable groups. The Working Group on the Right to Development of the former Commission on Human Rights suggested introducing and strengthening human rights standards and principles in undertaking impact assessments of trade. The Special Rapporteur on the Right to Food opposes market


Report of the High Commissioner, see note 146, paras 8 and 10.


liberalization and international trade and advocates considering “food sovereignty” as an alternative model for agriculture and agricultural trade.175

It is noteworthy that, in contrast to the prolific debate about “WTO and Human Rights” which has been going on in academic,176 UN and NGO circles, states have only in exceptional instances referred to human rights within WTO negotiations and procedures and no WTO dispute settlement decision has explicitly taken human rights into account. Possibly, the current institutional set-up is not conducive to this aim as WTO negotiations are not formally informed by human rights considerations.177 With respect to the right to food, only Mauritius and Norway argued before the Committee on Agriculture that the right to food should be taken into account in the continuation of the reform process.178 Burundi has also referred to this notion,179 and Burkina Faso

175 Report submitted by the Special Rapporteur on the Right to Food to the Commission, Doc. E/CN.4/2004/10 of 9 February 2004. The concept of food sovereignty is advocated by a number of NGOs. There is no uniformly accepted definition of food sovereignty. The Special Rapporteur uses the term as defined by the NGO Via Campesina: “Food sovereignty is the right of peoples to define their own food and agriculture; to protect and regulate domestic agricultural production and trade in order to achieve sustainable development objectives; to determine the extent to which they want to be self-reliant; [and] to restrict the dumping of products in their markets.”


178 Committee on Agriculture, Special Session, Note on Non-Trade Concerns, Doc. G/AG/NG/W/36/Rev.1 of 9 November 2000, 44 and 57 et seq. Mauritius and Norway made their suggestions as part of a joint submission of a number of WTO Members on non-trade concerns. The submission comprised different papers prepared for a conference on non-trade concerns in agriculture held in Ullensvang, Norway, in July 2000. Norway repeated its call to take the right to food into account in Doc. G/AG/NG/W/131 of 16 January 2001, 6 et seq.
stated that agriculture served to ensure its capacity to feed its people and to defend their right to food. However, none of them drew any clear policy conclusions from their referring to the right to food.

Trade, both domestic and international, was an important topic during the negotiations of the Voluntary Guidelines on the Right to Food. They address a number of aspects that are also dealt with in WTO Agreements, such as access to markets, food aid, domestic (food) safety nets, food safety etc. They mention some WTO agreements, notably the SPS Agreement, the TBT Agreement and the AoA, and they are based on an explicit recognition of the importance of functioning national, regional and global markets. According to the Voluntary Guidelines, international trade can play a major role in promoting economic development, alleviating poverty and improving food security (Section III, para. 6) and consequently they recommend promoting it (Section III, para. 7). Section III, para. 8 recalls the long-term objective of the AoA, namely to establish a fair and market-oriented trading system in order to correct and prevent restrictions and distortions in world agricultural markets. Section III, para. 9 emphasizes and reinforces

179 Burundi, however, referred to the right to food in the context of a criticism of an economic blockade against it, Doc. WT/MIN(98)/ST/78 of 18 May 1998.

180 Doc. TN/AG/R/10 of 9 September 2003, para. 35.

181 States and observers voiced widely divergent views on the extent to which international trade should be addressed in the Voluntary Guidelines. IGWG, Synthesis Report of Submissions Received from Governments and Stakeholders, FAO Doc. IGWG RTFG 1/2 Rev. 1, para. 42. Most recognized the potential of trade to reduce poverty and the need to pursue further liberalization of international agricultural trade. However participants also mentioned the negative impacts of unequal competition, subsidized exports, depressed world food prices and developing country market barriers. Some submissions called for recognition in the Voluntary Guidelines of the right of countries to define their own policies, levy import duties and provide targeted subsidies in order to realize the right to adequate food. Other submissions called for insertion of the right to adequate food as a priority principle in various WTO agreements or suggested that agriculture should not be subject to WTO rules. There was also a call for reform of international trade rules to favour small-scale producers. Others, notably the United States and the European Union opposed any reference to international factors, including international trade.

182 See e.g., Guideline 4 on Market Systems; Guideline 9 on Food Safety and Consumer Protection; Guideline 13 on Support for Vulnerable Groups; Guideline 14 on Safety Nets; Guideline 15 on Food Aid and Section III.
prior commitments, including paras 75 and 77 of the São Paolo Consensus which are reproduced and which refer to the Doha mandate. Section III, para. 10 states that the measures mentioned therein can contribute to strengthening an enabling environment for the progressive realization of the right to food.

While the domestic side of promoting agriculture for the realization of the right to food is well addressed, the Voluntary Guidelines’ recommendations with respect to international trade are disappointing. They never move beyond generalities. They neither address the implications of trade for the right to food, nor do they suggest how to deal with the most relevant issues of existing or possible tension. They also do not establish criteria for protecting the right to food in AoA negotiations and beyond. The Voluntary Guidelines are limited to reinforcing prior commitments and repeating previously negotiated language. The instrument that deals with the negative effects of the AoA on LDCs and NFIDCs, the Marrakesh Decision, is not even mentioned.

183 “75. Agriculture is a central element in the current negotiations. Efforts should be intensified to achieve the internationally agreed aims embodied in the three pillars of the Doha mandate, namely substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support. The negotiations on agriculture taking place in the WTO should deliver an outcome that is consistent with the ambition set out in the Doha mandate. Special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall take fully into account development needs in a manner consistent with the Doha mandate, including food security and rural development. Non-trade concerns of countries will be taken into account, as provided for in the Agreement on Agriculture, in accordance with paragraph 13 of the Doha Ministerial Declaration. …

77. Efforts at extending market access liberalization for non-agricultural products under the Doha Work Programme should be intensified with the aim of reducing or, as appropriate, eliminating tariffs, including tariff peaks, high tariffs and tariff escalation, as well as non-tariff barriers, in particular on products of export interest to developing countries. Negotiations should take fully into account the special needs and interests of developing countries and LDCs, including through less than full reciprocity in reduction commitments.”
3. Options for the Reform Process and Beyond

a. Inserting the Right to Food into the Agreement on Agriculture

The AoA recognises food security as an important non-trade concern and policy objective but without mentioning states’ underlying human rights obligations.\textsuperscript{184} This absence of references to human rights has several reasons, amongst them, particularly with respect to economic, social and cultural rights, are fears that they could be abused to interfere in a far-reaching and unpredictable manner with the WTO Agreements.\textsuperscript{185}

The High Commissioner for Human Rights, Venezuela and commentators have called for an explicit reference in the AoA to the promotion and protection of human rights.\textsuperscript{186} Such a reference should be to human rights both as an objective of trade and as a legitimate exception to trade commitments. While an explicit reference to human rights would neither add to nor subtract from existing obligations, it would frame the AoA in an appropriate manner, recognize the pivotal role human rights play, and facilitate human-rights-conducive interpretations.\textsuperscript{187} It can, however, be safely assumed that an explicit reference to the right to food in the AoA would meet the adamant resistance of at least one, but most likely more, of the WTO Members.\textsuperscript{188}

\begin{footnotesize}
\begin{enumerate}
\item For a discussion of the differences between the concepts of food security and the right to food, see, Mechlem, \textit{Food Security and the Right to Food in the Discourse of the United Nations}, see note 48.
\item Breining-Kaufmann points out that although food security as a non-trade concern is broadly accepted, there are as yet no clear conceptions on how such concerns should be incorporated into the WTO framework; see note 15, 350.
\item Report of the High Commissioner; see note 146, para. 45. Statement of Venezuela in: Trade Negotiations Committee, \textit{Minutes of Meeting Held in the Centre William Rappard} on 30 November 2005, Doc. TN/C/M/22 of 10 March 2006, 21; Gray, see note 177, 5.
\item It has been pointed out that many developing countries fear that explicit human rights clauses could be used as a new form of disguised protectionism; Lim, see note 167, 287. This concern seems to apply more to references to human rights, in particular labour rights, in other agreements than to a right to food reference in the AoA.
\item On the position of the U.S. with respect to economic, social and cultural rights, see P. Alston, “U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy”, \textit{AJIL} 84
\end{enumerate}
\end{footnotesize}
b. Interpreting the Right to Food into the Agreement on Agriculture and Article XX GATT

WTO law is “not to be read in clinical isolation from public international law.” According to article 3 (2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes “customary rules of interpretation of public international law” need to be used when interpreting WTO law. These rules have been codified in the Vienna Convention on the Law of Treaties (VCLT). Amongst them is the rule to take into account “any relevant rules of international law applicable in the relations between the parties” (article 31 (3) (c) VCLT). Amongst the relevant law applicable between WTO Members is human rights law, including the right to food. Both sets of obligations


191 UNTS Vol. 1155 No. 18232.


194 While certainly a customary right to food is comprised, the situation is less clear with respect to the ICESCR which is an inter-se agreement between a large, but still limited subset of WTO Members. Due to the fact that the WTO, in contrast to human rights treaties, accepts non-sovereign mem-
need to be interpreted in a reconciliatory manner. Some argue that such good faith interpretation can avoid or solve conflicts between the trade and the human rights regimes in most cases.195

One opening clause to bring in human rights is article XX GATT,196 which continues to be relevant for trade in agriculture.197 Article XX GATT contains a number of exceptions permitting WTO Members not to comply with their normal trade obligations in order to protect “important state interests”198 provided that the measures taken do not constitute a means of arbitrary or unjustifiable discrimination between countries.199 Article XX (b) GATT allows WTO Members to refuse to trade if the refusal is necessary and proportional to protect human life or health.200 Article XX (a) GATT foresees a similar exception in order to protect public morals.201 According to the UN Secretary-General “[t]he exceptions referred to [in article XX] call to mind the protection members, complete identity of membership to the WTO and another treaty is not possible. Relevant rules of treaties with broad membership, such as human rights treaties, can therefore be considered, cf. Bartels, see note 192, 360 et seq.; Marceau, see note 192, 782 et seq.; Pauwelyn, see note 192, 575 et seq. The Appellate Body considered on a number of occasions international treaties with a broad but different membership from WTO when interpreting a WTO Agreement; OHCHR, Human Rights and World Trade Agreements – Using General Exception Clauses to Protect Human Rights, Doc. HR/PUB/O5/5 (2005). See, for example, US-Shrimp, see note 192, paras. 127 et seq. which examined CITES and a number of other multilateral environmental agreements, many of which did not have the same membership as the WTO.

195 Cf. Marceau, see note 192, 804 et seq.
196 Cf. Lim, see note 167, 283 et seq.; S. Charnovitz, “The Moral Exception in Trade Policy”, Va. J. Int’l L. 38 (1998), 689 et seq. (742); Bartels, see note 192; Marceau, see note 192, 786; Howse/ Mutua, see note 169.
197 McMahon, see note 49, 206; Gray, see note 177, 13. The GATT remains applicable except to the extent that the AoA contains specific provisions dealing specifically with the same matter, which is not the case with respect to article XX GATT.
198 US-Gasoline, see note 189, 30.
199 Lim, see note 167, 283.
200 Similar clauses can be found in article 8 TRIPS and article IV (b) GATS.
201 It is noteworthy that public morals can be protected using a straightforward exception clause (see, for example the U.S. Gambling and Betting case, Doc. WT/DS285/AB/R), while for the protection of human rights more complicated and in dispute settlement proceedings riskier arguments must be provided.
of the right to life, the right to a clean environment, the right to food and to health … to mention just a few.”

Since without the realization of the right to food, human health suffers and life can be endangered, a strong case can be made for reading the right to food into article XX (b) GATT. Equally, the right to food has been so widely accepted that it can be regarded as being part of the public morals of most states. The potential human rights scope of these article XX GATT exceptions has not yet been clarified, as no WTO Member in any of the dispute settlement cases has actually used or invoked human rights in any of its panel submissions.

Entering human rights via the backdoor of exception clauses has the advantage of not requiring any formal, consensual amendments to the AoA. A danger is that they might be relegated to exceptions that are interpreted in a least trade restrictive way. Such an approach would make it unlikely that human rights are accepted as a ground for trade restrictions and thus diminish their potency. In contrast, if one joins the human rights actors in asserting that human rights should be the objective of trade, then human rights should not be interpreted in a...


203 The human rights concern can arise in the country taking the measure or in the country of the trading partner. For instance, state A may refuse to import goods from state B (or lower a tariff vis-à-vis B) in reaction to right to food violations in state B. Or, state A may refuse to import goods originating in state B (or lower a tariff vis-à-vis B) because of fears that those might have negative effects on the realization of the right to food in its own country. The former constellation, which has a theoretically interesting extraterritorial dimension (see, in detail, Bartels, note 192, on this issue), shall not be discussed here as the latter situation is more relevant in the context of this paper.

204 If a state invokes the “public morals” exception (article XX (a) GATT) on human rights grounds, the participation of a state in human rights treaties, and other confirmations of a state’s endeavour to protect human rights may be used in order to determine the legality of the measure. Marceau, see note 192, 790 et seq.

205 Lim, see note 167, 284. For a discussion of case law related to this issue, see, OHCHR, Human Rights and World Trade Agreements, see note 194.

206 Trebilcock/ Howse, see note 50, 140.

manner that is necessarily the least trade restrictive. Instead, trade rules should be interpreted to encroach upon human rights to the least extent possible, i.e., the direction of adaptation should be different.\textsuperscript{208}

c. Invoking the Right to Food as an Exception to a Trade Obligation

In the case of a conflict between an AoA obligation and the right to food that cannot be solved in another way than by applying one rule at the expense of the other, the right to food should take precedence. This precedence can easily be justified if one accepts that all human rights have a \textit{ius cogens} character.\textsuperscript{209} Otherwise, the problem exists that, on the one hand, a non-\textit{ius cogens} right to food would be, from a formal point of view, hierarchically equal to the AoA. On the other hand, human rights are the only rights that legal philosophy and international treaties, in reminiscence of natural law theories, recognize as inherent and inalienable to the human being,\textsuperscript{210} i.e., pre-existing any law and as not able to be relinquished. If this concept of human rights is taken seriously, human rights can structurally not give way to trade rules and must overrule them in cases of conflict.\textsuperscript{211}

\textsuperscript{208} Leader, ibid., 690.


\textsuperscript{210} Such natural law remnants can, for example, be found in the preambles of the UDHR, the ICCPR and the ICESCR.

\textsuperscript{211} If human beings are indeed born with certain rights that cannot be relinquished, all these rights (and not only those that are recognized as \textit{ius cogens}) should be accorded higher normative hierarchical value than other treaty rules such as trade rights that are created and changed as needed. Yet, an irreconcilable contrast between the idea, concept und claim of human rights and their formal legal protection as rights equal in status to other rights remains.
A related disputed question is whether human rights could overrule WTO law if a state invoked them before a WTO dispute settlement body within the framework of a claim under one of the covered agreements. WTO dispute settlement bodies have limited jurisdiction to assess the compatibility of a measure with WTO law, and do not rule on its compliance with international law in general. According to Pauwelyn, a defendant in a WTO dispute settlement procedure would, however, be allowed to invoke non-WTO rules as justification for a breach of a WTO rule, even if the WTO treaty itself does not offer such justification. The justification should be recognized if both disputing parties are bound by the non-WTO rule and if the rule prevails over the WTO rule pursuant to conflict rules of international law.

In this theoretical discussion, a practical concern should not be overlooked: while binding dispute settlement procedures are in place for disputes concerning WTO rules, no such effective redress mechanism exists to vindicate violations of economic, social and cultural rights. This shortcoming leads to weaker implementation of these rights, and

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212 Pauwelyn, see note 192, 577. The covered agreements are all WTO multilateral trade agreements and the plurilateral agreements unless otherwise notified to the DSU; DSU Appendix 1. Contra Marceau, see note 192, 777 et seq.

213 Arts 1 and 7 DSU; Marceau, see note 192, 762 et seq.; Lim, see note 167, 288.

214 Pauwelyn, see note 192, 577. Against this reading of the competence of the WTO adjudicating bodies, cf. Marceau, see note 192, 777 and 797, who argues that WTO adjudicating bodies cannot reach a conclusion that a human rights provision has superseded a WTO provision, as in doing so they would need to interpret and apply international obligations other than those of the WTO and would thereby be adding to or diminishing the rights and obligations of the covered agreements contrary to article 3 (2) DSU. Marceau underlines that although WTO adjudicating bodies can only enforce WTO applicable law, states remain, of course, bound by all their international obligations.

215 The reporting mechanism foreseen under the ICESCR does not offer the possibility to study any country’s situation in depth nor can the CESCR hear individual cases. The latter might change if the current process of discussing an optional protocol to the ICESCR bears fruit.

might induce countries, fearing the forceful WTO dispute settlement mechanism, to subdue them to trade rules if in doubt.\footnote{Dommen, see note 161, 16.}

d. Shaping the Future Rules for Trade in Agriculture

The last option of ways to better protect and realize the right to food within and through the AoA concerns the adequate design of the revised AoA. The discussion will take up some of the points developed in Part IV and take them further by analysing the agreements reached up until the 2005 Hong Kong Ministerial Conference.

The starting point is the obligation that states should not conclude agreements that harm the right to food.\footnote{CECSR, General Comment No. 12, see note 35, para. 19.} Rather, they have an individual and collective responsibility to protect and promote human rights also through international treaties not specific to human rights. The right to food should hence inform the design and implementation of rules for trade in agriculture. This seemingly simple rule is difficult to adhere to when it comes to international treaties such as the AoA that are concluded as part of a package deal with complex, context- and country-dependent, and only partly predictable effects.\footnote{Reducing trade-distorting domestic support and export subsidies will facilitate the realization of the right to food for those farmers that become more competitive but might harm the realization of others, e.g., individuals depending on cheap subsidized food imports.}

International trade is an area in which the one-time transfer of sovereignty sets in motion long-term processes in which the decisions of other states and powerful private actors have far-reaching implications for the realization of human rights. Decisions need to be made on the basis of economic projections that are prone to errors. Notwithstanding these limitations, there are some areas for which recommendations emerge on how the ongoing liberalization of trade in agriculture should be shaped in order to be conducive, or at least not detrimental to, the realization of the right to food and what the boundaries of policy options are.
aa. The Status of the Negotiations

The negotiations foreseen in article 20 AoA began in early 2000. At the 2001 Doha Ministerial Conference, they became part of the single undertaking of all negotiations of the Doha Round, which is now unofficially expected to end in 2006 or 2007, well after the originally planned end date of 1 January 2005. The sensitive and contentious topic of agriculture, together with the Singapore issues, caused much of the delay. The Doha Round has the ambition of becoming a Development Round, partly in reaction to manifold criticisms that developing countries lost out in the Uruguay Round, including through the AoA.

220 Negotiations for continuing the agricultural trade reform process were to be initiated one year before the end of the implementation period of the AoA, i.e., by the end of 1999. A sector-specific negotiation process was launched on 7 February 2000 (see WTO, Services and Agriculture Negotiations: Meetings set for February and March, WTO Press Release (Press/167 of 7 February 2000). An earlier attempt to launch the mandated negotiations in agriculture as part of the third Ministerial Conference in Seattle had failed as the Millennium round of comprehensive trade negotiations as such was not launched.

221 Other – passed – deadlines as in the Doha Declaration are: 31 March 2003 for formulas and other modalities for countries’ commitments, and the Fifth Ministerial Conference 2003 (Mexico) for countries’ comprehensive draft commitments and stock taking, see, <http://www.wto.org/english/tratop_e/agric_e/negoti_e.htm>.

222 The so-called Singapore issues comprise investment, competition, transparency in government procurement, and trade facilitation. For a detailed account of the developments in the agriculture negotiations, see Desta, see note 56, 8 et seq. Many doubt whether the Doha Round can realistically be expected to end in 2006. For an analysis of U.S. and EU domestic political interests and factors influencing the outcome, see S.J. Evenett, The WTO Ministerial Conference in Hong Kong: What Next?, 18 January 2006, available at: <http://www.evenett.com/articles/dohaprospects.pdf>.

Non-trade concerns are to be taken into account in the negotiations (article 20 (c) AoA). In the Doha Ministerial Declaration, WTO Members committed themselves “to comprehensive negotiations aimed at: substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support.” They agreed “that special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall be embodied in the Schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated, so as to be operationally effective and to enable developing countries to effectively take account of their development needs, including food security and rural development” (emphasis added).225 After the failure of the Cancún Ministerial Conference, negotiations were brought back on track with the adoption of the so-called July 2004 Package in which members agreed on a Framework for Establishing Modalities in Agriculture (July Framework).226 After slow progress,227 the Hong Kong Ministerial Conference in December 2005 made the broad agreements of the July Framework more concrete by deciding to adopt four bands for structuring tariff cuts, to have three

224 Subedi, see note 223, 438. Subedi mentions similar concerns with the agreements on textiles, subsidies, intellectual property protection, anti-dumping, and sanitary and phytosanitary measures.


227 See, Agricultural Negotiations: Status Report II Looking Forward to the Hong Kong Ministerial – Assessment by the Chairman, Doc. TN/AG/19 or 1 August 2005, para. 4.
bands for reductions in trade-distorting domestic support, and to complete the elimination of all forms of export subsidies by 2013, but fell short of developing concrete modalities. It is expected that modalities will be agreed upon by the end of 2006.\textsuperscript{228}

\textit{bb. Market Access}

Improving market access is the most complex and protracted issue of the current negotiations and crucial for a reformed trade system supportive of development.\textsuperscript{229} The current negotiations deal with the depth of tariff reductions and the method by which to reach the envisaged reduction targets.\textsuperscript{230} WTO Members agreed to adopt four bands for structuring tariff cuts, to cut the deeper the higher the tariff levels (progressivity),\textsuperscript{231} and to cut tariffs from bound rates rather than applied tariff rates.\textsuperscript{232} The latter favours developing countries as they have often significant differences between the two tariff rates.\textsuperscript{233} Most – but importantly not all, for example not Brazil and India – will be allowed to retain their existing applied rates while reducing their bound rates to levels which should, in many instances, still remain higher than what most of them will want to apply.\textsuperscript{234} Hence, the reduction commitment will be felt mainly in developed countries.

Both developing and developed countries will be able to designate “sensitive products” for which tariff cuts will be more lenient than

\textsuperscript{228} In Hong Kong, members decided to complete the agricultural modalities by 31 April 2006 and to submit comprehensive schedules by 31 July 2006. The April deadline was missed and the July deadline is unlikely. Sixth WTO Ministerial Conference, Hong Kong, 13-18 December 2005, Doha Work Programme Ministerial Declaration adopted on 18 December 2005, Doc. WT/MIN(05)/DEC of 22 December 2005 (hereinafter Hong Kong Declaration).

\textsuperscript{229} World Bank, \textit{Global Economic Prospects}, see note 5, xxvii.

\textsuperscript{230} Desta, see note 56, 13. See also Desta for a detailed account of the negotiations and proposals on this issue.

\textsuperscript{231} Such cuts would also address the problem of tariff escalation.

\textsuperscript{232} July Framework, para. 29; Hong Kong Declaration, para. 7.

\textsuperscript{233} Desta, see note 56, 21.

\textsuperscript{234} Ibid., 52. It is worth noting that not all, including some of the more important developing country players, e.g., Brazil and India, will be able to retain their applied tariffs despite cuts in the bound ones. Additionally, some applied tariffs may already be too low and a reduction in the space between the bound and the applied can become important in such cases.
those required by the formula.\textsuperscript{235} The number of products and other issues, such as tariff rate quota expansion,\textsuperscript{236} for such products, have not yet been determined and are hotly disputed. To be distinguished from sensitive products are “Special Products” which concern only developing countries. They will be allowed to self-designate “an appropriate number of products as Special Products, based on criteria of food security, livelihood security and rural development needs.”\textsuperscript{237} Special Products will be subject to more flexible treatment, including lower or no tariff cuts. However, they have been controversial and details still need to be worked out.\textsuperscript{238}

In addition, the fate of the SSG is under negotiation. For developing countries that typically have no access to the SSG but are particularly vulnerable to external commodity shocks, a new mechanism called Special Safeguard Mechanism (SSM) will be introduced to protect them against price slumps and import surges.\textsuperscript{239} Such a mechanism is crucial

\textsuperscript{235} July Framework, para. 31, Hong Kong Declaration, Annex A – Agriculture, A-5.

\textsuperscript{236} See note 64.

\textsuperscript{237} July Framework, para. 41. Possible indicators to identify Special Products could comprise the product’s share in total calorie consumption (food security), the product imported as a share of domestic consumption (food security), the product share in harvested area, the product share in total agricultural production and the product production growth rate (the last three relating to the livelihood security and rural development criteria); FAO, Fact Sheet for the Sixth WTO Ministerial Conference, Hong Kong, Identification of Special Products: Possible Selection Criteria and Treatment, FAO 2005, available at: <ftp://ftp.fao.org/docrep/fao/meeting/010/j6901e.pdf>. Lately, it seems that self-designation might be limited to a specific number or proportion of tariff lines, possibly combined with criteria for indicators. See, Committee on Agriculture, Chair’s Reference Paper – Special Products of 4 May 2006, available at: <http://www.wto.org/english/tratop_e/agric_e/ref_paper_sp_e.pdf>.

\textsuperscript{238} There is still a lot of controversy in this regard: some members proposed that Special Products should be fully exempt from any new market access commitments and have automatic access to the SSM. Others favour some degree of market opening for these products, albeit reflecting more flexible treatment than for other products. The Hong Kong Declaration mentions a new proposal for a tripartite categorization of Special Products involving limited tariff cuts for at least a proportion of such products which remains to be fully discussed. Hong Kong Declaration, Annex A Agriculture, A-6.

\textsuperscript{239} The Hong Kong Declaration provides that “[d]eveloping country Members will … have the right to have recourse to a Special Safeguard Mechanism
to enable them to manage reform processes carefully in order to avoid hardships such as the sudden flooding of national markets with subsidized imported goods. The new SSM should be simple to use, flexible and effective.\textsuperscript{240}

Both Special Products and the new SSM will be crucial mechanisms that offer countries the flexibility to use measures at the border to protect the livelihoods of small-scale and subsistence farmers (see above under II.). They help to prevent the displacement of local products by foreign imports, which, in the absence of other employment opportunities, would lead to food insecurity and impoverishment of the rural poor.

With respect to LDCs, developed and willing developing countries agreed to implement duty-free and quota-free market access for at least 97 percent of products originating from LDCs defined at the tariff line level.\textsuperscript{241} The gains might, however, be smaller than the figures seem to suggest as the remaining 3 percent will be sufficient to exclude a high number of products including, for example, sugar, rice and bananas.

c. Domestic Support

WTO Members agreed to three bands for reductions in Final Bound Total AMS, and overall cuts in trade-distorting domestic support in general.\textsuperscript{242} The EC, the member with the highest level of support, will be in the top band, the U.S. and Japan will be in the middle band and all other members, including all developing country members, will be in

(SSM) based on import quantity and price triggers, with precise arrangements to be further defined” (para. 7). Desta warns that the introduction of the SSM will come at too high a price. As developing countries’ applied tariffs are often lower than their bound tariffs they have already the flexibility to raise tariffs up to the bound rate so that the SSM might be of little additional value. Developed countries might, however, link the introduction of the SSM to the continued existence of the SSG from which mainly they benefit. Desta also makes the point that both mechanisms are contrary to the long-term objective of achieving a fair and market-oriented agricultural trading system; Desta, see note 56, 21.

\textsuperscript{240} For more details, see FAO, \textit{Trade Policy Briefs}, see note 73.

\textsuperscript{241} Hong Kong Declaration, para. 47 together with Annex F on Special and Differential Treatment.

\textsuperscript{242} I.e., Amber Box, \textit{de minimis} and Blue Box combined.
the bottom band.\textsuperscript{243} A 20 percent down payment at the beginning of the implementation period is foreseen.\textsuperscript{244} \textit{De minimis} levels will be reduced but developing countries that allocate almost all \textit{de minimis} support for subsistence and resource-poor farmers will be exempt.\textsuperscript{245} Furthermore, the \textit{de minimis} rights of developing countries with no AMS commitments remain unaffected. The Blue Box will be reduced to no more than 5 percent of the value of a country’s agricultural production over a period to be determined.\textsuperscript{246} The Green Box criteria will be reviewed to guarantee that they actually do have no, or at most minimal, trade distorting effects in response to concerns that some permitted policies have stronger impacts. They will also be reviewed to ensure that programmes of developing countries are effectively covered,\textsuperscript{247} i.e., to make Green Box criteria more development oriented and better tailored to the realities of developing country agriculture.\textsuperscript{248} Developing countries argue that some provisions of the current Green Box are difficult to apply in their context, and that for some most minimally trade distorting programmes which they would like to implement, no explicit provision exists. Developed countries are, however, concerned that accommodating such requests would open a Pandora’s Box of large-scale developing country subsidisation.\textsuperscript{249}

\textsuperscript{243} Cf. Hong Kong Declaration, para. 5. The gap in the amount of Final Bound total AMS within the 35 members that undertook commitments in the area is so big that the Hong Kong Declaration was able to be more specific about the allocation of countries to each of the three tiers, Desta, see note 56, 32. For the data, see Committee on Agriculture, Special Session, \textit{Total Aggregate Measurement of Support, Note by the Secretariat}, Doc. TN/AG/S/13 of 27 January 2005. The rate that will apply to each of the three bands which will be determined in the modalities agreement.

\textsuperscript{244} July Framework, para. 7 et seq.; Hong Kong Declaration, para. 4.

\textsuperscript{245} July Framework, para. 11.

\textsuperscript{246} July Framework, para. 15.

\textsuperscript{247} Hong Kong Declaration, para. 5.

\textsuperscript{248} July Framework, para. 16.

\textsuperscript{249} See, Committee on Agriculture, \textit{Agricultural Negotiations: Status Report II Looking Forward to the Hong Kong Ministerial – Assessment by the Chairman}, Doc. TN/AG/19 or 1 August 2005, Attachment, Agriculture Negotiations – Status Report, Key Issues to be addressed by 31 July 2005 – Assessment by the Chairman.
Export Subsidies

The main achievement of the Doha Declaration was the commitment to negotiate to reduce all forms of export subsidies with a view to phasing them out. In the July 2004 Framework, members agreed to eliminate export subsidies as listed in their schedules as well as to develop disciplines for other forms of export support, such as export credits, exporting state trading enterprises and food aid practices that may have the same effect as listed export subsidies. As provided for in the Marrakesh Decision (para. 4), the disciplines will make provision for special and differential treatment for LDCs and NFIDCs. In Hong Kong members reached a break-through by agreeing on the end of 2013 as the phase out date for all forms of export subsidies, but not much progress was made on export credits.

With respect to food aid, members decided to close loopholes for disguised export subsidization and commercial displacements. They will agree on effective disciplines on in-kind food aid, monetization and re-exports. At the same time, they committed to maintain an ade-

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250 Doha Ministerial Declaration, para. 13. Success and failure of the Doha Ministerial Conference depended until the very end on the inclusion of the commitment to phase out export subsidies; Desta, see note 56, 23. The vast majority of WTO Members, with the EC as the main opponent, had called for an end to export subsidies.

251 The term “export credits” is used here and hereinafter as shorthand for export credits, export credit guarantees or insurance programmes in the language of the July Framework.

252 July Framework, para. 45; Desta, see note 56, 10 et seq. This commitment addresses the criticism that the AoA prohibited some forms of export subsidies while unjustifiably allowing others, particularly measures favoured by the United States.


254 Hong Kong Declaration, para. 6. This date is subject to confirmation upon the completion of the modalities agreement scheduled for 30 April 2006. Developing country members will continue to benefit from article 9 (4) AoA for five years after the end-date for the elimination of all forms of export subsidies, para. 6.

255 Cf. Hong Kong Declaration, para. 6.

256 The disciplines on export credits, exporting state trading enterprises and food aid are to be completed by 30 April 2006 as part of the modalities, including appropriate provisions in favour of least-developed and net food-importing developing countries as provided for in paragraph 4 of the Marrakech Decision, Hong Kong, para. 6.
quate level of food aid and to take into account the interests of food aid recipient countries. To this end, a “safe box” for bona fide food aid will be provided to ensure that there is no unintended impediment when dealing with emergency situations.

Food aid disciplines under the AoA should be harmonized with the right to food. In the AoA negotiations, the types of food aid such as programme and project food aid, which affect trade, should be subject to stricter disciplines than non-trade impacting types such as emergency food aid. 257 States are under an obligation to request aid in cases of emergencies to fulfil their “provide” obligations. Food aid must serve this “fulfil/provide” function without compromising the “respect” obligation. This requires that food aid is made available for humanitarian and not commercial purposes, that it is delivered on the basis of a sound and independent needs assessment, in a timely manner, and as far as possible in grant form. In-kind contributions should be limited to cases where they are more appropriate than cash, e.g., because marketing channels are not functioning, and where appropriate United Nations or other international bodies have appealed for such help. 258 Food aid should be targeted towards the most vulnerable and needy countries and groups within countries, and should not harm local producers and sellers. 259 The latter is achieved if food aid is consumed in addition to other food and not instead of other supplies (criterion of additionality) and thereby does not displace commercial transactions and production. 260 Preferably, food aid should be channelled through international

257 In addition, the evidence on the degree to which different types of food aid displace commercial transactions is still inconclusive. It is clear, however, that commercial displacement occurs least in the case of emergency food aid, i.e., aid which is targeted and freely distributed to victims of natural and human-made disasters, and most in the case of programme food aid, which is untargeted aid provided directly to a recipient government for sales on local markets for balance of payments or budgetary support activities and which displaces either imports or domestic supply in final consumption. Project food aid, i.e., aid which is targeted to vulnerable groups to improve their nutritional status and to support specific developmental activities such as food for work or school-feeding, takes a middle position. For a critique of the Food Aid Convention, see Desta, see note 139.

258 World Bank, Global Economic Prospects, see note 5, 137.

259 CESCR, General Comment No. 12, see note 35, para. 37 et seq. Voluntary Guideline 15 and para. 13 of Section III.

agencies rather than be provided bilaterally. Some of these criteria are outside the purview of the AoA and are – imperfectly – addressed by instruments such as the Food Aid Convention and the FAO Principles on Surplus Disposal to which the AoA points.  

Food aid provided according to the criteria set out above can also “facilitate” the right to food by strengthening the ability of the poor to maintain sustainable livelihoods. Finally, it can “protect” their right to food by insulating them from fluctuations in food prices.

**ee. Assessment**

The Doha round negotiations until Hong Kong have yielded only moderate overall progress, but some decisions have been taken that will be conducive to the realization of the right to food.

As far as market access is concerned, the better market access opportunities foreseen under the new regime can have positive and negative effects on the right to food. A positive development is the decision to base tariff reduction commitments on bound rather than applied tariffs as it works in favour of developing countries. Most, but importantly not all of them, apply tariffs at much lower rates than their bound tariffs, which leaves them flexibility to adjust their height. The further reduction of tariffs in OECD countries will improve developing countries’ access to those markets and give them an opportunity to reap the benefits that such stronger integration into international trade will yield, particularly if such access spurs pro-poor economic growth and poverty reduction. Conversely, increased access of products to underdeveloped developing country agriculture markets can harm local producers, who cannot compete with cheaper imports, at a time when no

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261 Both instruments lack effective control mechanisms. In addition, the Food Aid Convention has not reached its objective of guaranteeing timely and predictable minimum flows of food aid to the most needy. A more inclusive instrument, in which recipient countries’ interest play a greater role and food aid is coordinated, could in the medium-term replace the Food Aid Convention. See, the Berlin Statement for Sustainable Food Security, tabled in closing of the International Workshop on Food Aid – Contributions and Risks to Sustainable Food Aid, 2–4 September 2003, available at: <http://www.ifpri.org/pubs/speeches/vonbraun/foodaidday.pdf>.

other possibilities to gain a living exist. The new rules foresee better protection against such negative effects of increased market access. Developing countries need policy space to protect their small-scale and subsistence farmers against being displaced as a consequence of reduced tariffs on those crops that these farmers grow as long as no other income earning opportunities have been created. Otherwise, impoverishment of a potentially large number of individuals and violations of their right to food would be a consequence. If details are worked out adequately, the envisaged introduction of special products and the SSM will give countries the flexibility to protect against such deteriorations of the realization of the right to food.

Both the domestic support reduction commitments and the decision to phase out all sorts of export subsidies by 2013 work towards a more level playing field. Their long-term effects on developing countries may well have positive repercussions for the realization of socio-economic rights. Also, the review of Green Box criteria to ensure that programmes of developing countries are covered, that do not cause more than minimal trade-distortions, is helpful. It opens a window of opportunity to exempt measures in favour of vulnerable groups from support prohibitions and to bring agricultural trade rules further in line with human rights requirements. Much depends, of course, on the specific modalities that will be agreed upon. With respect to food aid, members committed not to compromise humanitarian needs.

In principle, the mentioned rules give some concrete meaning to the principle of special and differential treatment and the label “Development Round”. However, they only set out broad lines of agreement. In addition, it remains to be seen how the rules operate in practice, which is difficult to predict. Advances at the level of detail also do not offset persisting fundamental problems. Special and differential treatment in favour of developing countries is still only of limited scope compared to the de facto existing “special and preferential treatment” for developed countries that allows the latter to continue to limit market access, to use trade-distorting domestic support and to provide export subsidies.

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263 See also the commitment to eliminate developed countries’ export subsidies on cotton by 2006; Hong Kong Declaration, para. 11.
264 LDCs are, however, largely exempt from any disciplines on market access and reduction commitments.
Unlike approaches in other fields, developing countries are not given leeway to catch up and use those measures from which the now developed countries once profited before they are bound by almost the same obligations as developed countries. These imbalances together with pervasive market failures in developing countries continue to hamper these countries’ possibilities to move out of poverty and to realize the human rights of individuals under their jurisdiction. Ideally, special and differential treatment rules would also take better account of the differences that exist between developing countries and move beyond the two groups of “developing countries” and “LDCs”. Such increased differentiation could both dispel the fears of developed countries to give too many privileges to developing countries and achieve meaningful rules. Creative rules need to be designed that do not primarily rely on the availability of often scarce financial resources and that work in favour of the poor in a country, not its elites.

VI. Conclusions and Recommendations

The WTO system and socio-economic rights pursue the same global objective: to advance human welfare. While the WTO scheme, including the AoA, is, however, concerned with aggregated improvements in global welfare, human rights focus on the individual. They set objectives to be reached for the benefit of each person and postulate standards that cannot be violated in the pursuit of overall societal goals. Despite the complementarity of goals at the abstract level, tensions therefore arise between trade and human rights in general, and the AoA and the right to food in particular, since impacts at country, community or household level can be negative.

In sum, the AoA is both a significant achievement and a failure for the right to food. On the one hand, it accomplished the setting in motion of a process of redressing imbalances in a highly distorted market which generally have worked against the interests of developing coun-

265 Cf. for example the Kyoto Protocol; on the discussions around the distinction between developed and developing country obligations under the Kyoto Protocol, see P. Sands, Lawless World, 2005, 69 et seq.

tries. It fell short of reaching significant progress in this regard, but might have prevented worse excesses. On the other hand, the obligations of the AoA, and in particular its rules on increasing market access, have harmed some countries or groups within countries and have caused right to food concerns.

In order to make the revised trade in agriculture regime more conducive to the realization of the right to food, four sets of measures could be taken. First, an explicit reference to human rights or the right to food could be inserted in the AoA to complement or substitute food security as a non-trade concern and to formally bring human rights into the WTO system, including its dispute settlement mechanisms. While this suggestion might appear formalistic and legalistic, it would send an important signal and provide a basis for interpreting the AoA. Second, the possibility to interpret exception and other clauses so as to cover the right to food should be explored. Third, in cases of irreconcilable conflicts, the right to food should be invoked in order to justify non-compliance with a trade obligation if this is the only way to avoid a human rights violation.

Fourth, and most importantly, human rights should be accorded greater weight in the formulation of new trade in agriculture rules. The process of liberalization needs to be continued in order to wipe out the asymmetries embedded in the current system. The interlinked protection still allowed under the AoA has detrimental effects on the realization of the right to food in developing countries by keeping their agricultural sectors uncompetitive.

The AoA’s inherent inequalities


The various forms of protection are linked. For instance, goods produced in countries with high tariffs and with the use of domestic support often depend on export subsidies to be sold at world markets, World Bank, *Global Economic Prospects*, see note 5, 118.

See in this context also the CESCR’s Statement on Poverty, in which the Committee expressed its view that the absence of an equitable multilateral trade, investment and financial system – amongst other factors – is a global structural obstacle to poverty reduction. CESCR, *Poverty and the Interna-
are heavily biased against these countries and the world’s poor.\textsuperscript{270} The challenge is to craft disciplines that effectively open markets and level the playing field while retaining the policy space needed to protect human rights. Human rights law forbids countries to trade away those flexibilities that are necessary to effectively realize human rights, including to manage transitions so that increased liberalization does not lead to unemployment and impoverishment of small-scale and subsistence farmers. Relevant and modestly promising progress has been made in all three pillars. It now needs to be given adequate final form in the remainder of the negotiations.

In this context, special and differential treatment would be a means to operationalize international cooperation commitments under the ICESCR and other legal instruments.\textsuperscript{271} In accordance with the principle that special attention needs to be paid to vulnerable groups, special and differential treatment should be designed in a way that benefits mainly the poor and vulnerable in a country. Such a right to food conforming AoA would also be conducive to achieving its long-term objective, namely to establish a “fair … agricultural trading system”. Only a system that takes full account of members’ obligations with respect to the most fundamental type of legally protected rights – human rights – deserves to be called fair. In addition to new AoA rules, the existing commitments undertaken in the Marrakesh Decision should be lived up to.

Finally, it goes without saying, that trade policies and law have to be accompanied with appropriate complementary policies and measures in a range of subject areas outside the purview of the AoA and the field of agriculture. For example, the establishment of an appropriate legal framework for the right to food including its justiciability, the creation of safety nets, the regulation of non-discriminatory access to natural and other resources, the participatory design of appropriate nutrition


\textsuperscript{270} Ibid.

\textsuperscript{271} Cf. \textit{Report of the High Commissioner for Human Rights submitted in accordance with Commission on Human Rights Resolution 2001/32}, see note 146, para. 25. However, the exclusive call upon the home state fails when developing countries become overall poorer as a consequence of acceding to WTO agreements. If this is the case, national redistribution measures are unfeasible due to overall impoverishment. For such situations, inter-state cooperation mechanisms are needed to bring WTO obligations in line with human rights cooperation obligations.
and consumer protection policies, and measures to ensure food safety, all play an important role. Trade in agriculture, including international trade in agriculture, is just one piece in a bigger puzzle.
Internet Regulation and the Role of International Law

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* The author would like to thank Professors J.H.H. Weiler, A. von Bogdandy and R. Wolfrum for their invaluable comments on earlier drafts of this article. All errors remain my own.
† To the memory of my father Tomás Antonio Segura Ortega.

I. Introduction

Given the “virtual” nature of its existence, the first important legal discussion about the Internet focused on its natural resistance to regulation. Despite this supposed resistance, national laws have been erected throughout the world with the aim and effect of subjecting the Internet to “real” regulation. Considering the global character of the Internet, however, International Law could be a more suitable tool for regulation in some of the various Internet-related issues. This article, therefore, aims to study the current and future roles of International Law regarding the regulation of this field.

After a short debate of the regulability of the Internet as such the article will focus on the current role of International Law with respect to the regulation of the Internet. That exercise will allow us to identify the main different national approaches to Internet regulation, as well as the existing International Law instruments stemming from those approaches. There is an array of questions related to this new technology that national laws have addressed in various forms. We would like to focus only on some substantial issues, such as freedom of speech and the fight against harmful content; the protection of intellectual property rights against piracy and the promotion of public domain information; and privacy rights and the protection of personal data vis-à-vis the commercial use of collected data. Although there are other possible questions to be discussed (education, cyber security, taxation, electronic commerce and contracts, etc.), these issues will give the measure of the differences between national laws, and will reveal the present role of International Law with respect to the Internet.

Then we shall consider some traditional International Law questions or issues relating to the Internet that have not attracted enough attention until now. First, it seems clear that the integrity of Internet facilities is a matter of national security for any country. As such, we shall determine whether a cyber-attack, in the form of a virus or otherwise, may be considered an armed attack; and if so, whether such an attack may legally trigger a nation’s legitimate self-defense response, or even the collective action of the United Nations (UN). Second, because the Internet is important not only for each and every country in the world, but also because it is so crucial for the well-being of people in developed and developing countries alike, it seems fair to ask about the future governance of the Internet. In this regard, International Law may add to the discussion by introducing a very interesting concept, the concept of CHM (Common Heritage of Mankind). The analysis of this
concept may be useful in answering various questions, such as who rules the Internet, or who is entitled to appropriate the Internet, and how should the Internet be governed.

Finally, we will consider whether access to the Internet may be regarded as a human right. It is clear that freedom of expression is a human right. Access to the Internet, however, means much more than merely freedom of expression, as it involves issues ranging from education to political participation. In this respect, some steps have been taken in order to outline what could be described as a right to “universal access”, which may include a right to Internet access.

To this end, the World Summit on the Information Society (WSIS), held in Geneva in 2003⁴ and in Tunis in 2005,² and sponsored by the UN and the International Telecommunication Union (ITU) will also be taken into account as the most recent international effort to bring together all issues connected with the Internet and to establish the principles on which democracy and justice can be instilled in this area.

II. The Debate on the Regulability of the Internet

From the inception of the Internet, there has been a debate that may be labeled regulation v. deregulation regarding this new field of activity.³ Is it possible and feasible to regulate the Internet, or on the contrary, is the Internet an essentially free place, a virtual terra nullius?

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The libertarian position was embraced by a few academics, especially in the U.S., during the nineties as the Internet was spreading from small communities to larger population coverage. According to the libertarians, the Internet cannot and should not be regulated.4 Cyberspace sovereignty is the core idea in seminal writings like those of Johnson and Post.5 In their view, not only is it impossible or futile for the state to regulate the Internet, but it is also desirable for the Net to be free of state regulation.6 In addition, the state faces legitimacy problems in its efforts to govern activities happening on the Internet;7 whereas, cyberspace self-governance would more fully realize liberal democratic ideas.8 A further analysis would require us to establish a difference between the extremist cyber-separatists, who assert that the Internet should be a place absolutely free from regulation, and those who merely advocate for self-regulation as the appropriate way to handle cyber-

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6 Johnson/ Post, see note 5, 1391-1395 and 1370-1376, respectively.


space. In any case, libertarians intend to create a space for “netizens”\(^9\) (Net citizens) which would be free from traditional nation-state rules.

The arguments used by these cyber-separatists are numerous and cover a wide range of issues. On the descriptive side, libertarians maintain that, because there are no borders in cyberspace (an intrinsically global phenomenon),\(^10\) any efforts made by territorially based sovereigns to regulate it will be doomed to failure.\(^11\) Similarly, if the Net is everywhere and nowhere in particular, in other words, if it is “a-jurisdictional,”\(^12\) then no sovereign state has a more compelling claim than any other to subject these events exclusively to its laws.\(^13\) They argue, then, that it would be unjustifiable to subject acts abroad to domestic regulation,\(^14\) because it would unfairly disturb individual activities in other jurisdictions and unacceptably affect regulatory choices of other nations.\(^15\) Surprisingly, cyberspace may reproduce those very boundaries\(^16\) (called electronic boundaries) of the physical world that it was meant to abolish, though that result would supposedly correspond to a better way of organizing Internet governance.\(^17\) The libertarian discourse maintains that there is also a problem of notice within such a system, due to the fact that cyberspace users would be unable to know


\(^{10}\) J.R. Reidenberg, “Governing Networks and Rule-Making in Cyberspace”, Emory Law Journal 45 (1996), 911 et seq. (915) [hereinafter Reidenberg, Governing Networks] (underscoring that the Internet provokes the disintegration of territorial borders and undermines substantive legal sovereignty).

\(^{11}\) They also suggest that, regarding enforcement, states may be unable to make cyber users abide by their laws, as they may very well be out of the state’s reach and control, cf. Perrit, see note 5, 423; Mefford, see note 7, 214.

\(^{12}\) Pf Post, Anarchy, State, see note 5, para. 36.

\(^{13}\) This argument is also based on the idea of “comity” in International Relations, cf. Johnson/ Post, see note 5, 1376 and 1391.


\(^{15}\) Johnson/ Post, see note 9, 4-5; Burk, see note 14, 1129-1134.

\(^{16}\) Reidenberg, Governing Networks, see note 10, 917 (speaking of visible network borders).

\(^{17}\) Johnson/ Post, see note 5, 1395; Johnson/ Post, see note 9, 11.
beforehand when and what jurisdiction they would encounter when navigating over the Net.\(^{18}\)

In their view, the alternative to state-based governance is self-governance.\(^{19}\) Building on the idea of “delegation”, they say that informal rules, called Netiquette (Internet etiquette), developed over time by cyberspace participants,\(^{20}\) and rules designed and accepted by business-people (a kind of new \textit{lex mercatoria}),\(^{21}\) would more appropriately fit the needs of this new virtual community. Governance of cyberspace must be construed not on the basis of remote, unaffected national legislators, but by cyberspace users themselves, “netizens”, who are the true and legitimate constituents of this new societal space.\(^{22}\) This kind of discourse is to some extent rooted in specific population layers, and is akin to the ideological trends of today’s politics, particularly in the U.S.\(^{23}\)

One of the most intricate problems posed by self-regulation is how far such regulation is to go. Even accepting the libertarian premise, that self-rule is good for cyberspace, would it mean that every regulatory area related to the Internet would be left to self-regulation? Would the


\(^{19}\) Perritt, see note 5, 477-478 (stating that self-governance for the Internet is, not only legally feasible, but also “desirable for several reasons: self-governance may be more efficient; electronic network communities need different rules and procedures; open networks escape enforcement of conventional rules; and self-governance promotes voluntary compliance”).

\(^{20}\) Johnson/ Post, see note 5, 1389; Reidenberg, \textit{Governing Networks}, see note 10, 920.

\(^{21}\) Johnson/ Post, see note 5, 1389.

\(^{22}\) Post, see note 8, 163-165 (recalling on this point Jefferson’s ideas on decentralization of law-making to support cyberspace self-regulation).

entire Net community be regulated by self-regulating regimes, or only some specific subsets within it?\(^\text{24}\) Another complex problem that cyber-libertarians face is enforcement. If there is no physical force in place, what means does the Net community have to enforce its own-built rules?\(^\text{25}\) Some commentators state that the cost of expulsion from the community would be a valid tool of deterrence,\(^\text{26}\) but this issue is far from solved.

The libertarian claims have been contested, both on the descriptive\(^\text{27}\) and normative fronts.\(^\text{28}\) First of all, it is debatable whether in fact cyberspace constitutes a free place, a sovereign jurisdiction, far from state’s reach.\(^\text{29}\) Secondly, even taking for granted that assumption, what the Internet actually is may differ from what it should be, as leading scholars like Lessig have argued.\(^\text{30}\) Goldsmith, in an already seminal work, has used the word “cyberanarchy” to describe (and fight back against) the kind of discourse which defends a space separate from the real world and devoid of any rules.\(^\text{31}\) In sharp contrast with the separatist view, those who may be called traditionalists affirm that the political and legal institution known as the state is the proper regulatory organization to carry out the task of regulating the Internet.\(^\text{32}\) The state, based


\(^{25}\) Mefford, see note 7, 213 and 235.

\(^{26}\) Gibbons, see note 3, 523.


\(^{30}\) Lessig, see note 28, 25.

\(^{31}\) Goldsmith, see note 18; Weinstock Netanel, see note 8, 443.

\(^{32}\) J.L. Goldsmith, “The Internet and the Abiding Significance of Territorial Sovereignty”, Ind. J. Global Legal Stud. 5 (1998), 475 et seq. (476); C. Fried, “Perfect Freedom or Perfect Control?”, Harv. L. Rev. 114 (2000), 606 et seq. (621); see also A.R. Stein, “The Unexceptional Problem of Jurisdiction in Cyberspace”, Int’l Law. 32 (1998), 1167 et seq. (1174) (stating, with regard to Cyber Law, that “[w]hatever connections the Internet facilitates among its users, it has no claim of authority over them. Whatever dif-
on elected governments combined with the rule of law, exhibits a proven democratic legitimacy and encompasses the institutional mechanisms to enforce the regulations needed to manage cyberspace. Traditionalists deal with the spillover effect, that is, the problems related to having as many regulations affecting Internet activities as there are states, many of which may be overly contradictory or conflicting, by pointing out that this problem is hardly exclusive to cyberspace. Moreover, conflict-of-laws doctrines have evolved to solve this problem effectively. In sharp contrast to the spillover effect, the issue of regulatory evasion or regulatory arbitrage remains, but this would be no more problematic within the field of Internet regulation than with regard to other areas of the real world. Thus, at least recently, there seems to be a growing consensus that the Internet does not constitute a distinct physical space or even a different jurisdiction, and that it is

34 Mayer-Schönberger, see note 23, 612.
35 Johnson/ Post, see note 5, 1374.
36 Goldsmith, see note 18, 1240-1242; Trachtman, see note 29, 568-569; Mody, see note 18, 382-384. On the normative side, it has been also pointed out that states have the legitimate right to subject to their jurisdiction transnational activity having local effects even if it causes spillover effects (that is, it affects activities and regulation in other countries), cf. again Goldsmith, see note 18, 1240-1241.
37 Goldsmith, see note 18, 1205-1212 (arguing that the current approach to choice of law is no longer based on a traditional and territorial conception of how conflicts of law are resolved as the “skeptics”, in Goldsmith terms, intend to show).
38 A.M. Froomkin, “The Internet as a Source of Regulatory Arbitrage”, in: B. Kahin/ C. Nesson (eds), Information Policy and the Global Information Infrastructure, 1997, 129 et seq. (140-150); Mayer-Schönberger, see note 23, 616 (describing it as the situation in which users of cyberspace, “seeking information that is illegal in their own jurisdiction, can go out on the Internet, disguise themselves, take another identity – and thus simulate their presence in another jurisdiction – and obtain the information they desire”). Goldsmith, see note 18, 1222.
39 J. Zittrain, “Be Careful What You Ask For: Reconciling a Global Internet and Local Law”, in: A. Thierer/ C.W. Crews Jr. (eds), Who Rules the Net?, 2003, 13 et seq. (22) (stating that early accounts “are now thoroughly dated,
starting to be viewed as the product of an advanced telecommunications technology. National regulation of cyberspace transactions is legitimate and feasible. The law must adjust to this new reality, and, as technology proceeds, we should expect to experience an increase in state regulation of cyberspace.

There is a third way to tackle the Internet issue, namely, mixed regulation or governance. This approach is not very different from a more classical view that distinguishes between default rules and mandatory rules. Most commentators taking this approach think that cyberspace regulation should be the result of a mixture of national laws and self-community rules. This hybrid regulation would assure the legitimacy, flexibility and enforceability needed for Internet regulation to become a working legal system. As Mayer-Schönberger has shown, it is possible to regulate the Internet avoiding the extremes (that is, relying exclusively on either national regulation or self-regulation) by way of blend-

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41 Cf. Stein, see note 32, 1174.
42 Goldsmith, see note 18, 1244, 1249 (pointing out that national and international regulations on the Internet are not only legitimate and feasible, but also necessary, because they provide the enforcement mechanisms and flexibility needed by private parties).
43 J. Hughes, “The Internet and the Persistence of Law”, Boston College Law Review 44 (2003), 359 et seq. (364) (pointing out that “[c]yberlaw has turned out to be a project of ‘cyberizing’ law, translating familiar legal concepts and the rough balance of interests created by the legal system into the Internet environment”).
45 Reidenberg, Governing Networks, see note 10, 929-930 (suggesting a “system of state-provided incentives through encouragement, as well as allocation of liability, that will induce networks themselves to adopt desirable public policies […] yet state governments cannot and should not attempt to expropriate all regulatory power from network communities”).
46 Goldsmith, see note 18, 1216 and 1245.
47 H.H. Perritt, Jr., “The Internet is Changing the Public International Legal System”, Kentucky Law Journal 88 (2000), 885 et seq. (930) (stating that “[t]hese hybrid structures offer the advantages of greater flexibility and decentralization available through private ordering, while tying private ordering to public law to enhance legitimacy, political acceptability, and enforcement through state-based coercion when necessary”).
ing together national law, self-regulation and even International Law.\textsuperscript{48} To be sure, international lawyers have always reminded us that International Law and harmonization could be, and indeed are, the natural solution for global problems. Regarding the Internet, however, International Law alone is not always recommended,\textsuperscript{49} and as a result, a sort of mixed governance has evolved with the Internet Corporation for Assigned Names and Numbers (ICANN), an allegedly fascinating combination of the three mentioned regulatory layers.\textsuperscript{50} We shall consider this situation and the question of Internet governance more deeply below.

Finally, that national regulation on the Internet is possible and is a reality can be confirmed very easily if we take a look at any country’s existing regulations in this field. For example, the U.S. legislation on the Internet includes, among the best known, the Communications Decency Act of 1991 (CDA),\textsuperscript{51} Child Online Protection Act of 1998 (COPA),\textsuperscript{52} Children’s Internet Protection Act of 1998 (CIPA),\textsuperscript{53} Digital Millennium Copyright Act of 1998 (DMCA),\textsuperscript{54} Uniform Electronic Transaction Act of 1999 (UETA),\textsuperscript{55} Anti-Cybersquatting Consumer Protection Act of 1999 (ACPA),\textsuperscript{56} Uniform Computer Information Transaction Act of 1999 (UCITA),\textsuperscript{57} Electronic Signatures in Global

\textsuperscript{48} Mayer-Schönberger, see note 23, 639-664 (giving examples, such as the case of obscenity laws – based on self governance and state governance, EU Directives – a mix of international and state governance, and others, to demonstrate the feasibility and the real existence of this kind of mixed regulation).

\textsuperscript{49} Perritt, see note 47, 930-931.

\textsuperscript{50} Mayer-Schönberger, see note 23, 656. See also Perritt, see note 47, 954 (confirming that the EU/US Data Privacy Agreement and ICANN regulation on Internet domain names are new models for international hybrid regulation). Mayer-Schönberger recognizes, however, that this kind of best regulatory option comes at a cost: “Governance blends potentially are less transparent to people than existing governance regimes [and] in some instances might lead to an increase in overlaps of governance regimes”, see Mayer-Schönberger, see note 23, 669.


\textsuperscript{52} 47 U.S.C. § 231 (Supp. 2005).


and National Commerce Act of 2000,\textsuperscript{58} and Computer Crime Enforcement Act of 2000.\textsuperscript{59} So abundant national regulations on different issues related to the Internet exist along with various approaches to those issues. What we need to further advance now is the current role of International Law regarding this existing and mainly national regulation of the Internet.

III. Current Role of International Law in Internet Regulation

In this section we will analyze several issues in which it is generally accepted that there is some room for the application of International Law. First, the willingness on the part of some states (especially European countries) to control and eliminate harmful content within the Internet has collided with the firm and constitutionally protected right of freedom of expression in the U.S. Questions of jurisdiction and choice of law between sovereigns have attracted much attention in this regard. Second, there is the question of the protection of intellectual property rights. Copyright and other intellectual property rights seem to be massively violated by existing software which allows the free distribution of copyrighted material. In this case, International Law instruments have been used by states desiring to combat this ever-growing activity. Third, the protection of data privacy against illegitimate uses on the part of companies operating through the Internet has finally prompted agreement between the main antagonists in this regard, i.e. the U.S. and the European Union (the EU).

1. The Conflict Between Free Speech and Harmful Content

One of the most compelling issues related to the Internet is the protection of free speech versus the restriction of harmful content. Whereas in the U.S. there is a strong sentiment, constitutionally protected, favoring freedom of speech, we see that European countries and Australia are more favorable, on balance, towards controlling the distribution of harmful content. The \textit{Compu Serve} and \textit{Yahoo! France} cases demonstrate the European approach followed by Germany and France on this

issue. International Law has a major role to play with respect to this substantive problem because this is also a jurisdictional issue. Regulatory conflicts in cyberspace are now frequently linked to the interplay between the worldwide availability on the web of data perceived to be harmful or offensive to fundamental values in the regulating state, and the constitutional protections for freedom of expression existing in the state in which the data is made accessible, i.e. the U.S. where many of content providers are located.

The CompuServe case60 was one the first and best known cases concerning a “true” regulatory conflict.61 The alleged offence to German law, the Criminal Code, consisted of the provision by CompuServe Deutschland (a 100 per cent subsidiary of CompuServe U.S.) of access to publicly available violence, child pornography and bestiality. The content was stored on CompuServe U.S.’s newsgroups servers. After blocking access worldwide to that content, CompuServe made available parental control software to its subscribers and unblocked the newsgroups. Nevertheless, a sentence was imposed by the Munich court on one of the managing directors of CompuServe Deutschland.62 Although the case was later overturned by a German higher court,63 this sentence attracted much criticism, particularly in the U.S.

Such criticism has been scant, however, compared to the almost universal condemnation received by the Yahoo! case in the U.S. This case


61 H.M. Watt, “Yahoo! Cyber-Collision of Cultures: Who Regulates?”, Mich. J. Int’l L. 24 (2003), 673 et seq. (676) (noting that “[t]ypically, an assertion of freedom of expression in the state in which the website is located clashes with restrictive legislation in the receiving state, designed to protect such values as the right of privacy, to restrict hate speech or libel, or to prohibit indecency or pornography. The free availability of information collides with the negative right of the receiving state to protect itself against outside interference”).


63 LG München (Munich Court of Appeals), NJW 53 (2000), 1051. Apparently, most commentators agree that the judge in the CompuServe trial simply did not apply the Internet legislation properly to the case, see L. Dertmann, “Case Update: German CompuServe Director Acquitted on Appeal”, Hastings Int’l & Comp. L. Rev. 23 (2000), 109 et seq. (112).
arose when two French public interest groups, La Ligue Contre le Racisme et L’antisémitisme (LICRA) and L’union des Etudiants Juifs de France (UEFJ), sued Yahoo! Inc., a Delaware corporation located in California. The alleged criminal offence was the offering for sale of Nazi memorabilia by the Yahoo! auction website accessible in France, which was deemed illegal under French law. Indeed, French legislation, along with many other nations’ laws, may be considered to be in accordance with the Convention on the Elimination of All Forms of Racial Discrimination (CERD).64 The plaintiffs sought an order prohibiting Yahoo! from displaying the memorabilia in France. The French court, which found it had personal jurisdiction because the harm was caused in France, sought an expert opinion on the possibility for Yahoo! to block access to French users, instead of completely eliminating the website content worldwide. After being advised that this could be achieved with a 90 per cent success rate (besides, French users were greeted by the website with advertisements in French, which meant some kind of geographical identification was already available), it ordered Yahoo! “to take all measures at their availability, to dissuade and render impossible all visitation on Yahoo.com to participate in the auction service of Nazi objects.”65 After that, Yahoo! sought a declaratory judgment that the French decision could not be recognized in the U.S. Besides finding it had jurisdiction,66 the U.S. District Court granted summary judgment on the merits in favor of Yahoo!.67 Nevertheless, the U.S. Court of Appeals has recently reversed that decision,68 and held that the California Court had no personal jurisdiction over the French parties and that France had every right to hold Yahoo! accountable in France.69

68 Yahoo! Inc. v. La Ligue Contre le Racisme et L’Antisémitisme, 379 F. 3d 1120, 1126 (9th Cir. 2004).
Despite the overwhelming criticism that the French ruling received in the U.S.,\textsuperscript{70} the Yahoo! case has shown that traditional conflict of laws instruments may apply to cyberspace, and that France was thus entitled to apply its national law because the harmful effects had occurred in its territory.\textsuperscript{71} The case has also confirmed that in trans-boundary disputes in which issues of freedom of speech arise,\textsuperscript{72} it is not the place of the country of the information provider but the place of the country of the recipient that governs the situation.\textsuperscript{73} The Gutnick case, decided by the Australian Supreme Court,\textsuperscript{74} has recently come to corroborate this ap-

\textsuperscript{70} B. Laurie, An Expert’s Apology (21 November 2000), available at <http://www.apache-ssl.org/apology.html> (describing the solution imposed by the French ruling as “half-assed and trivially avoidable”).

\textsuperscript{71} Reidenberg has been a rara avis in the U.S. when he has sided with the French ruling in several articles, e.g. J.R. Reidenberg, see note 23, 264 and 266, respectively (stating that “no one could seriously challenge that France has jurisdiction to prescribe rules for activities within French territory. Yahoo, however, thought it was above the law”; “[t]he Internet does not, however, displace the well-established principle in international law that allows states to exercise prescriptive jurisdiction of conduct having effects occurring within the national territory”). See also the delightful account of the Yahoo! case offered in J. Goldsmith/ T. Wu, Who Controls the Internet? Illusions of a Borderless World, 2006, 1 et seq.

\textsuperscript{72} There has been however self-criticism in the U.S. about the failure to explain the “differences between promulgation of speech-restrictive rules and mere enforcement of them” and “why speech directed abroad necessarily deserves First Amendment protection”, M.S. Van Houwelling, “Enforcement of Foreign Judgments, the First Amendment, and Internet Speech: Notes for the Next Yahoo! v. Licra”, Mich. J. Int’l L. 24 (2003), 697 et seq. (698).


proach, and reflects therefore the emerging majority opinion.75 The German, French and Australian democracies have chosen rules for free expression that are consistent with international human rights but that do not mirror the protection afforded by the First Amendment to the U.S. Constitution.76

It may be said that this kind of solution ultimately goes against the basic freedom of speech and freedom of information in cyberspace, but, as leading scholars like Lessig have demonstrated, the fact that the Internet has been developed as a free place does not say anything about how it should be.77 The technological designs developed by code writers, the web architecture, carries a sort of ideological or philosophical choice, very much reflecting the values expressed in the First Amendment.78 Code is law, but this kind of lex informatica79 need not entail normative implications for solutions of regulatory conflicts. The Internet is what we make of it; there is nothing essentially given and unchangeable. Technological innovation is now empowering sovereign states to assert their rules on Internet activity.80 Filtering and zoning technologies allows for location, and claims of the ubiquity of informa-

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75 Zittrain, see note 40, 19.
76 Declaration of Principles of the World Summit on the Information Society, see note 1, 2, para. 5, (stating, taking into account article 29 of the Universal Declaration of Human Rights, that in the exercise of their rights and freedoms, “everyone shall be subject only to the such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”).
77 Lessig, see note 28, 207-208.
78 Reidenberg, see note 23, 262-263 (confirming that the so-called “separatist” philosophy “derives largely from the American value placed on the unfettered flow of information”; but noting also that “the American position is becoming a minority view”).
80 Reidenberg, see note 69, 1960. Some authors have nevertheless expressed caveats with respect to the possibility that technology becomes the means of transmitting and implementing the values of the regulating nation, see Y. Benkler, “Internet Regulation: A Case Study in the Problem of Unilateralism”, EJIL 11 (2000), 171 et seq. (178).
tion on the web no longer hold. The *Yahoo!* case has just shifted the rule-making power from technologists back to political representatives. When considering regulatory conflicts in the international arena, then, “there is no reason that the interests of the society in which the harmful effects of free-flowing data are suffered should subordinate themselves to the ideological claim that the use of a borderless medium in some way modifies accountability for activities conducted through it. Analysis of such a claim has shown that it reverses the proper relationship between law and technology. Technology being purely manmade, and thus subject to ideological choice, should not dictate the way in which law manages conflicting interests arising through its medium.”

Extraterritoriality and jurisdiction in cyberspace have then been the focus of an intense debate, and the dichotomy between freedom of speech and the protection against harmful content has simply been the issue articulating this conflict, despite the existence of other kinds of extraterritoriality cases within the Internet, i.e. when the U.S. has required compliance with its copyright laws abroad. As Goldsmith maintains, extraterritorial regulation within the Internet field is justified on the basis that cyberspace is not functionally different from transnational activities carried out through other means and because every state has the right to regulate those extraterritorial acts that may produce harm or other local effects within the national jurisdiction. This kind of approach is commonplace in national legal systems and is legitimate until

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81 But see R. Corn-Revere, “Caught in the Seamless Web: Does the Internet’s Global Reach Justify Less Freedom of Speech?”, in: Thierer/ Crews Jr., see note 40, 219 et seq. (225-226) (stating that the Internet cannot be carefully calibrated by using technology to keep information out of restrictive jurisdictions).
82 Reidenberg, see note 23, 272.
83 Watt, see note 61, 695. See also Reidenberg, see note 69, 1970-1972 (maintaining that “when technologies exist and are deployed for commercial purposes, they are typically not configured to support public policies […] states have, as a result, a normative incentive to assert the supremacy of law over technological determinism”).
84 A very well known case was Twenty Century Fox Film Corp. v. iCraveTV.com, 53 U.S.P.Q. 2d (BNA) 1831 (W.D.Pa. 2000), where the U.S. District Court applies an analysis similar to the French *Yahoo!* decision. See C. Dawson, “Creating Borders on the Internet: Free Speech, the United States, and International Jurisdiction”, Va. J. Int’l L. 44 (2004), 637 et seq. (657). Reidenberg, see note 23, 274 (stating that “[t]he U.S. values are inconsistent by favoring the free flow of information against data privacy and speech restrictions, but not against intellectual property”).
a nation has acquiesced to an international law rule that specifies otherwise.\(^{85}\)

It can be said then that extraterritorial regulation in the Internet field is feasible, although it need not be perfect in order to be effective.\(^{86}\) Also, choice of law rules do work within the Internet realm as much as within other real world fields.\(^{87}\) The CompuServe, Yahoo! and Gutnick cases just show us that International Law and doctrines like prescriptive jurisdiction, effects-based jurisdiction, and the technical solution of filtering and zoning are helping to solve transnational disputes in a fair way until there is a solution based on international harmonization or otherwise.\(^{88}\) If international harmonization is difficult to achieve,\(^{89}\) it may be the time for the U.S. to take some steps in order to avoid being the so-called hate speech haven.\(^{90}\)

\(^{85}\) Goldsmith, see note 18, 1239-1240.

\(^{86}\) Indeed, the contrary appears to be true, because zoning and filtering technologies may make prescription and enforcement coincide, ensuring perfect compliance, see Watt, see note 61, 688-689.

\(^{87}\) Goldsmith, see note 18, 1223 and 1233-1234, respectively.


\(^{89}\) On the impossibility of developing universally accepted Internet content regulation, J.L. Henn, “Targeting Transnational Internet Content Regulation”, \textit{B.U. Int’l L. J.} 21 (2003), 157 et seq. (172).

2. The Consensus Concerning Intellectual Property Protection

With the coming of the Internet, the protection of intellectual property rights has been challenged by new technologies and software (like MP3 and Napster) allowing the free distribution of copyrighted digital works. These technologies permit Internet users to download perfect copies of songs, movies and other works previously protected by existing national laws and international treaties. This problem has only been aggravated by the advent of peer-to-peer (P2P) technologies, a new type of software which allows Internet users to download files between individual hard drives without a central server doing any job. Apparently, these kinds of Internet technologies have paved the way for massive piracy, with the ensuing losses for authors and the industry in general. The responses to this new situation have been twofold.

On the one hand, after the first efforts were carried out by the U.S. Commerce Department in 1995 with the aim of restoring the “balance” in intellectual property law, the immediate legal answer has been new national laws seeking to reinforce the protection afforded by traditional

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95 S. Biegel, *Beyond Our Control? Confronting the Limits of Our Legal System in the Age of Cyberspace*, 2001, 287 (commenting on the prominent examples of this kind of file sharing such as Gnutella and Freenet).

copyright laws. In the U.S., the No Electronic Theft Act (NET Act)\(^97\) in 1997 and the DMCA in 1998 were passed to that end, although the DMCA has been accused of shifting the balance in favor of private entities.\(^98\) Similarly, the Copyright Directive has been adopted in the EU.\(^99\) National courts have also made a great effort to deal with the question of how to protect copyright and to what extent, in order not to excessively limit the information available in the public domain, with the results tilting in favor of copyright protection.\(^100\)

On the other hand, the answer (allowed by national laws) has also been technical, because the industry (subsidized by government)\(^101\) has used technology as well to create copyright management schemes called “trusted systems”, that is software that makes it easier for information providers to control access to and the use of copyrighted content. In this way, enforcement by the code is “ex-ante”, free from legal scrutiny and efficient to a degree that does not exist in the non-virtual world.\(^102\) This technical response, which substitutes private empowerment for public law,\(^103\) has lead to an important criticism on the part of authors, because this perfect control carried out by private companies providing internet content may have consequences with respect to the right to

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98 Hughes, see note 43, 371.
101 Lessig, see note 28, 126.
103 Lessig, see note 28, 135.
privacy and freedom of expression, which in turn concerns other issues like fair use and public domain doctrines.\(^{104}\)

Efforts to craft international regulation in the intellectual property field have led to WIPO Copyright Treaties, i.e. the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.\(^{105}\) It may be said that these agreements are the only indisputable example of international treaty-based, top-down, development of legal norms regarding the Internet.\(^{106}\) These recent WIPO treaties have been added to the existing and already longstanding international treaties, i.e. the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works,\(^{107}\) with the stated aim of strengthening the protection afforded to copyright owners. There is some controversy as to the results achieved by these new treaties. Whereas for some it is not at all clear whether these treaties have really developed the protection previously existing,\(^{108}\) for others the WIPO treaties may be regarded as a positive outcome, even if

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106 Hughes, see note 43, 373-374.


the “high-protectionist” negotiating agenda of the U.S. did not succeed.\textsuperscript{109} It would also be pertinent to note here that the EU agenda in this regard was not less protectionist.\textsuperscript{110} Nevertheless, it seems that national implementation of these treaties has gone far beyond what they require,\textsuperscript{111} and what they require is no less contentious.\textsuperscript{112}

Furthermore, the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)\textsuperscript{113} which entered into force in 1995 has been a benchmark international agreement for the protection of copyright globally,\textsuperscript{114} and it may very well be so in the Internet field. This agreement not only sets out minimum rules and standards of protection and harmonizes domestic procedures and remedies for the enforcement of intellectual property rights, but above all, it extends the dispute settlement mechanism of the WTO to this particular field.\textsuperscript{115} This extension was meant to improve the enforcement mechanisms applicable to copyright violations that were almost absent before the com-

\begin{itemize}
  \item \textsuperscript{110} Grewlich, see note 93, 238 and 244 (noting that the EU wanted to have protected the ephemeral copies or temporary reproductions, together with a copyright on databases).
  \item \textsuperscript{111} P. Samuelson, “Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised”, \textit{Berkeley Technology Law Journal} 14 (1999), 519 et seq. (521); Grewlich, see note 93, 257 and 261.
  \item \textsuperscript{112} These treaties require signatories to provide “effective legal remedies against the circumvention of effective technological measures that are used by authors” in the exercise of their copyrights (article 11 of the WIPO Copyright Treaty and article 18 of the WIPO Performances and Phonograms Treaty), that is, states must take legislative measures to safeguard “technical protection systems” adopted by copyright owners; Elkin-Koren, see note 102, 141 (noting that this kind of anti-circumvention legislation may lead to the privatization of information policy in cyberspace).
  \item \textsuperscript{113} Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, \textit{ILM} 33 (1994), 81 et seq.
  \item \textsuperscript{114} It was not at all a cherished agreement for developing countries, which accepted it as a part of the Uruguay Round package deal, M. Trebilcock/ R. Howse, \textit{The Regulation of International Trade}, 1999, 2nd edition, 320-321.
  \item \textsuperscript{115} On the significance of this Dispute Settlement System, M. Matsushita/ T.J. Schoenbaum/ P.C. Mavroidis, \textit{The World Trade Organization, Law, Practice and Policy}, 2003, 18.
\end{itemize}
The benefits internationally of this treaty are now being coupled with other national benefits; that is, some representatives of copyright industries have already advanced the idea of using the TRIPS agreement to dispute existing exceptions to national copyright laws.\(^{116}\)

As we see, International Law has played and will likely continue to play a very important role in the protection of intellectual property rights in the Internet field. It is not only that there is some regulation, but also that this regulation is of the best kind. International treaties and agreements, that is, “hard law” as opposed to “soft law”, are used here by the states in order to cooperate and establish minimum standards, mandate the setting up of domestic enforcement mechanisms, and use a system to settle international disputes arising in this context. Why is it that we find this strong approach here, but only here?\(^{118}\) The convergence of interests between nation-states and copyright holders with vast intellectual property assets has made it possible for International Law to play an important role in the regulation of this specific area of the Internet. So it seems that only if International Law completely fulfills the expectations of business within the Internet field it will be a preferred tool for states to regulate this area of human activity.

\(^{116}\) In fact, the TRIPS has not been fully effective yet, as it was agreed not to bring non-violation complaints under it until 2000 (article 64 (2) and (3) of the TRIPS Agreement), and then the Doha Ministerial Conference delayed it to the following ministerial conference in Cancun (which failed to reach any agreement). The Hong Kong Ministerial Conference has directed the General Council “to continue its examination of the scope and modalities for complaints of the types provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 and make recommendations to our next Session. It is agreed that, in the meantime, Members will not initiate such complaints under the TRIPS Agreement”, WTO, Ministerial Conference, Sixth Sess., Hong Kong, 13-18 December 2005, TRIPS Non-Violation and Situation Complaints, WT/MIN(05)/DEC, 22 December 2005, para. 45.

\(^{117}\) Samuelson, see note 104, 332.

In this regard, it seems quite difficult to implement one of the action lines of the World Summit on the Information Society sponsored by the UN and the ITU, which provides for the “development and promotion of public domain information as an important instrument promoting public access to information.” The question remains whether the UN is as effective an international structure as, say, the WTO in attempting to regulate this field of human activity and in implementing regulation.

3. Different Approaches to the Privacy Issue

Large scale processing of personal data was initially reserved to institutions with centralized databases. The advent of the personal computer (PC) and the Internet has changed that situation, and now there are many more participants using personal information. Almost anyone with a PC and access to the Internet may collect and process personal information, which has led to a dramatic change with regard to the privacy issue. Specially, profiling and data mining activities on the part of marketing companies have been the focus of attention by scholars for some time now. Therefore, the protection of personal data and privacy in the Internet era has become a critical public policy concern.

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119 World Summit on the Information Society, Geneva 2003-Tunis 2005, Plan of Action, 12 December 2003, 4, para. 10 (a), Doc. WSIS-03/GENEVA/DOC/5-E, available at <http://www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0005!!PDF-E.pdf>. The Plan of Action states that the action lines are aimed “to advance the achievement of the internationally-agreed development goals, including those in the Millennium Declaration, the Monterrey Consensus and the Johannesburg Declaration and Plan of Implementation, by promoting the use of ICT-based products, networks, services and applications, and to help countries overcome the digital divide”, ibid. 1, para. 1.


and states have started to realize how important this question is in itself for democracy,\textsuperscript{123} let alone its role in fostering e-commerce. The World Summit on the Information Society has just recalled how vital this issue is for the development of the Internet.\textsuperscript{124}

The protection of personal information is not the same in every country but varies prominently between different states, and this disparity is striking when we compare the approaches taken by the U.S. and the EU.\textsuperscript{125} Although the U.S. was probably the first country regulating privacy,\textsuperscript{126} the protection afforded to personal information here has always been based on a market-dominated policy\textsuperscript{127} coupled with the strong influence of First Amendment principles that favor the free flow of information.\textsuperscript{128} Within this model, the role of the state is limited: legal rules and statutory rights are aimed at protecting narrowly defined sectors so that privacy protection is mainly to be achieved by industry self-regulation and codes of conduct.\textsuperscript{129}

\textsuperscript{124} Declaration of Principles of the World Summit on the Information Society, see note 1, 5, whose principle No. 5 states that “[s]trengthening the trust framework, including information security and network security, authentication, privacy and consumer protection, is a prerequisite for the development of the Information Society and for building confidence among users of ICTs [...] it is important to enhance security and to ensure the protection of data and privacy, while enhancing access and trade”.
\textsuperscript{126} Gellman, see note 122, 255.
\textsuperscript{127} Reidenberg, see note 125, 1318; P. Samuelson, “A New Kind of Privacy? Regulating Uses of Personal Data in the Global Information Economy”, \textit{Cal. L. Rev.} 87 (1999), 751 et seq. (770-773); D.J. Solove, \textit{The Digital Person, Technology and Privacy in the Information Age}, 2004, 91 (arguing that the market currently fails to provide mechanisms to enable individuals to exercise informed meaningful choices).
\textsuperscript{129} Reidenberg, see note 125, 1331.
This has been highly criticized by some scholars\textsuperscript{130} who have seen international and, especially, European regulation, as a formula to be followed. Schwartz and Reidenberg have persistently repeated that the European, as opposed to the U.S., approach regarding privacy is the most appropriate because it rightly considers data protection as a civil rights issue.\textsuperscript{131} They highlight the normative role of privacy in democratic governance,\textsuperscript{132} arguing that a model based in self-regulation and the market may harmfully affect deliberative democracy.\textsuperscript{133} Nevertheless, U.S. information culture may be changing.\textsuperscript{134} To some extent, there is a growing concern among the American population with the extensive use of information technologies to build profiles of individuals.\textsuperscript{135} That concern explains why the Federal Trade Commission (FTC) and the U.S. Congress have tried to improve the substantive and procedural rights of individuals regarding their right to privacy,\textsuperscript{136} although it is true that this regulation is still limited by its sector-based approach.\textsuperscript{137}

\textsuperscript{132}Reidenberg, see note 125, 1340.
\textsuperscript{133}P.M. Schwartz, “Privacy and Democracy in Cyberspace”, Vanderbilt Law Review 52 (1999), 1609 et seq. (1615) (considering that no other option but the imposition of standards through law will serve the aim of developing effective privacy norms); id., “Internet Privacy and the State”, Connecticut Law Review 32 (2000), 815 et seq. (analyzing the flaws in the dominant rhetoric that favors the market, bottom-up regulation, and industry self-regulation); J.E. Cohen, “Examined Lives: Informational Privacy and the Subject as Object”, Stanford L. Rev. 52 (2000), 1373 et seq. (arguing that both legal and technological tools will foster data privacy protection).
\textsuperscript{134}Samuelson, see note 127, 770.
\textsuperscript{135}Kang, see note 121, 1196-1197.
\textsuperscript{136}Even those who consider the traditional U.S. approach to privacy regulation as appropriate have conceded that there is a movement in this country towards a more intense protection in this field, F.H. Cate, “Privacy Protection and the Quest for Information Control”, in: Thierer/ Crews Jr., see note 40, 297 et seq. (311) (stating that the recent U.S. enactments “reflect a much broader concept of privacy protection than previously recognized by U.S. law”).
The other predominant approach, the European approach (which is also the model existing in countries such as Canada, Australia, New Zealand and Hong Kong),\textsuperscript{138} consists of a comprehensive data protection law.\textsuperscript{139} In this model, a kind of omnibus legislation creates a wide-ranging set of rights and obligations for the processing of personal information and, as opposed to a market-based policy, is based upon a human rights perspective where users are not “consumers” but “citizens.”\textsuperscript{140}

As a result of being party to the European Convention on Human Rights (ECHR) and other international agreements,\textsuperscript{141} countries in the European region are under certain obligations, such as ensuring the respect for private and family life, home and correspondence (article 8 ECHR).\textsuperscript{142} Specifically, in the digital context, there exist several international legal instruments relating to privacy and data protection with undeniable European origin or flavor. The Organization for Economic Cooperation and Development (OECD) Guidelines on the Protection of Privacy and Transborder Flows of Personal Data\textsuperscript{143} have been followed by the Ottawa Ministerial Declaration on the Protection of Privacy on Global Networks held in 1998.\textsuperscript{144} The latter reaffirms the objectives set forth in the 1980 Privacy Guidelines and “the commitment to the protection of privacy on global networks in order to ensure the respect of important rights,” and both texts come to set what has been called “technological neutral principles” for the protection of personal data at the international level.\textsuperscript{145} The OECD, however, continues to


\textsuperscript{140} Reidenberg, see note 125, 1331.

\textsuperscript{141} Grewlich, see note 93, 280.

\textsuperscript{142} Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, 4 October 1950, art 8, 5 E.T.S. 5.


\textsuperscript{145} Franda, see note 108, 165.
stress the economic implications of data protection; that is, it focuses on individuals as “users” and “consumers” instead of treating them as “citizens.” A slightly different approach is found within the Council of Europe in which two important legal texts have been adopted: the 1980 Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data and the 1999 Guidelines for the Protection of Individuals with Regard to the Collection and Processing of Personal Data on the Information Highways.

Finally, the 1995 European Community (EC) Directive on the Protection of Personal Data is the “world’s most ambitious and far-reaching data privacy initiative of the high-technology era.” One distinctive feature of this piece of legislation is its extraterritorial effect, made effective through the data transfer ban of article 25, that prohibits the transfer of data to states that do not provide “an adequate level of

146 Reidenberg, see note 125, 1353.
147 Council of Europe, Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, 28 January 1981, 108 E.T.S. Nevertheless, the U.S. is not a signatory of the Council of Europe Treaty.
protection” of personal information. This was clearly a threat to data flows coming from the EU to the U.S., because European officials deemed the U.S. legislation not to be sufficiently protective of personal data. With this Directive on Data Protection, the EU has set both the international standard and the agenda in this field for years to come.

Some kind of understanding between the U.S. and the EU was therefore necessary in order to avoid disrupting data flows, and that is how the major international cooperation effort to date with real effects in this area has been achieved by a Safe Harbor Agreement between the U.S. and the EU. As the EC Directive on Data Protection became effective in 1998 and its data transfer ban was immediately applicable, the Department of Commerce and the European Commission tried to reach some kind of common understanding on data protection. The U.S. proposal for a Safe Harbor Agreement was finally accepted, after two years of negotiations, by the European Commission in July 2000. This Safe Harbor Agreement establishes core data privacy principles for the industry to follow. Those companies joining the Safe Harbor principles on privacy protection would be placed by the Department of Commerce on its web site list of certifying firms and, conversely, EC Member States would not challenge them or otherwise condition any data transfers to them. Although some scholars consider this Safe Harbor Agreement as insufficient or even a surrender act on

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151 G. Shaffer, “Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting up of U.S. Privacy Standards”, Yale J. Int’l L. 25 (2000), 1 et seq. (50-51) (arguing that the ban would have prevailed should the U.S. have challenged this measure within the WTO Dispute Settlement System under the GATS).

152 Reidenberg, see note 125, 359-362 (arguing that a General Agreement on Information Privacy would be the best solution to attain international co-operation and harmonization in data protection. This treaty would need an institutional setting strong enough and the WTO would offer the best choice in that regard).


the part of the EU,\textsuperscript{156} it is nevertheless regarded as a “compromise through institutional development pursuant to which free transatlantic information flows may be preserved while satisfying legitimate EC concerns.”\textsuperscript{157} It seems, however, that this kind of negotiated settlement is not likely to serve as a permanent solution to the disparity between U.S. and European data privacy protection.\textsuperscript{158}

From an International Law perspective, the Safe Harbor agreement is clearly not an International Treaty. It has neither been signed nor ratified by the parties, and so it is not subject to the Vienna Convention on the Law of Treaties. At most, it could be maintained that it is a “Gentlemen’s Agreement,” or political agreement, but not even an “Executive Agreement.”\textsuperscript{159} Some scholars consider it as an example of a new kind of international regulation.\textsuperscript{160} This Safe Harbor agreement would then be an example of a “soft-law”, as opposed to a “hard-law” instrument, although regarding its effects it may very well achieve a \textit{de facto} harmonization of data privacy protection. Compared to the intellectual property protection afforded by hard-law, i.e. international treaties, it is again striking that Internet regulation in this area of data privacy rights has only been achieved by a soft-law instrument. It may however not be surprising. Vigorous international cooperation in this field is necessary, but when business interests within the U.S. are at stake,\textsuperscript{161} even in

\begin{itemize}
\item Fromholz, see note 150, 483.
\item Perrit, see note 47, 940 (referring to this agreement as an example of international hybrid regimes involving public and self-regulation).
\item Gellman, see note 122, 274 (arguing that there is no support in the U.S. business community to standardize privacy regulation).
\end{itemize}
light of support from the population, international legal texts with more teeth are difficult to achieve.

IV. Future Role of International Law on the Regulation of the Internet

As we have seen, International Law has played the role of a catalyst between states, solving some issues that affect mainly e-commerce and that require cooperation, i.e. an international response articulated through the application of traditional doctrines of conflict of laws for the problem of free speech and content regulation, international treaties (international hard-law) for the protection of intellectual property rights, or some kind of Safe Harbor agreements (international soft-law) for the protection of privacy rights. International Law has yet another role to play with regard to the regulation of the Internet. International Law tools and institutions may answer some of the questions that have not been, or only been tentatively, addressed to date. These questions are of an undisputed international flavor, and therefore, only International Law can answer them. International Law should be ready to react mainly to the possibility of invoking self-defense in the case of a cyber-attack; the likelihood of considering Internet’s core resources as part of the Common Heritage of Mankind; and the prospect of regarding access to the Internet as an International Human Right.

1. The Use of Force and Self-Defense in Cyberspace

a. Introduction

As it is well known, the use of force between states is definitively forbidden in International Law since the advent of the UN Charter. This prohibition is also a principle of customary International Law, as noted by the ICJ in the Nicaragua case. Nevertheless, there are two undisputed exceptions to this principle: the right of self-defense (Article 51 of the UN Charter) and the collective action by the UN as decided by the Security Council (Article 42 of the UN Charter). Other possible

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162 U.N. Charter Article 2, para. 4.
exceptions to this peremptory norm of International Law have traditionally been defended, but they are more disputed.\textsuperscript{164} Recent events, however, like the 11 September 2001 terrorist attacks, the ensuing campaign in Afghanistan and the 2003 Iraq war have again brought to the forefront the issue regarding the boundaries between the aforesaid prohibition and the related exception of self-defense.

The threat of a major Internet attack is no doubt a primary question of national security. This kind of computer network attack (CNA) may be defined as a virtual attack, that is, an attack using the Internet as opposed to a physical attack, to a state’s Internet infrastructure. The latter broadly understood as the combination of technological systems, connected to the Internet, controlling essential public utilities and national security services. Thus far this threat stands more as a general and latent risk, in other words, no state has yet been the victim of a CNA (this is the passive point of view of the attack) and no state has yet threatened to use the Internet as a weapon or tool to launch an attack in any given situation (this is the active point of view of the attack). In this regard, the threat of an attack using the Internet as a means is not like the threat of use of real (as opposed to virtual) armed force due to the fact that the former is still at a developing stage. On the other hand, not every state may have resort to a cyber-force action due to its technological under-development.

Because of the novelty of this threat though, the question arises whether an actual Internet attack or a threat of an attack of this sort might come within the terms of Arts 2 (4) and 39 of the UN Charter, triggering collective action and possibly allowing the right of self-defense. As mentioned, however, there is no state practice up until now on this possibility. From a legal point of view, a clearly different episode took place in the case of the North Atlantic Treaty Organization (NATO) strike against Yugoslavia, where some of the physical Internet facilities existing in Belgrade were one of the military objectives specifically targeted by NATO. A strike of this kind was an armed attack that may arguably have given way to a response justified by self-defense.\textsuperscript{165} NATO military campaign also included “limited” computer warfare in

\textsuperscript{164} Cassese, see note 159, 350.

\textsuperscript{165} B. Simma, “NATO, the UN and the Use of Force: Legal Aspects”, \textit{EJIL} 10 (1999), 1 et seq. (11) (noting that already the threats previous to the strikes against Yugoslavia, “not having been authorized by the Security Council either expressly or implicitly, are not in conformity with the UN Charter”).
what could be characterized as the “first cyber-war.” Setting aside, however, these computer attacks in wartime occurred during the NATO campaign, that is governed by _ius in bello_, we will focus on the possibility of attacks in peacetime, that is governed by _ius ad bellum_.

What about a CNA through viruses or otherwise directed to cause a major collapse in the functioning of a state’s vital infrastructure? Does this kind of attack constitute a use of force in Cyberspace? Could it even be considered an armed attack? Will a state’s reaction in the form of self-defense be justified? Could this self-defense reaction reasonably include the use of force? It seems that there is a need for answers based on International Law. These sort of questions have already been posed by some scholars who have foreseen the possibility of the Internet being used either as the battlefield of the 21st century (likely attacks from some countries have already been anticipated) or as the preferred tool for terrorist action. The low-risk character of this sort of Internet attack and the asymmetrical benefits that it offers to states (or non-state actors) which do not have the level of economic and military supremacy of developed states such as the U.S. makes it a very attractive tool. We will limit our analysis, though, to actions engaged in by states.

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b. Computer Network Attacks (CNA) as Use of Force

From the point of view of International Law, the first question to be answered is whether or not a CNA can be considered a use of force, or even an armed attack and when. Before we try to develop any analysis, it would be good to bear in mind some previous assumptions. As we maintained before with regard to the question of jurisdiction, the location of the attack must be determined according to the “effects doctrine”; that is, what matters is not the physical location of the attacker but where the effects of the attack are felt.172 Also, there is a broad spectrum of possible attacks, meaning not every CNA will meet the level comparable to a use of force. On the contrary, it would also be unreasonable to maintain that because a CNA does not physically destroy the object of the attack (although the effects are felt elsewhere), it can never amount to a use of force.173 In order to illustrate this idea, we should consider some examples of possible computer attacks against vital interests like an attack of the New York Stock Exchange, thereby shutting down the financial markets, the NYC subway system causing a massive collision or derailing, or the U.S. Air Control System resulting in the crash of civilian aircrafts. The question arises whether or not these other uses of force and these new kinds of weapons174 now available thanks to Internet technologies are covered by the prohibition of Article 2 (4) of the UN Charter.

In this regard, it is clear that the prevailing interpretation of the UN Charter makes the prohibition of the use of force applicable only to “military” force. After all, one of the main purposes of the UN Charter is the elimination of classic war between states, established in a rule of law through Article 2 (4). This restriction of the prohibition to armed force can be, however, interpreted broadly so as to include in some situations physical and indirect force.175 Accordingly, the ICJ affirmed in the Nicaragua case that other activities not necessarily amounting to armed force, such as the arming and training of the Contras in Nicaragua.

173 Jensen, see note 168, 222.
174 Joyner/ Lotriente, see note 167, 836 (elaborating a description of information warfare weapons, including “sniffers”, “Trojan horses”, “logic bombs”, “denial of service attacks”, “computer worms” or “viruses”, etc.).
gua, were also prohibited. Therefore, it seems appropriate to suggest that there are other activities also prohibited by Article 2 (4) even though they do not strictly consist of armed force, as long as they have the same consequences, that is, they are “employed for the destruction of life and property”.

In this vein, some scholars maintain that CNA’s challenge the prevailing paradigm and have ventured that it should be possible to equate a CNA to a use of force, taking into account the results or consequences of the attack. If the attack causes physical destruction and human injury, then it could be considered a use of force prohibited by Article 2 (4). On the other hand, as the ICJ stated in the Nuclear Weapons Advisory Opinion, Article 51 does not refer to specific weapons, so the choice of arms by the attacking state is irrelevant. There may even be some support for this reading in treaty law.

This interpretation has been presented as a modification to the traditional normative construction of Article 2 (4)’s prohibition, which would focus not on whether or not the attack actually has an armed character (or amounts to strictly military action), but on the causation of similar damage. This interpretive flexibility, however, seems justified in order to keep pace with the new technology. As the wording of Article 2 (4) does not explicitly refer to armed or military force, a flexible interpretation according to the evolution of weaponry and the logic

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176 Military and Paramilitary Activities, see note 163, 119.
178 Schmitt, see note 171, 913 (arguing that “[a]rmed coercion is not defined by whether or not kinetic energy is employed or released, but rather by the nature of the direct results caused [... that computer network attack employs electrons to cause a result from which destruction or injury directly ensues is simply not relevant to characterization as armed force”).
179 Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, 225 et seq. (244).
182 Schmitt, see note 171, 914.
183 Shaw, see note 163, 843 (referring to interpretive flexibility).
behind this provision does not prevent a broadening of its prohibition in order to incorporate new uses of force. In the light of the foregoing, therefore, it is our opinion that CNA’s having the effects of armed force attacks can be equated to uses of force regularly forbidden by Article 2 (4) of the UN Charter.

The problem that remains would be how to classify and clearly demarcate these attacks from those attacks not amounting to use of force, as traditionally interpreted. Regarding the possible response to those attacks that fall short of classic “armed force”, as the ICJ stated in the Nicaragua case the offended nation will only have recourse to countermeasures, limited by the applicable conditions as declared by the ICJ in the Gabčíkovo case. Therefore, CNA’s involving some kind of violence but not causing physical destruction and human injury should be considered as unlawful acts surely triggering state responsibility and the possibility of adopting countermeasures, or even an intolerable intervention in the internal affairs of another state, but should not be regarded as a breach of Article 2 (4) as long as their consequences are not similar to those stemming from an armed use of force.

c. CNA and Self-Defense

In the event of a CNA that could be equated to the use of force according to the analysis of the previous section, then, as we know, there are only two possibilities. Either the Security Council decides to take collective action according to Chapter VII of the UN Charter, or in the absence of such a reaction, the attacked state decides to make recourse to the right of self-defense. Article 51 limits the right of self-defense to those situations where there is an “armed attack”, not merely use of force as set out by Article 2 (4), so both provisions do not correspond to one another in scope. As stated in the Nicaragua case, and confirmed in the Oil Platforms case, only the most grave forms of the use

184 Military and Paramilitary Activities, see note 163, 110.
186 Joyner/ Lotriente, see note 167, 847.
187 Schmitt, see note 171, 914 (offering criteria to distinguish between them according to their consequences).
188 A. Randelzhofer, “Article 51”, in: Simma, see note 175, 788 et seq. (790).
of force may constitute armed attacks. Recognizing the difficulty that the ordinary meaning of the wording “armed attack” presents, however, the interpretive gap should be surmounted whenever a lethal result to human beings or serious destruction of property is caused. Therefore, as has been pointed out, it is appropriate to include within the right of self-defense responses directed against a CNA constitutive of use of force as previously stated, that is, one provoking the destruction of life and property. Of course, the attacked state will have to comply with the requirements of self-defense, meaning the immediate response must be necessary and proportional as well as subsidiary and provisional, in addition to the obligation to report to the Security Council according to Article 51. The question arises, then, whether the state attacked must react in the Internet field itself in order to comply with the proportionality requirement, in other words, with another CNA. In this regard, even if the response must be directed to halt and repel an attack, the defending state is not restricted by any International Law rules to the same weapons used by the attacking state. Furthermore, the defending state may not have the technological capacity and ability to defend itself in that particular field. For these reasons, an armed self-defense must be deemed appropriate in this case as a normative solution, as the attacked state can not remain devoid of an effective protection under its inherent right of self-defense. Of course, factual issues will be a key point whenever a CNA is launched, as the attacked state

191 Joyner/ Lotrionte, see note 167, 855 (arguing that if a computer-generated intrusion “resulted in shutting down a state’s air traffic control system, as well as in collapsing banking institutions, financial systems and public utilities, and opened the floodgates of dams that caused deaths and property damage, considerable merit would reside in alleging that such an attack inflicted damage equivalent to that caused by an ‘armed attack’”).
192 Schmitt, see note 171, 929.
194 N.Q. Dinh/ P. Daillier/ A. Pellet, Droit International Public, 7th edition, 2002, 943 (recalling that self-defense may be invoked and exercised until the Security Council gets involved and there is collective action).
195 Gray, see note 193, 121.
196 Joyner/ Lotrionte, see note 167, 828 and 853.
may be unable, not only to respond with the same kind of technological weapons but even to provide proof of the origin of the attack or the identity of the attacker. These questions involving evidence make it more complicated, though not impossible, for international law to offer sound solutions according to established rules. Supposing, however, that both states involved have the same technological capacity, proportionality requires that the degree of cyber-force employed be limited in magnitude, intensity and duration.197

If the right to self-defense is available to states in this field, another important issue would be where and at what moment is it possible to invoke this right. If the Internet allows for instant lethal attacks that do not let state officials have much time to react, it would make no sense to speak of a self-defense response designed to repel and end the attack when this attack takes no more than a computer click to occur. In other words, the question here is whether it is even possible to talk about self-defense in the ultra-fast Internet field (that is, a late response may be considered an unjustified reaction because it is non-immediate, and thus a retaliation198) and, therefore, whether some kind of anticipatory self-defense would then be justified.

There seems to be some truth in the assertion that in the age of instant computer lethality, it makes no sense to speak about self-defense if this self-defense is not somehow anticipatory (there could be no point in taking defensive measures against a CNA that within seconds achieves its targets causing damages and death). In principle, anticipatory self-defense is ruled out by Article 51 of the UN Charter, which requires an “armed attack” in order to exercise self-defense.199 This reading is also consistent with the object and purpose of this provision and state practice and it seeks to avoid the risk of an abuse on the part of some states exercising wide discretion.200 Some international lawyers

197 Id., 858 (arguing that “a cyber-generated effort to bring down a society’s financial or banking infrastructure [would not] be appropriate as a response to a computer intrusion that temporarily disrupted public telecommunica-
tions in the victim state”).

198 But see Dinstein, see note 190, 107-108 (considering “on-the-spot reaction” to CNA troublesome, and arguing in favor of armed reprisals at a different time and place as a legitimate response).

199 Brownlie, see note 177, 275-278; I. Brownlie, Principles of Public Interna-

200 Randelzhofer, see note 188, 803-804.
though have traditionally supported, under certain conditions, the doctrine of anticipatory self-defense.\textsuperscript{201}

The approach to the question of anticipatory self-defense, however, needs to be balanced in the light of recent events starting with the terrorist attacks of 11 September 2001. The ensuing developments and actions taken by the U.S., mainly the use of force in Afghanistan,\textsuperscript{202} the National Security Strategy (NSS) enacted in September 2002\textsuperscript{203} (the so-called Bush doctrine) and the invasion of Iraq have brought about an overwhelming reaction on the part of authors, either favoring or rejecting the concept of anticipatory self-defense. As a practical matter, there is an array of terms referring to the conceptual idea of an expanded interpretation of self-defense, and so we find concepts like anticipatory self-defense, pre-emptive self-defense, preventive self-defense and interceptive self-defense.\textsuperscript{204} For the sake of simplicity, we will assume with the majority of the doctrine that anticipatory and pre-emptive self-defense refer to the very same principle reflected by the Caroline case. According to this commonly quoted precedent, pre-emptive self-defense is justified whenever the perceived threat is imminent, in other words, there is a “necessity that self-defence is instant, overwhelming, and leaving no choice of means and no moment for deliberation.”\textsuperscript{205} A more flexible standard for determining necessity has been advanced by some authors, which have accepted the new parameters introduced by


\textsuperscript{202} T. Franck, “Terrorism and the Right of Self-Defense”, \textit{AJIL} 95 (2001), 839 et seq. (arguing that the United States’ use of military force against the Taliban and Al Qaeda in Afghanistan is lawful under the United Nations Charter); but see A. Cassese, “Terrorism is Also Disrupting Some Crucial Legal Categories of International Law”, \textit{EJIL} 12 (2001), 993 et seq. (997) (finding worrisome the broadening of the notion of self-defense).


\textsuperscript{204} N. Ochoa-Ruiz/ E. Salamanca-Aguado, “Exploring the Limits of International Law relating to the Use of Force in Self-defence”, \textit{EJIL} 16 (2005), 499 et seq. (500).

\textsuperscript{205} A summary of the dispute is found in A. D. Sosaer, “On the Necessity of Pre-emption”, \textit{EJIL} 14 (2003), 209 et seq. (214-220).
the NSS and therefore the justifications presented for the war in Iraq.\footnote{206}
This new standard, which is a step further from the already controversial doctrine of anticipatory self-defense leads to a concept of preventive self-defense,\footnote{207} whereby a state may legally react in self-defense to repel not simply an imminent attack, but rather a merely expected threat. This innovation will mean that, not only the moment for a military response is pushed back to an undefined earlier time, but also that it is for the U.S. government alone to determine whether a future threat is real and deserves reaction.\footnote{208} In the light of the foregoing, most authors have concluded that preventive self-defense or preventive war is not acceptable.\footnote{209}

As Thomas Franck has pointed out, the doctrine of anticipatory self-defense has been known to International Law for a long time and has augmented its credibility “both by contemporary practice and by deduction from the logic of modern weaponry.”\footnote{210} In other words, even if a strict interpretation of Article 51 of the UN Charter would initially render anticipatory self-defense unlawful, no state is obliged to wait and endure an imminent strike.\footnote{211} A more flexible and presently accepted interpretation of this strict exception\footnote{212} recognizes that the con-
ditions arising from the Caroline case for anticipatory self-defense, namely necessity, immediacy and proportionality, are in fact regarded as valid under current International Law and indeed pertinent to all categories of self-defense.\textsuperscript{213} If this reading is valid it should not imply, however, an expanded right to react whenever a state perceives a potential threat to its security, which is actually what the NSS proposes and the Iraq war has confirmed as a preventive war.\textsuperscript{214}

As a practical matter, it seems difficult to discern when a CNA may be considered imminent. There are a number of scholars, however, who defend the applicability of the doctrine of anticipatory self-defense to the Internet field. According to Sharp, the anticipatory right of self-defense should apply whenever there is a "penetration of sensitive systems that are critical to a state’s vital national interests."\textsuperscript{215} Jensen is also in favor of a flexible anticipatory self-defense doctrine and supports legal measures listing or defining those critical infrastructures that should be defended even by active means.\textsuperscript{216} Others, like Schmitt, are more cautious and provide some limited factors for the anticipatory self-defense to take place, but always within the framework of an overall armed attack and always by stressing that it is not the CNA but its context which should be used as the guiding principle.\textsuperscript{217} This latter posi-

\textsuperscript{213} Dinstein, see note 180, 219.

\textsuperscript{214} R. Wolfrum, “The Attack of September 11, 2001, the Wars Against the Taliban and Iraq: Is There a Need to Reconsider International Law on the Recourse to Force and the Rules in Armed Conflict?”, \textit{Max Planck UNYB 7} (2003), 1 et seq. (33) (stating that there are good reasons, basically the need to avoid abuse, for not extending the right of self defense \textit{de lege ferenda} so as to legitimate preventive use of force); M. Sapiro, “Preempting Prevention: Lessons Learned”, \textit{N.Y.U. J. Int’l L. & Pol.} 37 (2005), 357 et seq. (367) (asserting that “the Iraq experience may suggest that there is wisdom in preempting further talk of preventive self-defense”); E. Benvenisti, “The US and the Use of Force: Double-edge Hegemony and the Management of Global Emergencies”, \textit{EJIL} 15 (2004), 677 et seq. (691) (noting that while relaxing the doctrine of self-defense the new Bush doctrine has the effect of relaxing the concept of sovereignty).

\textsuperscript{215} Sharp, see note 168, 166 (in fact his starting point is more wide-ranging as he affirms that all hostile intent constitute a threat to use of force which triggers the right to use force to respond in anticipatory self-defense ibid., 95, but he seems to nuance his position in order to affirm the lawfulness of cyber espionage ibid., 129).

\textsuperscript{216} Jensen, see note 168, 226-231.

\textsuperscript{217} Schmitt, see note 171, 932-933 (delimiting the three factors that may trigger anticipatory self-defense as “1) the CNA is part of an overall operation
tion seems to be the most sensible and resembles the doctrine of “interceptive” self-defense. Again, as has been previously mentioned enough factual basis must be provided by the victim state in order to justify a defensive response in this very ultra-fast field. Otherwise, these forcible reactions may just conceal pure aggressions.

Bearing all these assertions in mind, if CNA’s cause damage similar to conventional uses of force they should be considered uses of force, allowing for self-defense responses. Claims for an anticipatory right of self-defense in cyberspace should be accepted in principle, but only under limited conditions. There is no reason at all to treat cyberspace attacks any differently from conventional armed force attacks or even nuclear missile attacks. In this sense, the Internet has not brought about any single innovation which should modify the traditional normative analysis of International Law on the right of self-defense, except for the need to consider the factual differences that this field presents. The UN Charter and International Law rules on the prohibition of the use of force and self-defense are flexible enough to be applied to the Internet.

2. Internet Governance and the Common Heritage of Mankind

a. Introduction

The history of the Internet is an American history. Invented, funded and developed in the U.S., the Internet has an unquestionable American flavor when it comes to analyzing its features. As we have seen, freedom of information and free flows of data, as part of the First Amendment culture, are profoundly rooted characteristics of the Internet. They are part of its code. They are in fact the law of the Internet. Although there are recent efforts that try to change this state of affairs, as the judicial decisions reviewed above demonstrate, it is still diffi-

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218 Dinstein, see note 180, 172-173.
219 Benkler, see note 80, 172 (noting that these factors should not be overlooked).
220 See Section III.1.
cult to modify the current functioning of the Internet where there is a country, i.e. the U.S., that bluntly plays the major role in its governance. In this regard, special attention has to be paid to the technical body called the ICANN (mentioned above). The ICANN is responsible for the control of the domain name system, the distribution of IP addresses, the establishment of standards for Internet protocols and the organization of the root-server-system. As has been pointed out, the importance of root governance goes well beyond the face value of the market for names and addresses. Although the ICANN pretends to be a model of mixed or hybrid regulation which should take into account the interests of all stakeholders, the truth is that the ICANN is an American private non-profit organization incorporated under Californian law, subject to U.S. jurisdiction and authority, where commercial interests have a leading role, but which on the other hand may violate fundamental U.S. policies. Furthermore, the major Internet Exchange Points through which Internet access is provided are still located within the U.S. This overwhelming U.S. control of Internet’s core resources lets this country set up provisions like the Digital Trademark Right provision of the Anticybersquatting Consumer Protection Act (ACPA) that allows a U.S. court to transfer a foreign registrant’s domain name

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221 F.C. Mayer, “The Internet and Public International Law – Worlds Apart?”, *EJIL* 12 (2001), 617 et seq. (621) (noting the fact that the ICANN is recognized as the final authority on matters of domain names by WIPO, which in turn shows a situation where an international organization defers to a corporation subject to US jurisdiction); id., “Europe and the Internet: The Old World and the New Medium”, *EJIL* 11 (2000), 149 et seq. (165).


to the U.S. trademark owner in spite of the Uniform Domain Name Dispute Resolution Policy (UDRP) of the ICANN.\footnote{X.T. Nguyen, “The Digital Trademark Right: The Troubling New Extraterritorial Reach of United States Law”, \textit{North Carolina Law Review} 81 (2003), 483 et seq. (547) (stating that “[p]otentially, if an ICANN panel ruled in favor of a foreign domain name registrant, the foreign nation will accept the panel’s decision. On the other hand, if the trademark holder complainant in that case decided, after the unfavorable UDRP decision, to bring an ACPA action against the domain name, U.S. courts are not bound by the UDRP decision and could rule in favor of the trademark holder complainant”).}

Given this situation, we could pose the question of what would happen if some day the U.S. decided on its own to shut down the whole Internet for alleged national security reasons, if only because it has the ability to do so. What would be the grounds to contest that kind of decision? Is there any answer or any theory that could be opposed to such an act on the part of the U.S.? We may try here to develop a new way of thinking about the Internet provided by an international doctrine that has been largely ignored for many years by developed states, namely, the Common Heritage of Mankind (CHM) concept. In order to assess the applicability of this concept to Internet’s core resources, it would be good to analyze the origin and the elements that define this institution in International Law.

\textbf{b. Brief History}

As far back as in 1898 the concept of “common heritage” was applied by a scholar to the legal status of the sea.\footnote{A.G. Lapradelle, “Le droit de l’Etat sur la mer territoriale”, \textit{RGDIP} 5 (1898), 264 et seq. (283).} The CHM concept, however, first arose in the 20th century in relation to the Law of the Sea. This concept is generally attributed to Ambassador Arvid Pardo, Malta’s UN representative, who proposed that the General Assembly declare the seabed and the ocean floor and its resources a “common heritage of mankind” and take the necessary steps to embody this basic principle in an internationally binding document.\footnote{Reservation Exclusively for Peaceful Purposes of the Sea-bed and of the Ocean Floor, and the Subsoil thereof, Underlying the High Seas Beyond the Limits of Present National Jurisdiction and the Use of Their Resources in the Interests of Mankind, GAOR 22nd Sess., 1st Ctte, 1515 Mtg, Agenda Item 92, Doc. A/C.1/PV.1515; Doc. A/ 6695; Doc. A/C.1/952.} Pardo’s ideas were
taken up by Part XI of the 1982 United Nations Convention on the Law of the Sea (UNCLOS),229 which provided in article 136 that the “Area and its resources are the common heritage of mankind” (“Area” is defined in article 1 (1) of UNCLOS) and established an international regime (with an International Seabed Authority) to administer the access to and exploitation of the Seabed Area.230

As some scholars have pointed out, however, this concept had already appeared in the field of Outer Space and in the Antarctic Treaty:231 The General Assembly’s Declaration of Legal Principles Governing the Activities of States in the Exploration and Uses of Outer Space232, which referred to the “common interest of all mankind,” was followed by the 1967 Outer Space Treaty,233 which stated that exploration and use of outer space shall be “the province of all mankind” (article I). Later, the 1979 Moon Treaty,234 adopted by a General Assembly Resolution,235 became the first treaty in force to give effect to the CHM principle,236 coming into effect on 11 July 1984. Article 11 (1) of this treaty proclaims that “(t)he moon and its natural resources are the

230 W.M. Reisman, “The Common Heritage of Mankind: Success or Failure on International Regulation?”, Canadian Council on International Law Conference 14 (1985), 228 et seq. (233) (stating that “the Seabed Authority provisions of the Law of the Sea Treaty represent the most complete effort at implementing the core of Pardo’s common heritage”).
234 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 5 December 1979, UNTS Vol. 1363 No. 23002.
common heritage of mankind." The Antarctic Treaty dates back to 1959, and although it does not refer expressly to the CHM, it has been widely seen as an international regime in which CHM elements are found, at least with respect to its substantial normative content. Other examples where the CHM is deemed to be applicable are cultural and natural resources, the environment, although in this latter field the concept of the common concern of mankind is preferred, genetic resources and sustainable development, and world's food

239 F. Francioni, "La conservation et la gestion des ressources de l'Antarctique", RdC 260 (1996), 239 et seq. (266) (noting that the institutional side of the CHM to be applied to the Antarctic would have to be regulated by way of conventional rules).
240 A.C. Kiss, "La Notion de Patrimoine Commun de l'Humanité", RdC 175 (1982), 99 et seq. (171) (asserting that the 1972 UNESCO Convention establishes the CHM principle for cultural goods and natural resources even though they are located within a given state and therefore under its sovereignty).
resources.\textsuperscript{245}

Initially, the U.S. was willing to apply the CHM principle to the deep seabed.\textsuperscript{246} Also, because the result of the space race between the U.S. and the Soviet Union was uncertain, the U.S. wanted to have CHM elements inserted in the Outer Space Treaty.\textsuperscript{247} Soon, however, this CHM was associated with a “socialist” type of claim on the part of developing states, and opposition from developed countries emerged.\textsuperscript{248} Developed states pressed hard in order to reach a new agreement on Part XI of UNCLOS, which was arrived at in 1994,\textsuperscript{249} and introduced some important changes in the exploitation system previously devised

\textsuperscript{245} M. Bedjaoui, “Le droit au développement”, in: M. Bedjaoui (ed.), 
Droit International, Bilan et perspectives, 1991, 1247 et seq. (1268); id., “Propos libres sur le droit au développement”, in: International Law at the Time of its Codification. Essays in honour of Roberto Ago, 1987, Vol. II, 15 et seq. (40); id., “Are the World’s Food Resources the Common Heritage of Mankind?”, IJIL 24 (1984), 459 et seq. (461) (asserting that “this innovatory concept is undoubtedly able to give fruitful expression to universal solidarity. It may show itself particularly rich in possibilities for the future of world relations and give rise to possible applications not only in and under oceans, but also in space […] not only on earth but in the air, in the environment, in the climate; on inner matter, but also on living matter, such as the genetic heritage, both animal and vegetable, whose richness and variety must be preserved for future generations. It can also open perspectives and suggest attractive solutions for questions such as the cultural and artistic achievements of humanity, as it can and should likewise be applied in the first place to human beings, the primary common heritage of mankind, and to humanity itself – as a new subject of international law and the primary heritage to be preserved from wholesale destruction”).


\textsuperscript{248} A. Cassese, International Law in a Divided World, 1986, 381.

(decision-making process and financial requirements), watering down the CHM features of the 1982 UNCLOS.  

c. Status and Elements of the CHM

Regarding the legal status of the CHM, it is initially difficult to ascertain whether the CHM constitutes a principle of International Law, a theory, a doctrine, or just a political or philosophical concept. There has been much debate, about the legal standing of the CHM, with many of the International Law writers concluding, on the one hand, that it may only be taken as a political challenge from developing countries so that “the CHM as a legal concept is dead” or just a flexible label and therefore “belongs to the realm of politics, philosophy or morality.” On the other hand, it is undeniable that the CHM is written in applicable international treaties which have effectively prevented private enterprise from developed countries from starting to exploit CHM spaces until now. But it is not settled whether the CHM constitutes a principle of customary International Law, or is rather a concept, though some of the elements of the CHM have become principles themselves. Its legal status nowadays is far from clear, because if in the 1980’s it was progressively gaining momentum, it has been severely

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250 Cassese, see note 159, 94.
253 Gorove, see note 231, 402.
258 C.C. Joyner, “Legal Implications of the Concept of the Common Heritage of Mankind”, *ICLQ* 35 (1986), 190 et seq. (199) (noting that the CHM could be considered an “emergent principle of international law”).
questioned since the 1990’s. It may be too early to predict the success or failure of the CHM, but it is our opinion that the CHM may be a principle, a legal regime and a concept, depending on the context in which it is used. It is a principle of International Law introduced by General Assembly resolutions, which may even have reached the legal standing of a *ius cogens* principle. It is also the legal regime set forth in Part XI of UNCLOS to regulate the Seabed Area. Furthermore, it is a concept applicable to the governance of the post-material global commons and, in this regard, it seems appropriate for our purposes to extend it to the Internet field.

**aa. CHM as a Principle**

General Assembly Resolution 2574 was the first step in the process of building-up the CHM principle. This resolution sought to introduce a moratorium in relation to the exploitation activities and sovereign claims over the Seabed Area until an agreed international regime was reached. It was followed by General Assembly Resolution 2749, also known as the Declaration of Principles of 1970, which established fifteen principles, all of them flowing from the very first one, the CHM principle. This resolution in fact anticipated the parameters of the future conventional regime, as it provided for the principles of non appropriation, peaceful use, universal participation in its management and exploitation, equitable sharing in the benefits flowing from the exploitation of the Seabed (specially benefiting developing countries), scientific

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259 S. Hobe, “ILA Resolution 1/2002 with regard to the Common Heritage of Mankind Principle in the Moon Agreement”, *Proceedings of the 47th Colloquium on the Law of Outer Space*, 2004, 536 et seq. (arguing that, in the new international context of growing commercialization and privatization of space activities together with the 1994 amendment to UNCLOS, the interpretation of the CHM has been modified and its equitable sharing element has been abandoned).

260 Shaw, see note 163, 454.


263 Kiss, see note 240, 205.

cooperation and protection of the environment. The CHM principle was also taken by article 29 of the Charter of Economic Rights and Duties of States established by General Assembly resolution 3281. The legal status of the CHM principle, especially as stated in the Declaration of Principles of 1970, was not at all clear, due to the transactionist character of the Resolution.

From the very beginning of the negotiations, there was a gap between developed and developing countries regarding the interpretation of the CHM. Developing countries wanted to introduce a communitarian CHM. In this regard, CHM should incorporate the key elements of non appropriation and equitable sharing. On the contrary, developed countries preferred a liberal concept of the CHM, therefore a CHM understood as a res communis mirroring the freedom of access and use of the high seas. The Declaration of Principles of 1970 was purportedly vague because it was a compromise between both interpretations. Nevertheless, the main elements of a communitarian reading of the CHM were present. Developing countries thus achieved a symbolic victory in their effort to transform the international community according to the New International Economic Order (NIEO).

The legal status of the CHM in the Declaration of Principles was then ambiguous. It was understood as a lex ferenda proposition because of its programmatic character. On the other hand, it was stated that the CHM had achieved full binding force, either as an instant cus-

265 R.P. Arnold, “The Common Heritage of Mankind as a Legal Concept”, Int’l Law. 9 (1975), 153 et seq. (157) (affirming that the essential thrust of the declaration and heritage clause is that all states must share in the resources of the sea).
266 A/RES/3281(XXIX) of 12 December 1974.
267 Pureza, see note 264, 233.
tomor even as a *ius cogens* norm. We believe that, in any event, the Declaration of Principles created some rights through the estoppels mechanism and defined new and emergent values in the then ongoing process of law-making.

In article 136 of UNCLOS the CHM principle was written the same way as in the Declaration of Principles. However, regardless of UNCLOS the CHM principle, in its general aspects, has attained the legal status of customary International Law, as has been demonstrated.

The question arises whether article 311 (6) of the Convention, which prohibits any amendment of this principle, could be used, together with the circumstances surrounding the Convention's adoption, as an argument to defend the *ius cogens* nature of the mentioned principle. It may be suggested that even the U.S., the major objector to Part XI, never expressly denied the legal nature of the Area, yet it was against the system of exploitation and the institutional arrangement.

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272 Anand, see note 268, 203.

273 Salamanca Aguado, see note 271, 298 (referring to the statements made by some developing countries during the 70's regarding the *ius cogens* nature of the CHM principle).

274 Anand, see note 268, 204; Pureza, see note 264, 261.

275 Kiss, see note 240, 207; E.D. Brown, “Freedom of the High Seas Versus the Common Heritage of Mankind: Fundamental Principles in Conflict”, *San Diego L. Rev.* 20 (1983), 521 et seq. (545) (stating that the Declaration of Principles did not create binding rules, but provided a significant basis for the generation of legally binding rules through a broader law-creating process).

276 R. Wolfrum, “The Principle of the Common Heritage of Mankind”, *ZaöRV* 43 (1983), 312 et seq. (333-334) (asserting that the preconditions that have to be met for a new principle of customary international law to emerge, that is, a distinct content and state practice, accompanied by *opinio iuris*, generally accepted, can be found regarding the CHM principle).


278 Salamanca Aguado, see note 271, 300.
practice and the 1994 Agreement on the Implementation of Part XI seems to have reaffirmed thereafter the CHM approach as a customary principle of International Law of a *ius cogens* character.\(^{279}\) The consensus existent at the time of the 1994 Agreement reinforces the idea that UNCLOS, and the CHM within its framework, has nowadays attained the status of an objective regime.\(^{280}\)

**bb. CHM as a Legal Regime**

The opposition in the interpretation of the CHM by developing and developed states since it first arose continued throughout the negotiations of the Third United Nations Conference on the Law of the Sea as a new form of the classic antagonism between developing and industrialized states.\(^{281}\) This antagonism was translated into the normative and institutional facets of the negotiations, as we will see. If in the first phase of those negotiations Third World proposals were on the rise,\(^{282}\) the second phase showed the radicalization of the developed countries’ positions.\(^{283}\) UNCLOS, approved in 1982, was the crystallization of the political compromise reached by both schools of thought. Nevertheless, Part XI of the Convention defined and regulated the Seabed as the CHM, a fact that by itself was interpreted as a major landmark and an important departure from traditional liberal International Law.\(^{284}\)

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\(^{279}\) N. Navarro Batista, *Fondos Marinos y Patrimonio Común de la Humanidad*, 2000, 49; but see V.D. Degan, “The Common Heritage of Mankind in the Present Law of the Sea”, in: Ando/ McWhinney/ Wolfrum, see note 244, 1263 et seq. (1374-1375) (noting that “[t]here is little doubt that the Hague Court would at that time [in the 1970’s] have ascribed the character of *ius cogens* to the rules and legal régime of the Area [but] [t]he 1994 Agreement has proved the fact that as the result of a shift in opinio juris within the ‘states whose interests were specially affected’, an actual rule of *ius cogens* can vanish”).


\(^{282}\) Pureza, see note 264, 268.


\(^{284}\) Paolillo, see note 280, 145.
On the *normative* side, the CHM legal regime applicable to the Seabed by UNCLOS was made of four principles:

1) The absence of any claim or exercise of sovereignty over the Area or its resources and any right of appropriation thereof (article 137). This is the first and foremost important corollary of the CHM principle and it must be understood as a non appropriation in the broadest sense.\(^{285}\) This is also an *erga omnes* obligation\(^{286}\) although this assertion has to be balanced in the light of article 137 (2), which provides that, once recovered, minerals may be subject to property rights.

2) The duty to exploit the resources in the interest of mankind in such a way as to benefit all, taking into particular consideration the interests and needs of developing countries (article 140). Although one of the main questions during the negotiations was the interpretation to be given to the term “benefit of mankind”,\(^{287}\) the Convention finally retained a broad interpretation. On the one hand, it not only means equitable sharing in the benefits flowing from the Area, but also effective participation in its management. On the other, it not only applies to financial benefits, but also to other economic benefits.\(^{288}\)

The CHM calls therefore for the “equitable sharing” of benefits “taking into particular consideration the interests and needs of developing states”\(^{289}\) and “peoples who have not attained full independence or other self-governing status”. This is a critical element introduced by developing countries that wanted an obligation framed according to the NIEO and its underlying philosophy. But those benefits will not be limited to financial benefits and will also include other economic benefits\(^{290}\) such as those derived from the policies related to the activities in


\(^{287}\) Wolfrum, see note 276, 321 (analyzing the compensation and the preferential treatment aspects of this CHM element).

\(^{288}\) Salamanca Aguado, see note 271, 308-309.

\(^{289}\) S. Paquerot, *Le Statut des ressources vitales en droit international. Essai sur le concept de patrimoine commun de l’humanité*, 2002, 43 and 60 (referring to the principle of *inégalité compensatrice* as one of the founding and hierarchically superior norms of the CHM).

\(^{290}\) Report by the Secretary-General on “Possible Methods and Criteria for the Sharing by the International Community of Proceeds and Other Benefits
the Area (article 150), scientific and research activities (article 143) and the transfer of technology (article 144). The clause “for the benefit of mankind” also requires effectively universal participation in the management of the Area (article 148), that is, no discrimination and equality among all states in the administration of the activities to be carried out in the Area. Finally, the mentioned clause also entails the protection of developing countries from adverse effects caused by activities in the Area (article 150 (h)).

Therefore, the CHM principle as provided by UNCLOS called for a de facto equality among developing and developed countries and was legally recognized through formal discrimination in a transformative way that sought to reverse the state of things as resulting from competition based on technical capacity and economic power of states. These aspects of the CHM principle have been downgraded to a large extent by the 1994 Agreement though as it was felt that the preferential

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291 J. Reverdin, “Le régime juridique des grands fonds marins”, Schweizerisches Jahrbuch für Internationals Recht 39 (1983), 105 et seq. (120) (noting that this obligation of transfer of technology became a deep concern for industrialized countries, because it may be used as a precedent and a first step towards the acceptance of technology as a common heritage of mankind).

292 Paquerot, see note 289, 63 (underscoring that the legitimate representation of a humanity made of equal human beings is another central element of the CHM).

293 Wolfrum, see note 276, 327.

294 Pureza, see note 264, 279.

295 Navarro Batista, see note 279, 137-138 (stating that “[t]he Agreement has suppressed the lata conception of the Convention, which implied the contribution of industrialized states to the effective participation of developing countries in the development of activities in the Area. The Community of 1994 does not seek any more to alter the structures defining in general terms the division of labor in the International Society; it does not constitute any more a changing instrument of economic international relations. The Community of 1994 interprets the concept of benefit in the framework of a Society led by market principles and, therefore, reduces this term to strictly financial benefits” so that the CHM “certainly conveys development aid, in a narrow sense, as it only consists of apportion of money sums”).
treatment aspect of the CHM principle was overemphasized in the Convention to the detriment of the idea of simple compensation.296

3) The obligation to explore and exploit the Area for peaceful purposes only (article 141). This peaceful use obligation can be interpreted either as requiring merely a non aggressive use or alternatively as a broad ban of any kind of military use, the latter being closer to the spirit of the CHM concept.297 According to article 301 UNCLOS the first interpretation, however, has prevailed as Western powers wanted the Convention to allow those military activities compatible with the UN Charter. Nevertheless, the addition introduced by article 141 consists of the complete exclusion of any possible claim of sovereignty or appropriation based on the military activities carried out by states in the Area.298

4) The duty to protect and conserve the natural resources and the marine environment (article 145). According to this principle, UNCLOS provides for an obligation of rational management of the Area’s resources (article 150 (1)(b)). In that regard, the Authority is required to adopt appropriate rules, regulations and procedures. The CHM concept is therefore closely related to the concept of sustainable development, specifically provided for oceans and seas in Chapter 17 of Agenda 21,299 and implies some kind of intergenerational equity,300 also incorporated in Principle 3 of the Rio Declaration.301 The precautionary principle has

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296 Wolfrum, see note 276, 332.
297 T. Treves, La notion d’utilisation des espaces marins à des fins pacifiques dans le nouveau droit de la mer, A.F.D.I. 26 (1980), 687 et seq. (692-694) (pointing out that the latter interpretation would lead to the prohibition of all military activities, even those compatible with the U.N. Charter; however, the Convention leaves the question open).
298 Pureza, see note 264, 277-278.
also been incorporated by Regulation 31 (2) of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area adopted by the Authority.\footnote{International Seabed Authority, Decision of the Assembly Relating to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (Annex), Assembly, Sixth Sess., 19, Doc. ISBA/6/A/18 (2000); e.g. D. Freestone/ E. Hey, \textit{The Precautionary Principle and International Law: The Challenge of Implementation}, 1996.}

On the \textit{institutional} side, the CHM regime calls for common governance and management of the Area by an international Authority (article 157).\footnote{Paolillo, see note 280, 171 (stating that “the common heritage of mankind implies the joint administration and management of the Area which can only be done through an international body [...] The internationalization of the Area and its resources implies therefore the institutionalization of the law applicable to them [as] was foreseen and acknowledge in the Declaration of Principles”); E. Mann Borgese, “The International Seabed Authority as Prototype for Future International Resource Management Institutions”, in: R.J. Dupuy (ed.), \textit{The New International Economic Order, Commercial Technological and Cultural Aspects. Workshop, The Hague}, 1980, 59 et seq. (59) (asserting that, “in the context of an NIEO, there must be some degree of international resource planning and management”); but see Wolfrum, see note 276, 317 (underscoring that the establishment of an international organization is not a necessary consequence of the CHM principle).} The international regime applicable to the Seabed was devised taking into account a narrow relationship between its normative and institutional facets.\footnote{A. Giardina, “L’ International Sea-Bed Authority: verso un nuovo esperimento di organizzazione internazionale”, \textit{Riv. Dir. Int.} 59 (1976), 247 et seq. (248).} The establishment of the Seabed Authority therefore was seen as the vehicle to equal participation by all (“on behalf of mankind”) as stated in article 153.\footnote{Pureza, see note 264, 280.} For this reason, the institutional framework set up by the Convention is based on the universality\footnote{Paolillo, see note 280, 184 (asserting that “the effectiveness of the Authority will depend, therefore, on the broadest possible participation of states and other entities which form part of the international community [...] For this reason, the Authority has been conceived as an intergovernmental organization with a universal vocation, open to participation not only by states but also by entities other than states that represent peoples”).} and supra-nationality principles and is oriented towards the car-
rying out of the activities directly by the Authority.\textsuperscript{307} In other words, the central role of the Authority\textsuperscript{308} within the system made it the warrantor of the International Community’s public interest.\textsuperscript{309} Although the trustee of mankind’s interests, however, the Authority had to give special consideration to developing countries in order to reduce the inequality between states with respect to their capability to take part in the exploitation activities of the Seabed.\textsuperscript{310}

Besides the administration of the Area and its resources through the Enterprise as the operative organ,\textsuperscript{311} the Authority was moreover endowed with another function, that is, the representation of mankind.\textsuperscript{312} Although mankind is not a subject of International Law even within UNCLOS,\textsuperscript{313} and has no real juridical dimension,\textsuperscript{314} it has been vested with economic rights (article 137 (2)) whose exercise was attributed to the Authority as its representative in all matters concerning the protection and implementation of those rights. Nevertheless, with respect to

\textsuperscript{307} Pureza, see note 264, 284.

\textsuperscript{308} T. Treves, “Continuité et innovation dans les modèles de gestion des ressources minérales des fonds marins internationaux”, in: R.J. Dupuy (ed.), \textit{The Management of Humanity’s Resources: The Law of the Sea}, 1981, 63 et seq. (71) (underscoring that the management scheme of UNCLOS has reversed the respective roles of states and international organizations because “the management of the system belongs to the organization whereas the function of states appears as subordinated and instrumental”).


\textsuperscript{310} Paolillo, see note 280, 181 (affirming that “the establishment of the Authority reflects the recognition that solutions to political and economic problems arising from inequalities and underdevelopment are the responsibility of the international community as a whole”).

\textsuperscript{311} E.H. Paolillo, “Institutional Arrangements”, in: R.J. Dupuy/ D. Vignes (eds), \textit{A Handbook on the New Law of the Sea}, 1991, 689 et seq. (759) (stating that the Enterprise is “by far the most interesting institutional innovation introduced by the Convention [as] the first international commercial organization”).

\textsuperscript{312} Paolillo, see note 280, 182 (referring to the Authority as “the incarnation of mankind or, in more technical language, as its juridical expression”).

\textsuperscript{313} Wolfrum, see note 276, 319 (stating that “the participants with respect to the utilization of the common heritage are states and not ‘mankind’ as an independent subject of international law”).

\textsuperscript{314} Paolillo, see 280, 184 (underscoring that “mankind is a collective entity, lacking true juridical dimension; it is a social, not a legal reality”).
the institutional dimension the CHM legal regime has also been wa-
tered down to a large extent through the 1994 Agreement.315

As mentioned, taking together both aspects, normative and institu-
tional, there has been an amendment316 that modifies UNCLOS ac-
commodating the objections of the U.S. and other industrial states to
Part XI.317 This amendment has been termed as a clear regression in the
CHM legal regime applicable to the Seabed Area.318 On the one hand, the
world economic and political context has changed dramatically so
that planned economy and public enterprise are not supported any
more.319 On the other hand, developed countries have tried successfully
to recover the CHM concept.320 The end result has brought about a
minimization of the CHM legal regime established by UNCLOS321 and
the dismissal of the solidarity philosophy that underlied it according to
the NIEO.322

315 Navarro Batista, see 279, 129 (concluding that “the Convention imposed
legal equality, the condition of one state-one vote in the name of a sort of
‘democracy’ in the international field. The 1994 Agreement however im-
posed the effectiveness principle. It takes into account the inequalities of
the International Society, the technological and financial disparities, and
translates them into the institutional model. Perpetuation against change,
effectiveness against ‘democracy’”).

316 J.P. Levy, “Les bons offices du Secrétaire Général des Nations Unies en fa-
veur de l’universalité de la Convention sur le droit de la mer”, RGDIP 98
(1994), 871 et seq. (890) (stating that the 1994 Agreement is without ques-
tion, and regardless of its heading, an Amendment Protocol); T. Treves,
“L’entrée en vigueur de la Convention des Nations Unies sur le droit de la
mer et les conditions de son universalisme”, A.F.D.I. 39 (1993), 850 et seq.
(862).

687 et seq. (695); D. Vignes, “La Convention sur le droit de la mer répond-

318 J.A. Pastor Ridruejo, “Le droit international à la veille du vingtième
siècle: normes, faits et valeurs. Cours général de droit international public”,
RdC 274 (1998), 9 et seq. (264).

319 Levy, see note 316, 875.

320 M.A. Bekkouche, “La récupération du concept de patrimoine commun de
l’humanité par les pays industriels”, RBDI 23 (1987), 124 et seq.

321 Pureza, see note 264, 301.

322 I. Forcada Varona, “La evolución de los principios jurídicos que rigen la
explotación de los recursos económicos de los fondos marinos y del alta
and 105).
The CHM has also played an important role in the Outer Space legal regime. The *res communis* regime purported by developed countries was contested by developing countries as soon as exploitation of this space became evident. Alternatively the latter insisted on the CHM principle which, suggested in the 1963 Declaration\[323\] and the 1967 Treaty,\[324\] was eventually taken as a key part of the 1979 Moon Treaty.\[325\] Indeed, General Assembly Resolution 34/68 of 5 December 1979 was, surprisingly, approved by consensus despite the existing divergences\[326\] and the Moon Treaty introduced an important change in the traditional rules of International Law concerning resources from Outer Space.\[327\] Therefore, roughly speaking, we find in the Outer Space regime the same features already mentioned regarding Part XI of UNCLOS,\[328\] specifically: prohibition of occupation or appropriation (article 11 (2) of the Moon Treaty);\[329\] utilization of the moon and its resources for the benefit of mankind (arts 4 and 11);\[330\] peaceful use (article 3)\[331\] and protection of the environment (article 7); and common


\[327\] S.M. Williams, “The Law of Outer Space and Natural Resources”, *ICLQ* 36 (1987), 142 et seq. (146-148) (asserting that the CHM provision of the Moon Treaty extends the non appropriation rule to the fruits and natural resources of the moon and other celestial bodies).

\[328\] Wolfrum, see note 276, 333-334.

\[329\] But see Roth, see note 326, 169 (noting that this prohibition only applies to resources *in situ*, not to resources already extracted by way of scientific research activities).

\[330\] But see Christol, see note 325, 478 (endorsing the interpretation of Western countries that this “cannot be treated as a device to eliminate the profits earned through the taking of risks under the free-enterprise system”).

\[331\] N.L. Griffin, “Americans and the Moon Treaty”, *Journal of Air Law and Commerce* 46 (1981), 729 et seq. (737) (stressing that this feature of the CHM has been reinforced through article 3 of the Moon Treaty).
administration through the setting up of institutional machinery (article 11 (5)). The question arises whether or not the Moon Treaty imposes a moratorium until the establishment of the foreseen international regime. Although there is not a clear-cut answer, the indefinite legal situation has to date prevented commercial exploitation.

The most specific facets of the CHM regime applicable to Outer Space, namely, the common management through an international regime and the equitable sharing are only generally stated and therefore it is difficult to ascertain what the precise conventional obligations for States Parties are. The real problem however rests on the willingness of the space powers to accept the CHM provision.

**cc. CHM as a Concept**

The CHM concept was launched in the 1960’s and used to symbolize a new conception of the function of International Law. The emphasis was put on a new kind of international relations based on active cooperation among states rather than on mutual national interest and self-restraint. Moreover, the CHM concept emerged as a major legal feature of the NIEO and so as an essential economic goal. International Law could therefore be used, not only as the instrument to regulate and control social order in the international community through conciliation processes on the basis of reciprocity. It could also serve to carry out dis-

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332 But see Roth, see note 326, 150 (underscoring the fact that the commitment to establish an international regime is no more than a *pactum de nego-tiando*).
333 Hoffstadt, see note 255, 620-621.
334 S. Ervin, “Law in a Vacuum: The Common Heritage Doctrine in Outer Space Law”, *Boston College International and Comparative Law Review* 7 (1984), 403 et seq. (422); Griffin, see note 331, 731 (noting that the U.S. was an active participant in the Moon Treaty but did not finally sign due to strong opposition from domestic interest groups); also B. Leger, “La Lune: patrimoine commun de l’Humanité”, *CYIL* 18 (1979), 280 et seq. (290).
335 Treves, see note 308, 70; Pureza, see note 264, 343.
336 P.M. Dupuy, “Humanité, communauté, et efficacité du droit, Humanité et Droit International”, in: *Humanité et Droit International. Mélanges Rene-Jean Dupuy*, 1991, 133 et seq. (136) (stating that the emergence of mankind in the field of international law reinforces the tendency towards the extension of those norms whose application is not subject to the reciprocity condition).
tributive functions.\footnote{Paolillo, see note 280, 149.} In other words, the UNCLOS and the CHM concept were to be understood, not only as one of the farthest-reaching steps for the progressive development of International Law,\footnote{F. Zegers Santa Cruz, “Deep Sea-bed Mining Beyond National Jurisdiction in the 1982 UN Convention on the Law of the Sea: Description and Prospects”, \textit{GYIL} 31 (1988), 107 et seq. (108).} but also for the progressive social development.\footnote{P. Allot, “Mare Nostrum: A New International Law of the Sea”, \textit{AJIL} 86 (1992), 764 et seq. (785).}

From a conceptual point of view, the CHM has two aspects.\footnote{R.J. Dupuy, “La notion de patrimoine commun de l’humanité appliquée aux fonds marins”, in: \textit{Droit et Libertés a la Fin du XXe Siècle, Influence des Donnes Economiques et Technologiques. Etudes Offertes a Claude-Albert Collard}, 1984, 197 et seq. (199).} First, it has a trans-spatial dimension. It regroups all current peoples and has a universalistic and egalitarian function; in other words, on the one hand it entails collective property and non discrimination and, on the other hand, it promotes integration and common management. Secondly, the CHM concept has a trans-temporal dimension. It compels present generations to take into account the interests and needs of future generations so that the former are only the managers and responsible \textit{vis à vis} the latter. In this regard, the CHM concept flowing from this new International Law is ultimately opposed to the sovereignty principle\footnote{Wolfrum, see note 256, 68 (stating that this principle “conflicts with the principle of sovereignty as it raises the ideas of international public utility and the obligation to cooperate”).} as framed by liberal International Law.

The CHM concept, as embodied in UNCLOS is one of the most advanced frameworks ever articulated with the aim of achieving the equitable sharing of resources among states and peoples.\footnote{Paolillo, see note 280, 149.} Nevertheless, from a doctrinal point of view, the \textit{de facto} equal participation and preferential treatment elements of a regime applicable to the Seabed Area are entrenched in a different background, that is, whereas the former is based on the CHM concept, the latter is founded in the development aid thinking.\footnote{Wolfrum, see note 276, 323.} The 1994 Agreement, however, has downgraded or even removed most important aspects of these two elements so that the customary CHM concept may have experienced a modification by way of
conventional law. The current CHM concept has therefore lost much of its economic dimension.

The CHM concept has recently experienced a process of expansion in its sphere of application as well. As an equitable and rational system to manage economic resources, it has been proposed to regulate post-material global commons often located within national jurisdictions. First, it has been invoked in the field of culture. Although there are traces in article 1 (a) of the 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict, the obligation towards the protection afforded to the cultural heritage of mankind is incorporated in general International Law as of the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage. Within the framework established by the 1972 Convention, UNESCO on behalf of the international community will cooperate with the national state in order to protect that cultural heritage. Institutional and financial mechanisms are articulated to that end. The 1972 Convention therefore does not have the effect of superseding national sovereignty over cultural goods located within the jurisdiction of the respective state. According to the Convention, however, the national state is not only the first competent to protect, but also the first obliged to do so, which means that state sovereignty is limited by the interest of the international community. Under this approach, the state is not the owner of the cultural heritage but the trustee of mankind, an idea most welcomed by industrialized countries.

344 Pureza, see note 264, 343.
345 UNTS Vol. 249 No. 3511.
346 UNTS Vol. 1037 No. 15511.
347 A. Monden/ G. Wils, “Art Objects as Common Heritage of Mankind”, RBDI 19 (1986), 327 et seq. (336) (stating also that “cultural heritage of mankind is qualitatively different from the mere sum of national heritages, and is more consistent with common heritage of mankind as applied to the deep seabed, the celestial bodies and the environment”); but see A. Strati, “Deep Seabed Cultural Property and the Common Heritage of Mankind”, ICLQ 40 (1991), 859 et seq. (862).
348 Monden/ Wils, see note 347, 336.
349 Baslar, see note 257, 296 (noting that “[i]ronically […] the Common Heritage of Mankind language was largely welcomed by the prosperous, art importing nations which argued that artifacts representing universal human culture should be located where they will be best cared for”).
Second, the CHM concept has also been retained in the field of natural resources (natural heritage) and the environment under a very similar approach. The growing damage caused to the natural environment has created the need for international action. “The greening of International Law” conveys the idea of the special responsibility this discipline has in meeting that need. The concept of CHM arises then as a useful tool to create international obligations and the machinery for the protection of the environment. Concerning the exploitation of natural resources, the term “common interest” and the preservation of the environment for future generations have been incorporated in international texts such as the Whaling Convention, the 1952 Tokyo Convention, the 1968 African Convention, the 1979 Bonn Convention, the Natural Habitats Convention, and the World Charter for Nature. In this field, however, the concept of “common concern of mankind” has been preferred to the CHM, as expressed by General Assembly Resolutions. Other international agreements that incorporate the concept of common concern of mankind are the Climate

350 Paquerot, see note 289, 15 (limiting the concept of CHM to those natural resources so vital as the air, water, the sun and biological diversity).
358 Convention on the Conservation of European Wildlife and Natural Habitats, 19 September 1979, 104 E.T.S.
Change Convention and the 1992 Convention on Biological Diversity. There are slight differences that distinguish this concept of the common concern of mankind from the CHM concept already examined: a) it focuses on global problems for the international community as a whole, but from a public order point of view and far from any appropriation’s approach; b) environmental protection implies, not only states, but all societies and communities from within these societies; c) the equitable sharing element refers to responsibilities. There is however controversy regarding the legal status of the common concern of mankind concept.

In this context, international regulation is not intended for resources located beyond national jurisdiction, but on the contrary they are situated within state territories. On the other hand, as already mentioned, there is no equitable sharing (trans-spatial element) of benefits flowing from the exploitation of natural resources. The CHM concept therefore needs to be reassessed when applied to global natural resources and the environment. Mankind here is designated, not as the recipient of a natural good to be exploited, but as the holder of a trans-temporal credit towards the international community, thus including future generations. The egalitarian element therefore translates into the “equitable sharing of burdens”, which means there should be more obligations for industrialized countries according to their historic contribution to pollution.

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365 Baslar, see note 257, 292-293 (recalling that traditional state sovereignty persistently works against any CHM applied to resources located within national territory).
366 Paquerot, see note 289, 126.
368 K. Ramakrishna, “North-South Issues, the Heritage of Mankind and Global Environmental Change”, in: I.H. Rowlands/ M. Green (eds),
responsibilities has been incorporated in Principle 7 of the Rio Declaration\textsuperscript{369} and other environmental Agreements\textsuperscript{370}.

In this framework, the common concern of mankind does not spawn the need of strong institutional machinery.\textsuperscript{371} The dichotomy between collective interest of the international community and subjective interest of individual states fades away.\textsuperscript{372} Every state is at the same time the beneficiary of environmental protection and the obliged as trustee of the interests and needs of the international community.\textsuperscript{373}

d. CHM and the Internet

Even if there are pessimistic views on the actual possibilities of the CHM in current International Law,\textsuperscript{374} it would be good for Internet governance to further at least some of the elements of the CHM. This is not a proposal based on natural-law-type norms,\textsuperscript{375} but a de lege fer-

\textit{Global Environmental Change and International Relations,} 1992, 145 et seq. (161).

\textsuperscript{369} The Rio Declaration on Environment and Development, see note 301, 877.

\textsuperscript{370} Article 4 of the Framework Convention on Climate Change, see note 361, 855; article 20 of the Convention on Biological Diversity, see note 362, 830.

\textsuperscript{371} But see Paquier, see note 289, 117 and 227-228 (arguing that the concept of common concern of mankind, because it does not entail an institutional machinery, does not help to alter the established international order; as it does not have a supranational perspective, it does not offer the utensils needed to set in motion the common interest; for these reasons, it is a retreat from the point of view of the CHM concept).

\textsuperscript{372} Pureza, see note 264, 374.


\textsuperscript{375} But see Baslar, see 257, 8 (stating that the CHM “is a moral philosophical idea acquiring its existence and legal normativity from, above all, natural law rather than state consent and auto-limitation [which] marks the end of positivist Westphalian international law”).
enda proposal which needs to be confirmed by state consent in the form of international treaties or otherwise.

There is clearly a failure in the way the CHM was conceived in the 1960’s and 1970’s. The use and exploitation of common resources like the Seabed, Outer Space and (perhaps) Antarctica need important economic investments that can only be brought about by private companies. A free market approach combined with a regulatory umbrella may then be a sound solution for the current impasse\(^{376}\) with the UN playing a central role.\(^{377}\) The Internet does not need such a push towards a market-oriented approach, because it is already a private-led field. On the contrary, it may be useful to have recourse to some of the traditional CHM elements to try to develop an international regime for the common governance of the Internet’s core resources. For this purpose, we consider that the CHM is a functional rather than a territorial concept\(^{378}\) so that it is theoretically possible to extend it to this particular field. Support for this interpretation may also be found in the 1984 Declaration of Buenos Aires on Transborder Data Flow, where Latin American countries considered informatics as “Mankind’s Heritage.”\(^{379}\)

First, the “non-appropriation” principle may not be the most crucial element to be applied to the CHM proposal for the Internet if we consider the decentralized nature of cyberspace. The Internet is nowhere and everywhere, so it may be said that no state has command and control of the Internet. However, we have already seen that the Internet’s main infrastructure is run according to U.S. – established parameters, where the private enterprise leads and ultimately the U.S. government can exercise authority over the Internet’s technical body called ICANN (thereby controlling the domain name system, the root server system, and the establishment of Internet protocols and standards).

Even if this wasn’t true, there would be every reason to try to set up a coordinated system for “international Internet governance.”\(^{380}\) The Declaration of Principles of the World Summit on the Information So-

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377 Rana, see note 236, 234.
378 Baslar, see note 257, 91.
379 Transnational Data Reporting Service, Transnational Data Report, 1985, 265.
380 Declaration of Principles of the World Summit on the Information Society, see note 1, 7, para. 50.
ciety has just called for an “[e]nabling environment” (Principle No. 6) where “[t]he international management of the Internet should be multi-lateral, transparent and democratic, with the full involvement of governments, the private sector, civil society and international organizations.”381 The Working Group on Internet Governance (WGIG) set up by the Secretary-General of the UN according to the aforementioned Declaration of Principles has recently handed out its first report in which it defines Internet governance as “the development and application by Governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programs that shape the evolution and use of the Internet.”382 This group makes it clear that Internet governance not only includes Internet names and addresses, as dealt with by ICANN, but also includes other important policy issues, such as “critical Internet resources.”383 This report also identifies, as the first group of public policy issues relevant to internet governance, those “relating to the infrastructure and the management of critical Internet resources, including the administration of the domain name system and Internet protocols and addresses (IP addresses), administration of the root server system, [and] technical standards”, among the most critical.384 In this regard, the Tunis Agenda for the Information Society has recently built on the idea expressed in the Geneva Phase that policy authority for Internet-related public policy issues is the sovereign right of all states and has therefore called for the “requisite legitimacy” of Internet governance, “based on the full participation of all stakeholders, from both developed and developing countries”.385 The link between legitimate Internet governance and participation of all states in the management of critical

381 Ibid., 6, para. 48.
383 Ibid., 3, para. 12.
384 Ibid., 4, paras 13 (a) and 15, (stating, with respect to the administration of the root zone files and system, that there is at present a unilateral control by the United States Government).
Internet resources has then been emphasized in very explicit terms in the Tunis Phase of the World Summit on the Information Society.

In the Internet field, therefore, there are vital resources that should be considered, not the property or the invention of a given state (even if it is so for historical reasons), but the common heritage or common concern of mankind. Even if the U.S. does not presently want to give up its current control over these critical Internet resources, as demonstrated in the Tunis Phase of the World Summit, it has nevertheless agreed to discuss the issue of sharing them within the framework of the new Internet Governance Forum and in the long run it may agree to declare the Internet as a CHM resource. Ultimately, the non-appropriation principle does not necessarily have to apply to every CHM resource, as is evident in the cultural and environmental fields, for the concept to be useful and applicable. Declaring Internet’s core resources as a common resource would have the advantage of involving the whole international community in its governance.

Second, it follows from the above explanation that the CHM element relative to “common management” is fully applicable to the CHM proposal for the Internet. A centralized, democratically structured international regime is needed in order to achieve a legitimate representa-


387 Tunis Agenda for the Information Society, see note 385, 11, para. 72 (mandating the UN Secretary-General to set up a body called the Internet Governance Forum to discuss, inter alia, issues relating to critical Internet resources).

388 Kiss, see note 240, 231 (distinguishing between CHM by “nature” and CHM by “affectation”, as in the case of cultural goods, the second case implying that the CHM concept applies even if the actual good is under a given state sovereignty).

389 Baslar, see note 257, 279 and 287 (admitting that, where environmental resources like global commons are located in the territory of one state, this state would be under an obligation of custody, as a trustee, in which case the non-appropriation principle does not apply and so it would be better to talk about the Common Concern of Mankind as an alternative concept).
tion of mankind. The only question would be how to articulate this common management, and what would be the appropriate body or forum, existing or to be construed, for this coordinated governance. The WGIG has proposed four different models, ranging from the creation of a strong international body called Global Internet Council with widespread competences which would take over the functions currently performed by the Department of Commerce of the U.S. Government, to the simple enhancement of the ICANN’s Governmental Advisory Committee. Although the concrete model to be chosen has to be discussed within the Internet Governance Forum, in any case, the WGIG recommends that any such body or forum should be linked to the UN and that no single government should have a pre-eminent role.

The common management of the Internet’s main infrastructure under the umbrella of the UN should be not more problematic than the management of other technical issues by organisms like the ITU (which manages the radio frequency spectrum and orbits used by satellites) or the International Standards Organization (ISO), although the latter is a non-treaty organization. In other words, the common management of the Internet’s core resources is not a technical, but a political question, which requires a political decision.

The third element, the “benefits sharing” element of the CHM proposal for the Internet may have two interpretations. On the one hand, it could be understood as a principle requiring Internet’s common management for the benefit of all mankind. In this regard, it would not add much to the second principle already mentioned. From the point of view of its lighter version, the common concern of mankind, it would mean no more than common management without international institutions. On the other hand, it may be related to the same problem already addressed by the CHM concept that arose in the field of the Law of the Sea and Outer Space Law, that is, development or access to resources by developing countries. In other words, the CHM was devised as an attempt to provide for distributive justice within the utilization re-

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390 Report from the Working Group on Internet Governance, see note 382, 12-14.
391 Ibid., 10, para. 48.
gimes created in those fields, certainly in UNCLOS.\textsuperscript{393} In the Internet field, however, there are no physical resources to be exploited (i.e. minerals), but the benefits from the digital revolution flow from the very existence of an enabling infrastructure and connectivity capacity, which are lacking in many developing countries. In this regard, the CHM applied to the Internet is more related to the concept as retained in the environmental sphere.\textsuperscript{394} The World Summit on the Information Society has therefore taken up the “commitment to build a people-centred, inclusive and development-oriented Information Society.”\textsuperscript{395} In other words, “the benefits of the information technology revolution are today unevenly distributed between the developed and developing countries,” and so the objective becomes “turning this digital divide into a digital opportunity for all.”\textsuperscript{396} In this vein, Principle No. 11 of the Declaration of Principles, named “International and Regional Cooperation,” calls for a commitment to the “Digital Solidarity Agenda” set forth in the Plan of Action and to the goals contained in the Millennium Declaration.\textsuperscript{397} This principle of action, however, has not led to the establishment of a transfer mechanism for the benefit of developing countries, except for a voluntary instrument called Digital Solidarity Fund. Such a mechanism could hardly be construed as a legal obligation arising from the CHM concept as well since this equitable sharing element has been discarded at least in the field of the Law of the Sea. Accordingly, our CHM proposal for the Internet will be limited to the common management of Internet’s main resources for the benefit of all humankind and therefore would not entail the establishment of a mechanism to redistribute the benefits flowing from the digital revolution at large.

The fourth element relative to the “peaceful use” of the CHM also makes sense in the Internet context.\textsuperscript{398} Information and telecommunication technologies and Internet infrastructure should serve to promote

\begin{itemize}
\item \textsuperscript{393} Wolfrum, see note 256, 68 (asserting that the equal distribution of seabed resources can be attributed to two different approaches, based on the idea of preferences or the idea of compensation).
\item \textsuperscript{394} Kiss/Shelton, see note 353, 21 (asserting that the equitable allocation of revenue is not the essential feature of the concept).
\item \textsuperscript{395} Declaration of Principles of the World Summit on the Information Society, see note 1, 1, para. 1.
\item \textsuperscript{396} Ibid., 2, para. 10.
\item \textsuperscript{397} Ibid., 8, para. 61.
\item \textsuperscript{398} But see Baslar, see note 257, 106 (asserting that this CHM element is applicable only if a territorial, instead of functional, concept of the CHM is sustained).
\end{itemize}
knowledge, information and communication, education and political participation. These technologies are also “effective tools to promote peace, security and stability, to enhance democracy, social cohesion, good governance and the rule of law.”

Governments should therefore cooperate in order to avoid any kind of warfare using critical Internet resources as a possible “battlefield”, and they should also cooperate to prevent criminal and terrorist uses of these resources.

The final element, regarding the “preservation” of the CHM resources may not be applicable to a CHM proposal for the Internet, because the resources are not exhaustible in the same sense they are with the Seabed, Outer Space, Antarctica or environmental resources. It may apply only if we consider the Internet basic network as a precious infrastructure that has to be preserved from other dangers, such as attacks or purported blackouts through viruses, but again those are not related to the exhaustion of a given resource.

As we have seen, most of the elements of the CHM concept, as currently interpreted, apply reasonably well to the Internet’s core resources. The Internet is a global resource that should not be appropriated by any single state, should be subject to a common management system, be managed for the benefit of all mankind (paying due regard to developing countries’ needs as a principle of action), and be used for peaceful purposes only. Nevertheless, the concept of the CHM has not even been mentioned to date by writers or representatives at the World Summit on the Information Society. Perhaps this concept still evokes the socialist type of claims presented by Pardo, so that it would be better not to use it while trying to negotiate with the U.S. to give up its control over the Internet’s main infrastructure. Maybe it would be better to talk about the CHM in relation to the Internet once an international Internet governance regime designed along the lines of the CHM concept is already in place.

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399 Tunis Commitment, World Summit on the Information Society, see note 2, 3, para. 15.
400 See under Section IV. 1.
401 Declaration of Principles of the World Summit on the Information Society, see note 1, 5, para. 36 (stating Principle No. 5 on “building confidence and security in the use of ICTs”).
402 But see under Section IV. 3. c.
3. Access to the Internet as a Human Right

a. Introduction

Freedom of expression plays an important role in the political and legal analysis of the Internet.403 Indeed, “the Internet has been conceptualized as a forum for free expression with near limitless potential for individuals to express themselves and to access the expression of others.”404 Even if this is an overstatement, scholars vividly debate the best way to establish conditions allowing each citizen to exercise meaningfully his or her right to freedom of expression.405 Against the Net libertarian school, which contends that it is the privatization of speech forums that best advances the free speech values on the Internet,406 the school defending an affirmative conception of the First Amendment requires the government’s involvement in the market for free speech in order to incorporate certain collective values.407 This latter conception of the First Amendment finds judicial expression in the development of the “public forum doctrine.” Under this doctrine, U.S. courts impose on the government the affirmative obligation to make public facilities available for persons wanting to exercise their free speech rights.408 Nevertheless, the failure to act on the part of the courts or the legislature has led to a situation in which the Internet has become transformed by privatization into a group of privately-owned and privately-regulated places, where scrutiny under the First Amendment is absent.409 Increasingly, the ability to produce speech is only open to large scale producers of

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403 Declaration of Principles of the World Summit on the Information Society, see note 1, 1, para. 4 (recalling article 19 of the Universal Declaration of Human Rights and stating that communication is a fundamental social process).
405 Ibid., 1144.
409 Nunziato, see note 404, 1151 (arguing that this situation is also due to the U.S. Supreme Court decision holding that Internet access provided by public libraries does not constitute a public forum).
content who are also owners of the physical network,\footnote{D. Colby, “Conceptualizing the ‘Digital Divide’: Closing the ‘Gap’ by Creating a Postmodern Network that Distributes the Productive Power of Speech”, \textit{Communication Law and Policy} 6 (2001), 123 et seq. (123) (stating that the end-user is increasingly less capable of creating content to “push” onto the network).} which undermines the very idea of a free market of ideas and meaningful freedom of expression.\footnote{Cf. C. Sunstein, \textit{Republic.com}, 2001, 153.}

As is well known, freedom of expression is internationally protected by the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights (ICCPR); and the International Covenant on Economic, Social and Cultural Rights (ICESCR).\footnote{Universal Declaration of Human Rights, A/RES/217 A (III) of 10 December 1948; International Covenant on Civil and Political Rights, 16 December 1966, UNTS Vol. 999 No. 14668; International Covenant on Economic, Social and Cultural Rights, 16 December 1966, UNTS Vol. 993 No. 14531.} Specifically, article 19 (1) and (2) of the ICCPR guarantees an individual the right to hold opinions and a right to freedom of expression without interference. On the other hand, arts 19 (3) (a), (b) and 20 of the ICCPR provide for exceptions to freedom of expression.\footnote{See the discussion under Section III. 1 on harmful content.} Of course, the Internet is not any different from the real world in this regard either, and since very un-democratic governments “seek to control the content of information to which their citizens are exposed or are imparting over the Internet, individuals around the world are experiencing human rights violations.”\footnote{A.L. Collins, “Caging the Bird Does not Cage the Song: How the International Covenant on Civil and Political Rights Fails to Protect Free Expression over the Internet”, \textit{John Marshall Journal of Computer & Information Law} 21 (2003), 371 et seq. (388).} This should be, then, a primary issue of concern for international lawyers, and the existing international mechanisms for the protection and enforcement of freedom of expression should be fully applied and exhausted in the Internet field to the same extent.

There is, however, a second question we would like to focus on, i.e., access to the Internet as a human right. For a start, in order to enjoy meaningful freedom of expression, connectivity to the Internet network becomes a prerequisite. As stated by Principle No. 2 of the Declaration of Principles of the World Summit on the Information Society, “connectivity is a central enabling agent in building the Information Soci-
ety.415 Telecommunications and the Internet therefore have the potential to ensure, not only the right to inform and the right to communicate, but also to ensure the economic, educational and social parity necessary to attain equality for each member of society.416 Countries that do not provide access for their citizens to telecommunications services will generate a world were citizens are denied many benefits of basic and advanced communications, including healthcare, education and economic opportunities, and the increased ability to participate in the political process.417 The fact is that to date not everyone has the ability to seek, receive, and impart information and ideas through the Internet, and as a result, an important segment of the world population misses out on the political, economic, and social opportunities offered by the digital revolution.418 In short, what we have today is the actualization of information “haves” and “have-nots,” in other words, a “digital divide.”419 The digital divide is found both first at the domestic level420 and second at the international level.421

415 Declaration of Principles of the World Summit on the Information Society, see note 1, 3, para. 21.
b. Human Rights and the First Digital Divide

Is there something close to a right to be online? Is there a right to Internet access or even a right to communicate? Are these the proper subjects for human rights law?

From the point of view of International Law, the question arises whether access to the Internet, universal access, as an issue related to connectivity rather than freedom of expression, can then be articulated as a human right, as a right every human being has against the state. In this regard, out of the economic, social, and cultural rights established in the ICESCR cultural rights initially seem to more adequately incorporate the right to Internet access. Under article 15 of the ICESCR, cultural rights contain the following rights: the right to take part in cultural life; the right to enjoy the benefits of scientific progress and its applications; the right to benefit from the protection of the moral and the material interests resulting from any scientific, literary or artistic production of which the beneficiary is the author; and according to paragraph 3 states parties undertake to respect the freedom indispensable for scientific research and creative activity. Alternatively, this right of access may form part of the right to education, protected by arts 13 and 14.

If we turn to the practice of states, developed countries, such as the U.S and countries of the EU, have adopted and implemented legal regimes incorporating universal service obligations in an effort to achieve the goal of increased access to the Internet and telecommunications services in general. The concept of universal service is commonly attributed to Theodore Vail, president of AT&T, who used it in 1907 and generally refers to a public policy initiative designed to provide widespread access to telecommunications services. The deregulation proc-


424 Worthy, see note 416, 54 (arguing that the 1996 Telecommunications Act retains a functional, and therefore evolving, concept of universal service, which may include access to the Internet, that has not been taken up by the FCC yet). The EU has also adopted a functional notion of the universal service concept, see Directive 2002/22/EC of the European Parliament and
ess that affected monopolies in telecommunications services in the 1990’s, like those implemented through the Telecommunications Act of 1996 in the U.S. and the EU Directives on market liberalization, was accompanied by the enactment of universal service obligations.

In short, the universal service program provides subsidies to high-cost regions to ensure affordable telecommunications services in these areas. The universal service system has been criticized on several fronts, but even if it has to be modified, it seems clear that the universal service concept has socio-economic justifications and ultimately “is principally about politics”, which therefore makes it highly unlikely that it can simply be retired. It is said that the universal service concept should embrace not only the provisioning of network access, but also of personal computers to low-income families, just as telephone sets were traditionally provided as part of basic telephone service.

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426 A. Segura Serrano, El Interés General y el Comercio de Servicios, 2003, 194.

427 E.g. S. Buck, “TELRIC vs. Universal Service: A Takings Violation?”, Federal Communications Law Journal 56 (2003-2004), 1 et seq. (3) (stating that the universal service system obliges the common carrier to offer its wholesale access at cost, while it must still sell its retail services to all customers at an average price that ignores costs, which could drive the utilities to the point of insolvency); J.B. Speta, “Deregulating Telecommunications in Internet Time”, Washington & Lee Law Review 61 (2004), 1063 et seq. (arguing that the 1996 Act should have taken additional steps to create conditions of competition).

428 A.S. Hammond, IV, “Universal Service: Problems, Solutions, and Responsive Policies”, Federal Communications Law Journal 57 (2005), 187 et seq. (197) (arguing that in order to sustain the universal service a revision of the current system to provide for equitable contribution from all platforms is needed).

429 Young, see note 423, 191 and 203 (arguing that the concept of universal service relies on the idea that telecommunications services are so essential to social activity that everyone should have access to a basic level of communication facilities and services, to ensure that they are able to participate as citizens in modern society).

430 Worthy, see note 416, 55-56.
though the content of universal service is not completely clear, this regime has to some extent created some rights for individuals.\footnote{W. Sauter, “Universal Service Obligations and the Emergence of Citizens’ Rights in European Telecommunications Liberalization”, in: M. Freedland/ S. Sciarra (eds), Public Services and Citizenship in European Law, Public and Labour Law Perspectives, 1998, 117 et seq. (118).} These rights, however, do not seem to fit very well into the currently existing human rights framework.\footnote{C. Graham, “Human Rights and the Privatisation of Public Utilities and Essential Services”, in: K. De Feyter/ F. Gomez Isa (eds), Privatisation and Human Right in the Age of Globalisation, 2005, 33 et seq. (56) (noting the problems of enforcing positive obligations and enforcing these obligations against private bodies).} Even if it would be possible to include the right to Internet access among the cultural rights internationally protected, however, there is the question of the underdeveloped justifiability of these rights due to the wording of these provisions and the relatively weak international monitoring mechanism set up by the Covenant.\footnote{P. Alston, “No Right to Complain About Being Poor: The Need for an Optional Protocol to the Economic Rights Covenant”, in: A. Eide/ J. Helgesen (eds), The Future of Human Rights Protection in a Changing World, 1991, 86-88.} Despite the efforts deployed by some scholars in order to confer them a true legal value,\footnote{P. Alston/ G. Quinn, “The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights”, HRQ 9 (1987), 156 et seq. (164); G.J.H. van Hoof, “The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views”, in: P. Alston/ K. Tomasevski (eds), The Right to Food, 1984, 97 et seq.; P. Alston, “Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights”, HRQ 9 (1987), 332 et seq. (360).} there is also a pragmatic approach advanced by other authors under which those rights remain to be concretized only within a given economic and social context.\footnote{M. Dowell-Jones, Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic Deficit, 2004, 8.} So when the Secretary-General of the ITU refers to the “right to communicate”\footnote{ITU, World Telecommunication Development Conference adopts Valletta Action Plan with series of bold measures to improve access to telecommunications worldwide, Press Release 1 April 1998, 5, available at <http://www.itu.int/newsarchive/press_releases/1998/16.html>}, as functionally equivalent to the right to Internet access, it seems that he does so in political terms,
because a generally accepted public notion in International Law of such a right has not so far emerged.\footnote{Grewlich, see note 93, 84.}

c. Human Rights and the Second Digital Divide

There is another digital divide along the lines of the North-South development’s fracture. Developed countries account for more than eighty percent of the world market for information technology, while Internet penetration is very limited in sub-Saharan Africa, the Middle East, Latin America, and South Asia.\footnote{Yu, see note 418, 4.} Accordingly, the World Summit on the Information Society has called in Principle No. 11 of the Declaration of Principles for a “Digital Solidarity Agenda” which will contribute to “bridge the digital divide.”\footnote{Declaration of Principles of the World Summit on the Information Society, see note 1, 8, para. 61.} The objective of bridging the digital divide will only be achieved to the same extent that “universal, ubiquitous, equitable and affordable access” to digital technologies is realized.\footnote{Tunis Commitment, World Summit on the Information Society, see note 2, 3, para. 18.}

The right to development, interpreted in the light of today’s Internet role, could possibly be invoked in order to include a right of universal access.\footnote{Declaration of Principles of the World Summit on the Information Society, see note 1, 1, para. 3. (recalling the “right to development, as enshrined in the Vienna Declaration”).} The right to development was first recognized by the UN Commission on Human Rights in 1977 and was also explicitly adopted by the General Assembly in the 1986 Declaration on the Right to Development.\footnote{Declaration on the Right to Development, A/RES/41/128 of 4 December 1986.} It has been described as a right to solidarity among third generation rights\footnote{K. Vasak, “Pour Une Troisième Génération des Droits de L’homme”, in: C. Swinarski (ed.), Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet, 1984, 837 et seq. (840).} based on natural law,\footnote{M. Bedjaoui, “The Right to Development”, in: M. Bedjaoui (ed.), International Law: Achievements and Prospects, 1991, 1177 et seq. (1182).} and related to the NIEO.\footnote{M. Bedjaoui, “The Right to Development”, in: M. Bedjaoui (ed.), International Law: Achievements and Prospects, 1991, 1177 et seq. (1182).}
The content of this right is then “unusually open-ended and indeterminate”, which nevertheless should be considered as a strength that gives the concept the “degree of flexibility” needed in this area. The question remains, however, as to whether this right to development has achieved a sufficient degree of legal status, taking into account the important disagreement still existing with respect to the issues related to the content and the subject of this right (the individual or the collective).

Certainly, there have been some voices pointing to some kind of resources transfer in order to close the gap between the North and the South in this field. For example, within UNESCO it has been asserted that “every citizen in the world should have the right to meaningful participation in the Information Society” because “information technology is by its very nature a human right, ought to be regarded as an obvious human right, and ranks alongside the concept of human liberty itself,” calling for a “global governance” of cyberspace “that is not driven by interest.” Some scholars, however, have warned that this kind of speech may have the effect of riskily reproducing the power struggle represented by the New World Information and Communications Order (NWICO), centered along the lines of the NIEO that led to the U.S. withdrawal from UNESCO. So what are developing countries doing today? Are they claiming a kind of expanded right to development in order to ensure telecommunications and Internet access to their populations? Not at all, as they seem to embrace Western policies such as competition and deregulation, fostered in the telecommunications field by the General Agreement on Trade in Services (GATS) Fourth Protocol concerning basic telecommunications. Therefore,

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449 Specitar, see note 421, 80 and 90.
even if developing countries are pushing the Digital Solidarity Agenda to be realized within the World Summit on the Information Society, this is not a claim related to any sort of right to development.

Legal regimes based on universal service obligations, which as we have seen have been articulated in developed countries, are probably not suitable models for developing countries because those regimes build on the existence of an extensive infrastructure and are based on a funding mechanism which could not realistically be used in these countries. As a result, developing countries are implementing a less resource intensive model of increasing access to telecommunications service not surprisingly called “universal access.” Instead of aiming to provide for a telephone in each home, the goal of the universal access is to provide each citizen access to telecommunications services, without regard to geography, on an affordable basis. There are three key components in this universal access policy: a strong political support from the government; a stable regulatory regime that encourages competition in the long term; and a realistic financing plan for universal access policy. This kind of regime allows developing countries to be able to ensure that people can obtain communications services through a competitive model without having to subsidize substantial infrastructure required by the universal service system, as demonstrated by some countries like Jamaica, Senegal, Ghana and others. This is probably the concept of universal access retained by the World Summit on the Information Society.

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451 Manner, see note 417, 86.
453 Manner, see note 417, 90 and 103.
454 Declaration of Principles of the World Summit on the Information Society, see note 1, 3-4, para. 21 (“[u]niversal, ubiquitous, equitable and affordable access to ICT infrastructure and services, constitutes one of the challenges of the Information Society and should be an objective of all stakeholders involved in building it. [In order to achieve this goal] policies that create a favourable climate for stability, predictability and fair competition at all levels should be developed and implemented”); see also the Report of the Task Force on Financial Mechanisms for ICT for Development, World Summit on the Information Society, Geneva 2003-Tunis 2005, 22 December 2004, page 89, available at <http://www.itu.int/wsis/tffm/final-report.pdf> (concluding that continued promotion of a level playing field for invest-
It seems, therefore, that the right of Internet access can hardly be deemed to be incorporated into any of the already established rights protected by the International Covenants or the right to development. This means that, as supporters of a progressive agenda, we would have to encourage such a development, while waiting to see when, if ever, this ever more important access to the Internet is deemed a right by states and other international actors, using the traditional law-making avenues existing in International Law or otherwise. In the meantime, states should incorporate the World Summit principle on universal access as an essential policy consideration or principle for action.

V. Conclusions

The role of International Law in the regulation of the Internet is then twofold; and has a present and a future role.

The analysis undertaken in the third section shows that International Law plays a role as a tool for cooperation among states. However, in these three realms of content regulation, intellectual property and privacy, governance decisions affecting the Internet have already been taken by national laws and courts, the result sometimes coming closer to the U.S. approach, sometimes to the EU approach. In other words, International Law does not directly govern these issues and only serves as an instrument to settle or ease regulatory conflicts. It is Private International Law which has played an important role in Internet governance until now. However, there is every reason to try to reach the consensus necessary to keep improving cooperation and harmonization. The advantage of having more international treaties and agreements in the Internet field is that regulatory conflicts would be diminished to a large extent.

In this regard, while the protection of intellectual property is already covered by several international treaties, and therefore there is no conflict anymore (leaving aside the political issue regarding enforcement that confronts the North with the South), in the fields of content

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regulation and privacy, enhanced cooperation could prove to be most beneficial in order to put an end to existing different approaches among states. As a result, content regulation could benefit from an agreement along the lines of the EU E-commerce Directive that has set up the principles of “rule of origin” and “home country control”, thereby avoiding regulatory conflicts among EU countries. Likewise, in the area of privacy more cooperation to level the playing-field and enhance protection to individuals would also help to solve the existing caveats regarding the present Safe-Harbor Agreement.

The analysis carried out in the fourth section of the paper has focused on the future role of International Law regarding the regulation of the Internet. In the light of the existence of the Internet, we have considered some traditional International Law issues, namely, the questions of the use of force and self-defense in cyberspace; the likelihood of considering Internet’s core resources as a part of the Common Heritage of Mankind; and the prospect of regarding access to the Internet as an International Human Right. The study has tried to show that regarding those questions, as opposed to the ones addressed in the third section, it is for International Law to directly govern these issues. Therefore, International Law has not merely a role as a tool for solving regulatory conflicts, but a role as a tool for governance. It is then for Public International Law itself to take a normative stance regarding some of the problems related to the coming of the Internet. That does not amount to say that International Law has an existence independent from states’ consent. It only means that there are issues in which simple cooperation among states does not suffice and therefore they have to make decisions that introduce democracy and justice to a greater or a lesser extent.

If the question of the use of force in cyberspace can be solved using the existing legal institutions, and therefore a clarification is possible, that is not the case regarding the other two issues. The use of the Internet as a medium to launch an attack with results similar to those provoked by an armed attack can be addressed by the present International Law framework. However, when it comes to the issues of international governance of the Internet, through the acceptance of the CHM concept or otherwise, and the configuration of Internet access as a human right, Public International Law (and of course the states behind it) needs to take a normative decision.

The role adopted so far by Public International Law in the Internet area has been very modest. Together with historical reasons affecting this field of human activity, i.e. its inception and development by the
U.S., there are traditional structural reasons, like national sovereignty and consent that affect in a negative way the advancement in the afore-said areas. The benefit, however, of addressing them and adopting progressive agendas in order to solve them will prove itself with the introduction of more democracy and justice in this field.
Cologne Cathedral versus Skyscrapers – World Cultural Heritage Protection as Archetype of a Multilevel System

Diana Zacharias *

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* The author thanks Prof. Dr. Ben Boer, Matthias Goldmann, Jürgen Friedrich LL.M., Markus Rau, Dr. Alison Pennington, and, above all, Prof. Dr. Armin von Bogdandy for helpful advice.

I. Introduction

Cologne Cathedral is a massive High Gothic five-aisled basilica in the centre of Cologne, a fast-growing city in the Western German Federal State of North Rhine-Westphalia with more than one million inhabitants.\(^1\) The building consecrated to St. Peter and Mary was constructed during a period of 632 years from 1248 A.D. and has been continuously maintained by the Cathedral Workshop (\emph{Dombauhütte}).\(^2\) The Cathedral is the most famous sight of Germany; in 2004, it received about six million visitors from all over the world, as many as the Eiffel Tower (\emph{Tour Eiffel}) in Paris.\(^3\) The church’s dimensions are vast: the basilica is 144.38 meters long, has a projecting transept 86.25 meters wide\(^4\) and a two-tower western façade with a surface of more than 7,000 square meters which is surpassed by no other sacred building in the world.\(^5\) With a height of 157.38 meters, the Cathedral is the second highest church in Germany (after the Munster in Ulm/ Baden-Württemberg) and the

\(^1\) See the actual statistics in: Der Oberbürgermeister (ed.), \emph{Statistisches Jahrbuch Köln} 2004, 2004, 15 et seq.
\(^3\) Cf. the article “Kölner Dom” available at: <http://de.wikipedia.org/wiki/K%C3%B6lner_Dom>.
\(^4\) See World Heritage List, see note 2, 24.
\(^5\) See note 3.
third highest in the world. Consequently, its silhouette, a landmark of Cologne and of the whole Rhine area, can be seen from a great distance. Accordingly, there is a proverb saying that the Cathedral directs the people of Cologne home and, indeed from most places in the city, the Cathedral’s two towers are guides for orientation.

In February 1996, an expert mission of the International Council on Monuments and Sites (ICOMOS) visited Cologne. ICOMOS is an international non-governmental organization of professionals dedicated to the conservation of the world’s historic monuments and sites. It is named in the 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) as one of the three formal advisory bodies to the World Heritage Committee. ICOMOS recommended inscribing Cologne Cathedral on the World Heritage List (see for further details under III. 1.) on the basis of criteria (i), (ii) and (iv) of the then valid version of the Operational Guidelines of the World Heritage Committee. In 1996 the World Heritage Committee followed this recommendation.

In autumn 2003, the City Administration of Cologne, after having organized an expert hearing with architects and city planners, granted permission for the construction of a complex of skyscrapers on the other side of the Rhine opposite the Cathedral. Meanwhile, one high-rise building of that complex with a height of 103.5 meters had already been structurally completed; other, even higher skyscrapers up to a height of 120 meters would follow according to assurances the City had given to private investors. The planned new trade fair which has been

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6 See note 3.
8 Concerning these Guidelines see below note 150.
10 See World Heritage List, see note 2, 25.
pre-financed with a sum of 300 million Euros by an investor should, thus, enjoy worthy surroundings.\textsuperscript{11}

With Decision 27COM 7B.63 the World Heritage Committee had requested Germany to provide a detailed report on the situation in order that the Committee could examine the state of the Cathedral at its 28th session, because it was feared that the buildings would block the view to the Cathedral from the western areas of the city. As Germany did not provide the Committee with the relevant information, the Committee after having threatened the German authorities for several times to delete the sacred building from the World Heritage List, at its 28th session in 2004 decided to inscribe Cologne Cathedral for the time being on the List of World Heritage in Danger. It was the first time that a cultural monument in Germany was put on the so-called Red List.

The Committee had argued that the Cathedral's visual integrity and the unique city silhouette of Cologne were threatened by the skyscrapers on the other side of the Rhine opposite the Cathedral. It regretted that the German authorities had not provided the information concerning the high-rise building projects in time and that the Federal Republic of Germany as State Party of the World Heritage Convention had not designated a buffer zone for the property, despite the Committee's request at the time of the inscription. The Committee urged the City of Cologne to reconsider the current building plans as to their visual impact on the World Heritage property of Cologne Cathedral and requested that any new construction should respect the visual integrity of the property. Moreover, Germany was requested to provide a detailed report on the situation, including the status of the building plans, visual impact studies as well as the development of a buffer zone, by 1 February 2005 for review by the World Heritage Committee at its forthcoming 29th session.\textsuperscript{12} The German Commission for UNESCO added in its statement to that decision that all participants on the level of the Federal Republic, of the Federal State, and of the local authority should now work together to find a quick solution to the conflict on the basis of the

\textsuperscript{11} Cf. the article “Jahn oder nein. Kölner Hochhaus-Streit wird schärfer”, \textit{F.A.Z.} (Frankfurter Allgemeine Zeitung) No. 163 of 16 July 2005, 31; Sedlmayr, see note 7.

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The Mayor of the City of Cologne proved to be both surprised and annoyed by the decision of the World Heritage Committee. He said that he had not been informed about the intentions of the Committee and, furthermore, the expansion of the city could not be prohibited. In a press release, the Mayor declared that it was impossible that a city should stop all further development because it had a cathedral. Of course, the development of Cologne had to and would be in accordance with the Cathedral. But there were obviously some people in the UNESCO who had an aversion to all kinds of high-rise buildings. The Mayor concluded: “We really did not make it easy for ourselves to decide on the development in the areas of Cologne on the right bank of the Rhine River. We have […] proposed to the City Council a limitation of the height of the buildings that strictly observe the architecture and the dimensions of the Cathedral […]. Regardless, we hold that the historic opportunity for the right bank of the Rhine must be taken to allow for the creation of a, from the architectural point of view, highly qualified and modern Cologne with economic importance for the whole city”.\footnote{See Mayor F. Schramma, in: Kölner Dom ist Weltkulturerbe – auch in Zukunft, Press Release of the City of Cologne of 6 July 2004, available at: <http://www.stadt-koeln.de/presse/mitteilungen/artikel/2004/07/03719-37k-10.Okt.2005>.
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Additionally, the head of the construction department of the City of Cologne, when asked by the press, answered that the city would not change its plans.\footnote{Cf. M. Kretz-Mangold, Der Dom, die Stadt und die Weltkultur. Die Kölner verstehen die Entscheidung der UNESCO nicht, available at: <http://www.wdr.de/themen/kultur/1/weltkulturerbe_dom/rote_liste_reaktionen.jhtml>.
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In fact, in the following months the city organized a competition for the allocation of public land to be used to build further high-rise towers and granted planning consent for an 89 million Euro project concerning the construction of an office block of 110 meters in height.\footnote{See note 11, 31; A. Rossmann, “Mer losse dr Dom opd Liste. Gnadenfrist: Kölns Weltkulturerbe-Status ist weiter in Gefahr”, F.A.Z. No. 161 of 14 July 2005, 29.
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The case was, for a long time, discussed controversially in the press. Some articles mentioned that Cologne had high unemployment figures and needed new impulses for the development of industry, especially service industry. Therefore, “in Cologne, economic growth must have priority over an inflationary [protection of] world cultural heritage.” Other articles harshly insulted UNESCO for being a very amorphous organization without a clear democratic structure so that no one could understand its decisions. For instance, a well-known German daily paper sarcastically stated: “Whether the high-rise buildings made sense under aspects of city planning or not, [whether they] would be architecturally valuable or not, [whether they] found users or not, all these points do not matter. The main thing is that you can see the Cathedral from every corner of the City”. The criticism even culminated in the naive question whether the City of Cologne should not leave the United Nations.

However, there had been also a multitude of articles condemning the City Administration because of its stubbornness and uncompromising attitude. It was argued that deleting Cologne Cathedral from the World Heritage List would be a disgrace of the first rank for the Federal Republic of Germany which was the mother country of the protection of historic monuments. In particular, the Chapter of the Metropolitan (Domkapitel) which is representative of the “High Cathedralic Church of Cologne (Hobe Domkirche zu Köln)” in a statement signed by the Provost and the Master Builder of the Cathedral pointed out that withdrawing the church from the List would be “a national shame, moreover a shame for the City of Cologne to which we seriously appeal to do everything to come to an agreement with the Cultural Heritage Committee.” Furthermore, the Chapter turned to the World Heritage

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18 Cf. Rossmann, see note 17, 33.
20 Cf. Rossmann, see note 17, 33.
22 Cf. World Heritage List, see note 2, 24.
Committee and asked whether the inadequate development on the other side of the Rhine River was really such an immense threat that the Cathedral must be taken from the List. The Chapter had the strong impression that the Committee wanted to make an example and criticize the city planning of Cologne but this resulted in punishing the Cathedral.\textsuperscript{23} Besides, the Chapter mentioned that during the whole process it had neither been consulted by the Committee or ICOMOS nor by the City Administration,\textsuperscript{24} although it bore the costs for the restoration and maintenance of the Cathedral which come to ten million Euros each year.\textsuperscript{25} Finally, the Foreign Office of the Federal Republic of Germany sent a letter to the Mayor of the City of Cologne in which he was admonished to take “all necessary measures” and to avert “foreign policy damage.” That letter which seems to be the very first action of a German Federal authority towards the City of Cologne was, however, received by the Mayor with the statement that city planning did not fall into the Foreign Ministry’s competences.\textsuperscript{26}

Against this background, there was a heated debate\textsuperscript{27} at the 29th session of the World Heritage Committee in 2005. The Committee recognized the need to develop and rehabilitate the area to ensure economic and social development and the fact that Germany had provided a detailed report on the current situation. It decided to retain Cologne Cathedral on the List of World Heritage in Danger and to examine the situation at its 30th session in 2006.\textsuperscript{28} Nevertheless, the City of Cologne

\textsuperscript{23} See the article “Nationale Schande. Appell zur Welterbestätte Kölner Dom”, \textit{F.A.Z.} No. 157 of 9 July 2005, 33; cf. in that context the similar opinion of the biggest opposition party in the city council of Cologne as described in the article “Sonderparteitag. Kölner CDU zum Weltkulturerbe Dom”, \textit{F.A.Z.} No. 221 of 22 September 2005, 33.


\textsuperscript{25} See note 3.

\textsuperscript{26} Rossmann, see note 16, 29.


initially did not show any sign of being prepared to make concessions. Instead, the Mayor told a local newspaper that the City could not and would not give up the towers.\textsuperscript{29} It appeared that the City Administration would try to sit the affair out, according to the famous proverb which describes the typical mentality of the people of Cologne.\textsuperscript{30} The attitude of the City was, admittedly, not completely incomprehensible, for the City had organized the expert hearing with regard to the matters of the Cathedral before drawing up the building plans for the area on the right bank of the Rhine;\textsuperscript{31} thus, it held that it had done everything which was necessary to clear the admissibility of its planning. Furthermore, both forcing the investors or rather the owners of the property to tear down the already erected tower and cancelling the building permits and licenses, would lead to enormous claims for remedies.\textsuperscript{32} Under pressure from the UNESCO, the Federal Republic of Germany, the Federal State of North Rhine-Westphalia, the Chapter of the Metropolitan, and a part of the press, the City was in a difficult situation.

Finally, in December 2005, the City Council of Cologne capitulated and decided to amend the building plans concerning the right bank of the Rhine opposite Cologne Cathedral and to present the new concept at the next session of the World Heritage Committee in summer 2006. The official reason given for this measure was, on the one hand, that the City wanted to counteract the immense loss of prestige caused by the dispute with the UNESCO, and on the other hand, that it discovered that there would not be a sufficient demand for the premises in the high office blocks; even in the completed skyscrapers, many offices did not yet have leaseholders.\textsuperscript{33} Whether the new concept will convince the World Heritage Committee so that it will withdraw Cologne Cathedral of World Heritage in Danger, because the City of Cologne had offered to scale down its plans, Doc. WHC-06/30.COM/7A of 26 May 2006, 103. That decision took place shortly before this article was about to be sent to print. Thus, it could not be recognized in the following. Anyway, it does not change anything with regard to the arguments.

\textsuperscript{29} See the article “Jahn oder nein”, see note 11, 31.

\textsuperscript{30} “There has as of yet always been a good end [\textit{Et hätzt noch immer jott je-jangle}]", cf. Rossmann, see note 16, 29.

\textsuperscript{31} Cf. the Press Release of the City of Cologne, see note 14; Rossmann, see note 24, 29.

\textsuperscript{32} Cf. Rossmann, see note 21.

from the List of World Heritage in Danger cannot be foreseen; time
will tell.

Anyway, the case is a prime example for possible problems concern-
ing the compliance of international law to national legal systems, in par-
ticular those with a federal structure, for there are several stages of pub-
lic authority from the national to the local level that, one after another,
have to perform a legal transfer according to their prevailing compe-
tences. Moreover, the case, in the end, points out the effectiveness of
global governance by information. Such governance mainly works on
the basis of “reputation enforcement”\(^{34}\) its (reactive or rather repres-
sive) instruments are naming and shaming\(^{35}\).

Therefore, in the following, I will examine the dispute between the
UNESCO and the City of Cologne in the context of the general com-
pliance debate. In a second stage I will give an overview of the relevant
provisions dealing with the protection of world cultural heritage on the
international, national, and local level. Hence, the competences of the
UNESCO, of the Federal Republic of Germany, of the Federal State of
North Rhine-Westphalia, and of the City of Cologne will be described,
and I will demonstrate how the single levels are linked to each other and
should cooperate, which instruments ensure that lower authorities
observe the instructions of the higher ones, and what limits or scopes
must be respected. Finally, I will show how non-state actors affected by
positive or negative measures of world cultural heritage protection, for
instance the Chapter of the Metropolitan, have legal opportunities ei-
ther to introduce their concerns into the process of decision-making or
to claim that their rights or interests have not been sufficiently taken
into account. By doing so, we may discover what went wrong in the
Cologne case and how the conflict could have been avoided or, at least,
defused in time.

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II. Embedding the Cologne Case in the General Compliance Debate

The problem that states do not fulfil their obligations based on international agreements and treaties is well-known in international law; in particular it is a phenomenon which can quite often be observed in federal states where various levels, e.g. Federal, state and local authorities, are involved in the implementation or application of international standards or other kinds of international requirements. Indeed, it is a popular assessment in international law that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time”;36 which means, when turned into the negative, that there are nations which do not observe each principle of, or each obligation under, international law at any time, either generally or only in certain, exceptional cases. Against this background, the question may be asked why nations, in principle, comply with international law and what are the reasons why they sometimes do not.

In political and legal science, several theories have been elaborated in order to explain the mechanisms of compliance, of which only a few will be mentioned in the following:37 an early approach which was that

of legal positivism focused on the binding character of rules but could not give any persuasive argument with regard to the fact that, on the one hand, some states ignore binding rules of international law whereas, on the other hand, the so-called soft law which is characterized by legally nonbinding instruments enjoys widespread respect and obedience, for instance in the fields of international environment protection, health, and education, and not least in that of world heritage protection which is essentially based on a system of governing by information enshrined in UNESCO’s lists. The last criticism also applies to political realism which is, to a certain extent, a reaction to legal positivism. According to the political realists, the most powerful states of
the world cannot be constrained effectively by rules;\textsuperscript{43} the influence of
law generally ends where it contradicts the logic of power because no
law enforcement exists against the powerful.\textsuperscript{44} Hence, this doctrine
maintains that the influence of international law depends on enforce-
ment possibilities. Admittedly, there might not be any possibility of en-
forcing military sanctions against powerful states. But realism neglects
that there are factors other than the possibility of enforcement which
can be influential for the decision-making of states, in particular, for
their decision in each single case of whether to comply or not. Fur-
thermore, realism insufficiently explains the increase of international
cooperation and legalization of such cooperation, in matters of eco-
nomics as well as in other areas.\textsuperscript{45} States cooperate to the extent that
they give up a part of their sovereignty and, thus, weaken, at first
glance, their position, in favour of supra-national entities like the Euro-
pean Union, and even the most powerful states follow decisions issued
by international organizations and institutions such as the Dispute Set-
tlement Body and the Appellate Body of the World Trade Organization
(WTO).\textsuperscript{46} As realism merely concentrates on the limitations of coopera-

\textsuperscript{43} See e.g., the assessment of realism by D. J. Bederman, “Constructivism,
Positivism and Empiricism in International Law”, Geo. L. J. (2001), 469 et seq. (473).

\textsuperscript{44} H.J. Morgenthau, Politics Among Nations: The Struggle for Power and

\textsuperscript{45} Note the fact that multilateral regimes and institutions like NATO, the
United Nations, the European Community and the WTO make a positive
contribution to international security and economic relations, although
there are competing expectations and theorising of realists: J.G. Ruggie,
“Multilateralism: The Anatomy of an Institution”, in: id. (ed.), Multilater-
alism matters: The Theory and Praxis of an Institutional Form, 1993, 3 et seq.

\textsuperscript{46} Cf., e.g., the GATT Dispute Panel Reports in: United States – Standards for Reformulated and Conventional Gasoline (complaint by Venezuela), WTO Doc. WT/DS2/10/Add.7 of 19 August 1997; United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (complaint by Japan), WTO Doc. WT/DS184/R of 28 February 2001. Both decisions were rulings against the United States, which reacted to them by amendments of their domestic law; see United States – Standards for Reformulated and Conventional Gasoline. Status Report by the United States, WTO Doc. WT/DS2/10/Add.7 of 19 August 1997; United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan. Status Report by the United States – Addendum, WTO Doc. WT/DS184/15/Add.12 of 7
tion by certain power constellations and the lack of centralized enforcement, it fails to give a positive answer as to why compliance with international law takes place, despite possible inconveniences for powerful states. A third approach which comprises another approach to international law, in which rules and institutions both reflect and advance state interests, was predominant in the Cold War era but was not distilled to an independent theory of compliance. It is, hence, based on the utilitarian assumption that states comply only if and insofar as it is within their political, military, economic or other kind of interest, which could be, in the case of heritage protection, the interest in receiving financial support or even in being acknowledged as a famous cultural nation with an impressive history that left its marks for posterity in literature and in stone. Later, it was pointed out that the aspect of “interest” was too vague, and from a practical point of view, not easy to handle. Therefore, on the one hand, legal processes were invoked to show how the need for plausible justification and argument in international law binds state behaviour and systematically encourages states to move closer to compliance. On the other hand, it was claimed that there were a number of factors which weighed in favour of compliance, like reputation, reciprocity, norm observation, and domestic politics. However, this does not yield a clear theory of why and when states do comply but was merely a cautious convergence of two approaches.

In the 1980s, institutionalism and regime theory were discovered to explain compliance mechanisms. They say that states establish regimes,
i.e. sets of explicit or implicit principles, norms, rules, and decision-making procedures around with actors’ expectations converge in a given area of international relations and institutions, i.e. general patterns or categorizations of activity or formally or informally organized human-constructed arrangements because and when such a cooperation is in their long-term interest. Largely relying on rational economic structures, the states’ interest in cooperation and, thereby, also in integrating themselves into the prevailing regulatory system depends to a great extent on positive “payoff-structures” or rather positive cost-benefit calculations. Hence, states comply in order to receive the benefits produced by the institutional arrangement, whereas states which do not comply after having made or shared the arrangement must expect to be excluded from possible benefits. Possible benefits from the cooperation in multilateral regimes include, for example, lower transaction costs, a better predictability of actions and reactions from other states, or the acquisition and maintenance of a good reputation and respect through participation and compliance with the regime. The latter could be a decisive incentive in the Cologne case because neither the German State, the State of North Rhine-Westphalia nor the City of Cologne receive any direct financial support from UNESCO for protecting and preserving Cologne Cathedral, but they get a lot of visitors, in particular from foreign countries, which strengthens the turnover and, thus, the economic power of the city, region, and country. Incidentally liberal institutionalism has a broader notion of interests than does realism. Regarding international law, however, it does not seem to concede an important role since benefits are independent from the influence of legal rules as such.

53 Oye, see note 52, 1, 4 et seq.
54 Young, see note 50, 72.
55 Cf. in this context Keohane, see note 51, 386 et seq.
In contrast, the *theory of political economy* addresses the question of the role of international law for the functioning of international cooperation. It emphasizes the importance of incentives and disincentives in regimes to achieve compliance. This does not refer to enforcement in the form of sanctions but rather to multilateral strategies which can deter non-compliance by offsetting the net benefits which a violator of the rules could gain from his non-compliance. Accordingly, the greater the benefits a state can get from defection, the greater is the necessity for deterrence in form of a threat of being punished with disadvantages. The costs for compliance rise with the depth of cooperation, i.e. the extent to which a treaty requires states to depart from what they would have done in its absence. This means that the deeper the cooperation that is strived for by the agreement, the greater must be the costs or incentives envisioned by an enforcement strategy. Since the incentives and disincentives are set by legal provisions, the function of international law is to improve the incentive structures and, thus, the conditions for cooperation. The influence of law on the states’ behaviour is, though, at best indirect: states follow the law because and as long as this makes economic sense, and the law can indirectly influence that decision by providing the necessary incentives structures. The function given to law in this approach is, after all, very limited. Incentives and disincentives of economic nature may not be the only aspects to improve state behaviour; legal rules and legal processes as such may have direct influence, too.

Therefore, by the end of the 1980s, the focus in the scholarly discussion concerning compliance turned to the quality of rules and rule-making processes and emphasized the importance of the fairness of these processes and the *legitimacy of legal rules*. It was stated that legal rules exerted a “compliance pull” when they were legitimate and

58 Downs, see note 57, 321.
59 Downs, see note 57, 324.
60 Downs/ Rocke/ Barsoon, see note 57, 383 and 386.
based on right processes. Such conditions were, in turn, increased when the rules had four characteristics: (1) determinacy (the ability of the text of the rule to transmit a clear message), (2) symbolic validation (the communication of authority through certain cues that indicate the significance and validity of the norm), (3) coherence (the rules must emanate from principles of general application) and (4) adherence to secondary rules of “right process”. Regarding the last aspect, the secondary rules were ultimately legitimized through a rule of recognition by the international community. This approach puts legal rules (back) into the centre of the discussion but the criteria for legitimacy does not seem very helpful. Legal rules that are most influential and fundamental are often the ones that are the least definite and the most open to interpretation. In fact, a low grade of determination of a norm allows a wide field of legal interpretation and, thus, flexible application. Similarly, it is often a matter of perception how coherent a norm is with regard to its application and how it conveys symbolic authority. Probably most problematic is the criterion of adherence: a rule displaying the characteristic of adherence to secondary rules needs to be recognized by the community of states through a procedure following ultimate rules of recognition. This recognition can only be demonstrated “by the conduct of nations manifesting their belief in the ultimate rules’ validity as the irreducible prerequisite for an international concept of right process.” The aspect of adherence as variable of legitimacy is, therefore, dependent on the conduct of the states as addressees of the rule. This gives rise to a circular argument because focusing on the power of legitimacy can be seen as an attempt to explain behaviour by looking at the actual compliance of actors: the basis for ultimate rules and, thus, of legitimacy of the primary rules is merely that states habitually act according to the latter ones.

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64 See also Raustiala/ Slaughter, see note 37, 538, 541.
66 Franck, see note 65, 34; id., see note 63, 91.
67 Franck, see note 65, 38; id., see note 63, 152.
68 Franck, see note 63, 194; id., see note 65, 45.
69 Cf. Brunnée/ Toope, see note 37, 273, 288 et seq.
70 Franck, see note 63, 194 (emphasis in original).
72 Franck, see note 63, 43.
tique, the legitimacy approach is important for drawing attention to the specific influence of legal rules for achieving compliance. Such influence is a result of a certain authority of legitimate rules; it has to do with the process of how rules evolve and operate. The observation or assumption that these processes have autonomous effects suggests that enforcement is not the only key to compliance. Nevertheless, it is still not clear in what exact way processes are influential, how legitimate rules look like and, finally, how compliance could be promoted by processes and rules without focusing on enforcement.

A part of these questions was answered in the early 1990s by the so-called managerial model which rejected sanctions and other “hard” forms of enforcement as decisive elements for achieving compliant behaviour in the context of regulatory agreements.\(^3\) Observing that states have a “propensity to comply” with international law even in the absence of enforcement, this approach emphasizes three factors being relevant for compliance: first, norms are largely accepted and obeyed by the subjects of the legal system because their authoritative character creates a feeling of obligation. The norms’ authoritative character is based on a mixture of tradition, on the belief that some kind of order is necessary for social life\(^4\) and, very importantly, on their legitimacy. The latter depends “on the extent to which the norm (1) emanates from a fair and accepted procedure, (2) is applied equally and without invidious discrimination, and (3) does not offend minimum substantive standards of fairness and equity.”\(^5\) Thanks to their authority which is an indigenous quality, the norms play a central role in the conduct of international relations as actions can be most convincingly justified or attacked in terms of legal rules. The influence of law is, therefore, largely generated through justificatory discourse.\(^6\) Thus, the managerial theory not only underlines the importance of legitimacy and fair procedure but stresses an independent influence of norms. Moreover, it proposes a way of looking at the processes through which legitimate international law can be influential. Second, compliance saves transaction costs because states do not have to continuously reconsider their policy deci-

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\(^{4}\) Chayes/ Handler Chayes, The New Sovereignty, see note 73, 116 et seq.

\(^{5}\) Chayes/ Handler Chayes, ibid., see note 73, 127.

\(^{6}\) Cf. Chayes/ Handler Chayes, ibid., see note 73, 118 et seq.
sions which would waste scarce governmental resources.77 This reflects the already mentioned institutionalist thinking and rationalist paradigm, where cooperation takes place because it is beneficial to participants. Third, treaty-making processes which imply national and international negotiations, reconsiderations and reviews ensure, at least in democratic countries, that the rules established roughly represent the national interests of the country, even compliance might require a compromise. This goes back to the assumption that states would not have signed the treaty if they had not somehow managed to incorporate their interests or if the process had not reshaped their interests.78 This last aspect is, again, deeply rooted in rationalist thinking as it explains commitments in terms of underlying interests. However, the analysis has difficulties in explaining why states sometimes comply even in cases where their interests changed after the process of ratification. Furthermore, there might be other reasons for states to sign treaties. For instance, states can be induced to accept a treaty because of internal pressure from nongovernmental organizations in the field of environment, human rights or historic monument protection or from industries or because of external pressure from other countries. States can also wish to gain a better international reputation by acting as others do.79

As states tend to comply with international law due to the above mentioned factors, eventual non-compliance is, according to the managerial model, mainly caused by: ambiguity and indeterminacy of treaty language, limitations on the capacity of parties to carry out their undertakings under the treaties as well as unforeseen social, political and economic changes.80 In the Cologne case, the first reason could be pertinent, since UNESCO and the City of Cologne as the competent national authority in Germany seem to have different views concerning the interpretation of national duties under the World Heritage Convention. The City of Cologne claimed that the UNESCO did not sufficiently recognize its interests when setting out the scope of its evalua-

77 Cf. Chayes/ Handler Chayes, ibid., see note 73, 4.
78 Cf. Chayes/ Handler Chayes, ibid., see note 73, 7.
80 See Chayes/ Handler Chayes, The New Sovereignty, see note 73, 10 et seq.
tion. Thus UNESCO had not applied the treaty norms in the right way. Anyway, since problems with compliance are hardly ever the result of wilful obedience, the managerial model provides a solution: a management strategy is needed that helps parties to overcome obstacles. That strategy should comprise several aspects. Problems with ambiguity of treaty language could be addressed by informal dispute settlement, including elements of negotiation and mediation, and the lack of capacity should be countered by enabling capacity building through the provision of technical and financial assistance. Central to the management of the treaty regime was, furthermore, the inclusion of mechanisms to promote transparency. Transparency which refers to the “accuracy, availability, and accessibility of knowledge and information about the policies and activities of parties to the treaty” is important because it facilitates cooperation, provides reassurance and exercises deterrence against non-compliance. The main tools to achieve transparency are information sharing procedures and monitoring. The four managerial measures merge “into a broader process of ‘jawboning’”, which essentially means that they, in combination with discourse, persuade miscreant states to change their ways. Despite the interest in discourse which underlines the power of legal norms in shaping persuasive arguments, the fundamental reason why the management strategy is expected to work is that a state needs a good standing in the regimes established by the states in order to be able to participate in the international system securing economic growth and political influence. In fact, this is for most states the only way in the interdependent world to realize and express their sovereignty: by being a respected and reliable member of the community of states. To keep that status, states might have to transcend and even put back their own interests in a particular regime.

The managerial approach with its emphasis on membership and reputation belongs to the spectrum of rationalist institutionalism. It is,

81 Chayes/ Handler Chayes, ibid., see note 73, 207.
82 Chayes/ Handler Chayes, ibid., see note 73, 25.
84 Cf. Chayes/ Handler Chayes, The New Sovereignty, see note 73, 135 et seq.
85 Chayes/ Handler Chayes, ibid., see note 73, 25 et seq.
86 Cf. Chayes/ Handler Chayes, ibid., see note 73, 27 et seq.
87 Cf. Chayes/ Handler Chayes, ibid., see note 73, 27.
though, located at one end of that spectrum, seeing enforcement of rules as only “a marginal factor in compliance calculations”. Hence, it is opposed by the representatives of the other end, the political economists. In particular, the critics claim that the managerial approach was not suitable for regimes of “deep cooperation” which are still rare in our days but will occur more and more in the future. Examples verify, indeed, that states have been eager to include tougher enforcement measures as the level of cooperation increases, like in the context of GATT (cf. article 16 of the Dispute Settlement Understanding – DSU) or environmental agreements. However, the examples are incidents where states created stronger organizations, provided more formal rules or strengthened the position of courts. They may show that there is a need for more powerful international institutions and regimes in areas of deep cooperation but this does not necessarily mean that there is also a need for enforcement structures as a prerequisite for compliance. In the mentioned cases, states comply with supranational panel or court decisions without any direct enforcement and even without any incentive structures for various other reasons. Therefore, the critique and argumentation put forward by the opponents of the managerial approach cannot actually negate the finding that enforcement is not the (main or rather only) key to compliance, nor can they deny the importance of a management strategy based on legitimate rules. They are, though, not without weight, because focusing on strong institutions and incentive structures as tools to support management strategies could prove helpful in cases of treaty regimes which directly affect the economic interests of states. If States Parties of international agreements, especially in the field of trade and commerce, behave like completely rational, self-interested utility maximisers, they would rely on the information they have and make their decisions according to cost-benefit calculations, but not necessarily take into account reputational factors. Incidentally this is the central difference between the purely rationalist perspective and the managerial approach which lays stress on

88 See, e.g., Young, see note 50, 75.
89 See also above in the text at footnote 57.
90 Cf. Downs/ Rocke/ Barsoom, see note 57, 380 and 388 et seq.
91 Cf. Downs, see note 57, 335.
92 Cf. Raustiala/ Slaughter, see note 37, 538, 542.
93 See F.V. Kratochwil, “How do norms matter?”, in: M. Byers (ed.), The Role of Law in International Politics: Essays in International Relations and International Law, 2000, 54 et seq.
legal norms and discursive processes as the bases of international law's power and influence. Following the latter position, it is the normative force of the legal rules rather than the force of economic incentives that makes states comply. Nevertheless, the managerial approach remains rooted in rationalist thinking, because rationality does not exclude the consideration of such factors as reputation and social standing. These factors can be part of a rational strategy to receive the maximum material (economic) as well as immaterial (reputational) benefit from cooperation in an interdependent society of states. Thus, the theory of political economy and the managerial model are not that far away from each other; the difference lies in their prevailing emphases and prescriptions. The prescription linked to, and derived from the managerial approach is helpful to overcome difficulties of countries which are not willing to comply at all, whereas the political economists' approach emphasizes the importance of changing the incentive structures in cases where states are inclined to defect. Thus, both approaches are compatible as long as the enforcement-orientated measures do not destroy managerial efforts. In the final analysis rather than polarizing by acclaiming one of the two approaches and harshly refusing the other, it would seem to be more effective to combine managerial with incentive thoughts in a common strategy saying that international law not only plays an indirect role by setting the incentive structures but also plays a direct one by helping to persuade and justify the processes of discourse.

Anyway, even this strategy still leaves open questions since it is based on the assumption that the state actors must be “jawboned” into compliance because their underlying interests are unalterable. The managerial aspect therefore cannot answer how legitimate rules in discursive processes lead to greater compliance. The reason is that it is still not clear why justificatory or persuasive processes culminate in changing the decision-making rationale of a state in cases where its underlying interests remain the same; this would, in any case, mean that its in-

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94 Cf. Chayes/ Handler Chayes, The New Sovereignty, see note 73, 134.
96 Cf. Koh, see note 95, 2640.
terests are not decisive. Thus, managerialism does not explore the full consequences of the focus on norms and discourse; as it is rightly pointed out in literature, it cannot explain why legitimacy enhances compliance. But if the approach reconsiders and revises its starting position coming to the conclusion that state interests are flexible, one could possibly say that the discourse, framed and supported by authoritative arguments based on legitimate law, can change these interests to achieve voluntary compliance.

Consequently, the main criticism which is raised against the rationalist paradigm is that it takes interests and identities as exogenously given, thereby neglecting the possibility that internal social structures of the international regimes and, for that matter, legal rules might make states acquire certain identities which in turn shape the corresponding interests. Such factors could lead to compliance independently of the benefits a state can expect from the membership or participation in the international regime. Furthermore, the rationalists are blamed for not taking into account that there could be a reconstitution of interests during the processes of regime-participation. In this regard, the theory advanced by institutionalism and managerialism remains inconclusive. Hence, a deeper inquiry into the processes by which legal rules can influence state actors through discourse and thus affect their underlying motivations is needed. There must be an examination of whether cooperation in international regimes and compliance with their law can go beyond rationalist strategies, whether interests can be reshaped and, again, what is the specific role of legal rules in such processes.

An attempt to penetrate further in that field is constructivism which emerged in the late 1980s. Although far from being a homogenous school of international relations theory, adherents to the constructivist approach share the belief that the objects and practices forming social life are intersubjectively construed. Instead of taking social reality for granted, the constructivists identify it with a complex structure of “in-

97 Brunée, see note 61, 261.
99 See, e.g., J. Fearon/ A. Wendt, “Rationalism versus Constructivism. A Skeptical View”, in: Carlsnaes/ Risse/ Simmons, see note 37, 52, 57.
stitutional facts” that came into existence only because the actors agreed that they should exist and what they should mean. In other words: the actors construct the very bases of social reality by collectively imposing functions on brute physical or social facts which can be very well illustrated by the example of money which plays an important part in social reality but exists as money purely due to a collective intention to accept it as such. Thus, the foundations of social reality are, at least to a large extent, “shared understandings, expectations, or knowledge” of the actors, resulting from their interaction. It springs from this importance of the collective agreement that law as a social institution is dependent on the “continued collective acceptance or recognition of the validity of the assigned function[s]”, because without the continuous acceptance of the rules, they cease to exist as such and the institution dies from lack of collective agreement. Constructivism argues that similar to individuals’ states through their interactions socially construct the international structure; the international structure is, thus, not only material but also social. Since international law is part of the international structure, it can be seen as a socially constructed institution. Furthermore, the interactions resulting in shared understandings not only constitute the international system but also shape and construct the identities of the international actors. And since “identities are the basis of interests,” interests are (indirectly) constructed as well, contrary to the assumptions of realism and institutionalism.

This could explain a part of the dispute in Cologne. Certain historic monuments and sites are protected by international law because there is

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102 Searle, see note 100, 45.
103 See Arend, see note 98, 127.
105 Kratochwil, see note 93, 56; Keohane, see note 51, 382.
106 Wendt, see note 98, 398.
a widespread view within the society of states that they are a part of the common heritage of mankind and that the individual states having such an item of cultural heritage in their territory must take the function of guardians in favour of the world community. The states may now adopt that function as a part of their national identity and develop their own interest in protecting the cultural assets because fulfilling this task is generally regarded as a responsibility of high quality and a characteristic for a state being a developed cultural state.

In fact, it is not only the Cuban Missile Crisis that indicates that identity and self-perception matter in shaping the interests of states and in determining whether states will comply with international law or not.\textsuperscript{108} It is, though, much harder to grasp the construction of identities. To some extent, the shaping of identities is implied in the possibility of shared understandings. That actors can constitute social institutions through shared understandings reveals that they are abiding by certain rules upon which the institutions are founded. However, this does not yet explain why shared understandings constitute the identity of actors and do not merely result in rules that everybody agrees upon at a certain moment in time. According to an opinion in literature, actors follow the rules agreed upon because they have developed “background capabilities.”\textsuperscript{109} In other word: “[A] person behaves the way he does, because he has a structure that disposes him to behave that way […] and he has become to be disposed to behave that way, because that is the way that conforms to the rules of the institution”.\textsuperscript{110} Thus, actors develop a set of dispositions that are “sensitive to the rule structure”, which means that behaviour is rule-governed although the actors do not consciously follow the rules in each decision they make. The actors have developed the ability to live in a society having those rules as its basis; thus the actors are constituted by the rules that evolve from interaction on shared understandings.

Since one of the institutions that evolve during the shared understandings of the principal actors is international law, the constructivist approach says that international law can constitute the identity and interests of the actors.\textsuperscript{111} The legal norms of international law, thus, do not only have a regulative but also a constitutive function: they consti-

\textsuperscript{109} See Searle, see note 100, 129.
\textsuperscript{110} Searle, see note 100, 144.
\textsuperscript{111} See Jepperson/ Wendt/ Katzenstein, see note 107, 33, 54.
tute the international legal system as well as the actors which are primarily the states. Moreover, the legal norms stipulate, for instance, under which conditions something is called a treaty, thereby triggering the basic rule of *pacta sunt servanda*. The links to and effects on compliance are obvious: state actors are likely to comply if the rules reflect a broad base of acceptance or of shared understanding. Once this is the case, international law can play its constitutive role.

In the final analysis constructivism gives a suitable explanation for the influence of law in the horizontal structure of the international society of states. By emphasizing identity and interest formation through the socialisation of actors, it not only fills the gaps of rational approaches such as institutionalism but is also able to account for the effects that social factors have on actors. Nevertheless, it still does not extensively answer the question how international law can influence the identity, i.e. what is the role of law in socializing the actors and, furthermore, whether international law can also play an active role in achieving those shared understandings that shape the actors’ identities. Additionally, it remains silent on the question whether the law has certain qualities that make its influence unique and specific and, if so, whether the law’s influence can be enhanced in some way.

These open points are the focus of the interactional theory of law which is mainly built on the foundations of the constructivist approach. According to that theory, law is continuously evolving through the interaction of the actors who are engaged in “mutual generative activity.” In other words, law evolves as a pattern of expectations constructed between the actors when they interact in formal and informal institutions. At the same time, the processes of interaction shape the identities of the actors through a variety of elements such as

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112 Cf. Katzenstein, see note 104, 1, 6 and 20; A. Hurrel, “Conclusion: International Law and the Changing Constitution of International Society”, in: Byers, see note 93, 327 and 346; Arend, see note 98, 130.


114 Another source of inspiration for that approach is the legal theory of L. Fuller, *The Morality of Law*, 1969.


membership of organizations, reputation, self-esteem, or the need for financial or administrative help. In line with most constructivists though, the main actors are the states; but other actors like nongovernmental organizations, cooperations, expert networks or epistemic communities also play a role in the processes and, thus, can have a share in forming a state’s identity and interests. Applying these theoretical underpinnings, the representatives of the interactional theory propose that neither authority based on the hierarchy of norms nor the ability to enforce the law can provide for any specific binding character of the rules of international law as opposed to other norms of social practice. Rather, it is the “internal morality of law” which provides for the law’s legitimacy and, thus, ultimately for its persuasiveness when shaping the actors. The emphasis on persuasion indicates that law exerts its constituting influence especially through argument and, thereby, though discourse. Therefore, its constitutive role manifests itself in the ability to shape the discourse and the decision-making. It, thereby, exerts an influence which is in turn displayed in the shared meanings and legal rules that evolve in the process. Hence, the interactional theory says that the role of norms is not restricted to shaping the behaviour of actors once the shared meanings are established. Instead, the function of norms is much wider, starting at an earlier point; the rules already shape the interactional processes by providing the framework for the discourse between the actors. This shows that the interactional theory emphasizes processes of communication and the influence of law upon them; it assumes that the power to shape discourse is an beneficial characteristic of law.

Moreover, the theory tries to give an answer to the question of what is special about law to have such a power on the basis of three observations: first, law, which has persuasive argument and language at its hand as important and unique tools, shapes the individual and collective identities of the actors by influencing the actors’ perceptions of each other and by categorizing actors into (opposing or uniting) groups. For instance, there are treaties designed to point out the common prob-

117 Cf. Brunnée/Toope, see note 115, 69.
118 Brunnée/Toope, see note 115, 51.
119 Brunnée/Toope, see note 115, 56.
120 Cf. Brunnée/Toope, see note 37, 292 et seq.
121 S.J. Toope, “Emerging Patterns of Governance and International Law”, in: Byers, see note 93, 91, 95; Katzenstein, see note 104, 1, 6.
122 Cf. Brunnée/Toope, see note 116, 144 et seq.
lems, something which is also true for the World Heritage Convention that notes in its Preamble that the cultural heritage worldwide is increasingly threatened with destruction which is in particular caused by changing social and economic conditions. Thus such treaties do unite rather than divide and, thereby, provide the ground for effective “normative evolution” towards cooperation. Second, law helps to differentiate between persuasive argument and pure rhetoric and, thus, establishes the framework for discourse. Third, it is the specific legitimacy of law that provides the ground for persuasion. In order to achieve maximum legitimacy and, thus, authority, the law must be transparent, fair and accountable. This means that the interactional theory does not cut out the substantive content of a rule as a contributing factor for legitimacy. The reason for this is that the main influence of law, in its view, lies in the shaping of the interactions by providing for persuasive legal arguments and categorizations; arguments are more persuasive if they build not only on procedural but also on substantive values. Accordingly, compliance mechanisms can be assessed on the basis of, on the one hand, fairness, transparency and accountability of the procedural rules and, on the other hand, justice and material fairness of their substantive values. Only under these preconditions will they be regarded as legitimate and persuasive and can they, as a consequence, develop their full potential in shaping the actors to comply with the rules. This speaks again in favour of the thesis that enforcement is not the key to compliance. Instead, adherence to legal norms can be promoted, inter alia, through “the design of processes of interaction and consultation” for regimes. This underscores the importance of providing room for communicative exchange and discourse in the design of compliance mechanisms. If enforcement measures such as sanctions or other disincentives are employed, they must be founded on general acceptance or shared understandings derived from interaction. Conversely, if these premises are absent, even collective enforcement measures will be widely regarded as illegitimate and will be ineffective. After all, it can be recorded as an insight linked to interaction theory that, as law shapes

123 Brunnée/ Toope, see note 116, 154.
124 Brunnée/ Toope, see note 116, 144.
125 See in this context Brunnée/ Toope, see note 116, 156.
126 Toope, see note 121, 98.
127 Toope, see note 121, 103.
128 Toope, see note 121, 99 and 106.
129 Cf. Brunnée/ Toope, see note 37, 294.
discourse, compliance will be enhanced if the prevailing law is able to provide for unifying arguments, i.e. arguments which stress the common interests of the participants rather than the differences. Similarly, as law provides for the framework for arguments, compliance will be strengthened by legal rules that diminish the possibility to justify non-compliant behaviour.

In order to understand and possibly enhance the processes by which states can develop voluntary obedience instead of “grudging compliance”130 under the influence of constitutive legal norms, it seems necessary to further analyze how these processes function. This is the task of the theory of transnational legal process which complements the interactional theory. This theory claims that the so-called “transnational legal process” which means the internalization of international norms can provide for the necessary link between externally existing rules and internal voluntary obedience.131 This process is described as follows: at first, transnational actors provoke interactions with one another in law-declaring fora, e.g. treaty regimes, domestic and international courts, nongovernmental organizations or conferences.132 The key agents in these interactions are transnational norm entrepreneurs, governmental norm sponsors, transnational issue networks, and interpretive communities.133 The term “transnational issue networks” in this regard means foremost the so-called epistemic communities,134 i.e. “networks of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area.”135 The interactions of the actors, in a second step, lead to a common interpretation of the norms in their application to certain situations.136 As a result of this ongoing process, the international norm is, then, internalized into the domestic legal system of the

130 Koh, see note 95, 2646.
131 Koh, see note 95, 2648.
133 Koh, see note 132, 645.
134 Koh, see note 132, 648.
136 Koh, see note 95, 2645.
participants by means of social, political or legal internalization. As a consequence of the internalization, the state perceives the norm as binding and will, in principle, act accordingly; I will analyze in the following part whether there were in particular in this respect, deficiencies in the Cologne case since it does not seem to be clear at first glance and it is even doubted by some representatives at the local level whether the World Heritage Convention is binding for the municipal authorities in Germany. In sum, the process generates rules that will guide future interactions between the parties and ultimately shape the interests and identities of the participants.

The theory of transnational legal process emphasizes interactional processes that are norm-creating; it, thereby, focuses on the vertical processes by which these norms become part of a state’s domestic structure and, thus, of its identity. Hence, the theory of transnational legal process shares important features with both constructivism and interactional theory. By clarifying that international horizontal interaction is not sufficient to explain identity formation, it complements and advances these approaches. The theory may be criticized for merely describing an empirical pathway to obedience through internalization or, more precisely, a pathway to norm incorporation into domestic law without really explaining why and when states follow international rules. But it rightly points out the importance of the participation of the civil society in order to establish long-term acceptance of the rules and, thus, ensure reliable long-term obedience.

To conclude, embedding the Cologne case in the general compliance debate revealed a series of possible explanations why the City of Cologne initially and for a long time has not accepted the view of the World Heritage Committee concerning an adequate buffer zone around Cologne Cathedral. However, the current development of the case also indicates that international law in the field of world heritage protection is not ineffective. After a process of discourse which was able to make the City of Cologne or rather its representatives feel ashamed or which, at least, reduced the City’s reputation in the world community, the City signalled efforts to comply with the international norms and standards.

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137 For discussion of these aspects in detail Koh, see note 132, 641 et seq.; id., “Transnational Legal Process”, *Nebraska Law Review* 75 (1996), 181 et seq. (204).
138 Koh, see note 95, 2646; id., see note 137, 204.
139 See also Brunnée/ Toope, see note 37, 273, 291.
140 Raustiala/ Slaughter, see note 37, 538, 544.
In the following the legal situation will be examined a little more intensively. Thereby, the question about the binding force of the World Heritage Convention towards local, in particular municipal authorities in Germany will be answered.

III. The International Regime of World Heritage Protection: Competences, Authorities, and Decision-Making on the Level of UNESCO

UNESCO was established as a specialized agency in 1945 to promote the aims set out in article 1 para. 3 of the UN Charter. According to article I para. 1 of the UNESCO Constitution of 16 November 1945, its purpose is "to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of the law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world." To achieve this purpose, UNESCO can assure the conservation and protection of the world’s inheritance of books, works of art and monuments of history and science, and recommend to the nations concerned the necessary international conventions (article I para. 2 (c) UNESCO Constitution).

One of these international conventions to foster conservation and protection of world heritage is the previously mentioned World Heritage Convention which was adopted by the General Conference of UNESCO in 1972. The Convention aims at the protection of immovable and tangible cultural heritage (monuments, groups of buildings, and sites) and natural heritage (natural features, geological and physiographical formations, and natural sites) of "outstanding universal value" (Preamble, arts 1 and 2 of the Convention). The provisions of

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141 UNTS Vol. 1037 No. 15511; ILM 11 (1972), 1358.
the Convention are rightly described in literature as an example of “a delicate balance between national sovereignty and international intervention.”

1. The Duties of the States Parties under the World Heritage Convention

At first, the Convention in its article 4 sentence 1 addresses the individual State Party as being responsible for implementing the obligations towards its own heritage in the national legal system. The provision reads that each State Party recognizes that “the duty of ensuring the identification, protection, conservation, presentation, and transmission to future generations of the cultural and natural heritage ... belongs primarily to that state.” Article 4 sentence 2 of the Convention continues that the state will do “all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and cooperation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.” Although these provisions are formulated quite softly in acknowledging the States Parties’ sovereignty, it is clear that the states are obliged to attend to the protection and conservation of the cultural and natural heritage in their territories. Therefore, to ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated in a State Party’s territory, article 5 of the Convention in addition to the two sentences of article 4 provides that each State Party to the Convention shall endeavour, so far as possible, and as appropriate for each country:

a) to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive (French: générale) planning programmes;

b) to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions;

c) to develop scientific and technical studies and research and to work out such operating methods as will make the state capable of counteracting the dangers that threaten its cultural or natural heritage;

d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and

e) to foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field.

The points mentioned in arts 4 and 5 are the primary obligations of the States Parties under the World Heritage Convention. Thereby, the provision of article 4 sentence 1 of the Convention can be qualified as an extensive, general clause to make the protection of the cultural and natural heritage a State Party’s duty, whereas the rules in article 5 of the Convention can be regarded as action-related concretizations of that general duty.

2. The Competences of the World Heritage Committee

Moreover, on the other hand, the Convention stipulates the duty of the international community as a whole to cooperate (article 6 para. 1), which should be achieved through the establishment of a system of international cooperation and assistance designed to support States Parties of the Convention in their efforts to conserve and identify that heritage (article 7). This is an expression of the thought that the world heritage belongs to the whole mankind (cf. the Preamble). One

145 See in this context M.E.E. Castelli, Protección Jurídica del Patrimonio Cultural de la Humanidad, 1987, 17 et seq.; Genius-Devime, see note 142, 20 et seq. and passim; Fitschen, see note 142, 183, 206 et seq.; M. Müller, “Kulturgüterschutz: Mittel nationaler Repräsentation oder Wahrung des Gemeinsamen Erbes der Menschheit”, in: F. Fechner/ T. Oppermann/ L.V. Prott (eds), Prinzipien des Kulturgüterschutzes. Ansätze im deutschen, europäischen und internationalen Recht, 1996, 257 et seq., 266 et seq.; E. Rou-
means of cooperation and assistance is the Intergovernmental Committee for the Protection of the Cultural and Natural Heritage of Outstanding Universal Value called the World Heritage Committee which is established on the basis of article 8 para. 1 of the Convention. The Committee which consists of 15 members elected by the General Assembly of the States Parties is the final decision-making body. Its responsibilities include, in particular, the establishing, keeping up to date, and publishing of the World Heritage List (article 11 para. 2) and the List of World Heritage in Danger (article 11 para. 4).

a. The Inscription of Properties in the World Heritage List

The World Heritage List (currently comprising some 812 properties) is a list of properties forming part of the cultural and natural heritage which the World Heritage Committee “considers as having outstanding universal value in terms of such criteria as it shall have established” (article 11 para. 2 sentence 1 of the World Heritage Convention). Since 1978, the Committee has added new sites to the List at each session, in 2005, for instance, the Historic Monuments of Macao in China, the Architectural, Residential and Cultural Complex of the Radziwill Family at Nesvizh in Belarus, the Biblical Tels and Ancient Water Systems of Megiddo, Hazor and Beer Sheba in Israel, the Syracuse and the Rocky Necropolis of Pantalica in Italy, and the Old City of Mostar in Bosnia and Herzegovina. The material precondition for a property to be included on the List is, as indicated by the wording of article 11 para. 2 of the Convention, that it can be identified as cultural heritage in accordance with article 1 of the Convention or natural heritage in accordance with article 2 of the Convention and having “outstanding universal value.” This crucial term was introduced in the Convention to limit its application to the protection of the most important places of cultural and natural heritage in the world. But the notion itself is left deliber-

ately\textsuperscript{148} undefined in the Convention.\textsuperscript{149} Rather, as is laid down in article 11 para. 2 of the Convention, the criteria shall be defined in detail by the World Heritage Committee.

The World Heritage Committee has, thus, the competence and, at the same time, a scope for the assessment whether an item of cultural or natural heritage should be put on the List. However, this competence or scope should be limited by the requirement to determine the decisive criteria \textit{ex ante}. Accordingly, the Committee created these criteria at its first session in 1977 by the Operational Guidelines for the Implementation of the World Heritage Convention which were based on a working paper prepared by the Committee’s secretariat (since 1992 called the World Heritage Centre) in cooperation with the Advisory Bodies.\textsuperscript{150} The Operational Guidelines are considered to play an essential role in the implementation of the World Heritage Convention, as stated in a note in the 1977 version saying that “these guidelines, which will need adjusting or expanding to reflect later decisions of the Committee, are of crucial importance, in that they provide a clear and comprehensive statement of the principles which are to guide the Committee in its future work.”\textsuperscript{151} The Guidelines primarily have the status of internal law of an international organization but might, to a certain extent, be compared with administrative regulations in the sense of the German understanding.\textsuperscript{152} Although they are not addressed to inferior authorities, they serve, not least, a uniform administrative practice of the States Par-

\textsuperscript{144} See Strasser, see note 144, 217.


\textsuperscript{151} Note 1 sentence 2 subpara. 3 of the Operational Guidelines 1977, Doc. CC-77/CONF.001/8 Rev. of 20 October 1977 available at: <http://whc.unesco.org/archive/out/opgu77.htm>.

ties, in particular with regard to the application for including a property in the List (cf. arts 3 and 11 para. 1 of the Convention). In sum, more transparent, foreseeable, and calculable decisions shall be guaranteed. The Committee has bound itself with the Guidelines. Nevertheless, it can amend and modify them at any time. In fact, since the first version was drafted, the Operational Guidelines have been revised approximately fifteen times\footnote{Cf. already Strasser, see note 144, 247.} and their content has been extended from 27 paragraphs in 1977 to 290 paragraphs, including 9 annexes, in February 2005.\footnote{The new Operational Guidelines are available as Doc. WHC.05/2 of 2 February 2005 available at: <http://whc.unesco.org/archive/opgiuide05-en.pdf>.} According to para. 77 of the Operational Guidelines 2005, the Committee considers a property as having outstanding universal value if the property meets one or more of the listed criteria in para. 77. To be deemed of outstanding universal value a property must also meet the conditions of integrity and/or authenticity and must have an adequate protection and management system to ensure its safeguarding, according to paras 78 and 79.\footnote{Also on this prerequisite, e.g., H. Caspary, ”Weltkulturerbe”, in: D.J. Martin/ M. Krautberger (eds), Handbuch Denkmalschutz und Denkmalpflege, 2004, Part A, 138.}

The new criteria no longer formally distinguish between cultural and natural heritage; there is now a uniform set of criteria for both kinds of property. Among the criteria are that the property represents a masterpiece of human creative genius (i), exhibits an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town-planning or landscape design (ii), bears a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared (iii), or is an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates (a) significant stage(s) in human history (iv); to name but a few. The Cologne Cathedral in 1996 was classified under the criteria (i), (ii), and (iv) of the Operational Guidelines which were valid at that time.\footnote{Cf. above in the text, at note 8.} Although the text of all criteria has changed since 1986, their material contents remained in broad terms with regard to the aspects that had been of relevance for the classification of Cologne Cathedral.
As stated in article 11 para. 2 of the World Heritage Convention in conjunction with para. 24 (a) of the Operational Guidelines 2005, the World Heritage Committee has to identify cultural and natural properties of outstanding universal value which are to be protected under the World Heritage Convention and to inscribe those properties on the World Heritage List. The decision of the World Heritage Committee to inscribe a property on the List which is, as in the case of Cologne Cathedral, based on the criteria mentioned in the Operational Guidelines for a property having outstanding universal value can be understood as a concretization of the States Parties’ duties laid down in arts 4 and 5 of the Convention with regard to the object of protection and conservation. In other words: if a historic monument is inscribed on the List it is determined to be a cultural or natural heritage in the sense of the Convention; thus, the questions of interpretation or evaluation are decided. The general duties of the States Parties, which exist according to the wording of the Convention, are made actual and definite by the concretization of the object. As a consequence, a State Party having in its territory a monument enshrined in the List is now obliged to take care of the protection and conservation of that concrete monument according to article 4 of the Convention in conjunction with the decision of the World Heritage Committee; in particular, it is obliged, according to article 5 (a) of the Convention in conjunction with the Committee’s decision, to work towards the protection of the concrete item of world heritage being integrated into comprehensive planning programmes.

This can be done, above all, by legislative measures but also by administrative measures. For instance, a state supervisory authority could instruct or force an inferior administrative authority by the ordinary means of supervision ruled in the law not to act contrary to the duties of the state laid down in the World Heritage Convention or rather not to thwart their fulfilment. Incidentally, the identification of cultural and natural properties of outstanding universal value and their inscription in the List do not take place without the agreement of the State Party in whose territory the property is located according to article 11 para. 3 of the Convention.\(^\text{157}\)

The identification process is laid down in paras 120 et seq. of the Operational Guidelines 2005. Several requirements have to be fulfilled according to paras 132 et seq. Reviews of nominated property are undertaken by the Advisory Bodies to the World Heritage Committee.

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the previously mentioned ICOMOS as has happened in the case of Cologne Cathedral, the World Conservation Union (IUCN), or both\textsuperscript{158} (cf. paras 35 and 36 of the Operational Guidelines 2005).\textsuperscript{159} Following a positive evaluation, the Advisory Bodies prepare the justification for inscription on the List. The Bureau of the Committee which coordinates the work of, and passes the Advisory Bodies’ evaluation to the Committee might recommend the inscription as well as the texts. In most cases, the Committee follows the Bureau’s recommendations and approves the texts in connection with the inscription of the property; changes in the texts made by the Committee are rare. After all, the definition and formulation of what is considered to be of outstanding universal value is proposed, and the process initiated by the States Parties, and transferred from a political body, the Committee, to a level of technical experts, as represented by the Advisory Bodies.\textsuperscript{160} The composition of the World Heritage List is, thus, the result of input from three different participants in the process of recognizing a property as cultural heritage: the State Party that nominates the property; the Advisory Bodies that evaluate the property and eventually propose its inscription; and the Committee that decides formally on the inclusion in the List.\textsuperscript{161}

A hearing or the involvement of authorities below the level of the State Party or of the owner of the property is not provided for by the World Heritage Convention; therefore, the World Heritage Committee is not obliged to give local authorities or private persons the possibility to participate in the process of inscription. However, para. 123 of the Operational Guidelines 2005 reads that “participation of local people in the nomination process is essential to enable them to have a shared responsibility with the State Party in the maintenance of the property. States Parties are encouraged to prepare nominations with the participation of a wider variety of stakeholders, including site managers, local

\textsuperscript{158} See about these advisory bodies M.C. Ciciriello, “L’ICGGROM, l’ICOMOS e l’IUCN e la salvaguardia del patrimonio mondiale culturale e naturale”, \textit{in}: id. (ed.), \textit{La protezione del patrimonio mondiale culturale e naturale a venticinque anni della Convenzione dell’UNESCO del 1972}, 1997, 109 et seq.

\textsuperscript{159} For an overview about the evaluation procedure see, e.g., H. Stovel, “The Evaluation of Cultural Property for the World Heritage List”, \textit{Nature and Resources} 28 (1992), 30 et seq.


\textsuperscript{161} Strasser, see note 144, 215, 218.
and regional governments, local communities, non-governmental organizations and other interested parties.” According to that regulation which recognizes that broad acceptance is a mechanism to achieve compliance, as worked out by the interactional theory of law, it is the responsibility of the State Party, when preparing a nomination, to hear and involve persons whose interests could be touched by the inscription. Neither the World Heritage Convention nor the Operational Guidelines, oblige the state to work together with other authorities or private persons; the regulation in para. 123 of the Operational Guidelines 2005 is a mere recommendation that can be disregarded by the state. However, the non-conformity of the state procedure with that rule can be taken into account by the World Heritage Committee when comprehensively evaluating the status of a historic monument which is proposed to be inscribed on the List. It is a factor that can be of relevance in the context of the requirements concerning the national protection system, which are laid down in paras 79 et seq. of the Operational Guidelines 2005.163

b. The Inscription of Properties on the List of World Heritage in Danger

The legal basis for inscribing properties recognized as World Heritage on the List of World Heritage in Danger (known as the “Red List”, currently comprising 34 sites) is the previously mentioned article 11 para. 4 of the World Heritage Convention. As laid down there the Committee shall establish, keep up to date and publish, whenever circumstances shall so require, under the title of List of World Heritage in Danger, a list of the property appearing in the World Heritage List. With regard to the material preconditions of the inscription of property in the List of World Heritage in Danger, the provision stipulates that only such properties forming part of the cultural and natural heritage may be included in the List for which major work is necessary and for which assistance has been requested under the Convention. The List may include property being cultural or natural heritage which is threatened by serious and specific dangers, such as the threat of disappearance caused by accelerated deterioration, large-scale public or private projects or rapid urban or tourist development projects; destruction caused by changes in the use or ownership of the land; major alterations due to

162 See above in the text, at note 114.
163 See in this context above, after note 154.
unknown causes; abandonment for any reason whatsoever; outbreak or threat of an armed conflict; calamities and cataclysms; serious fires, earthquakes, or landslides; changes in water level, floods, and tidal waves (article 11 para. 4). These threats may exclusively refer to the loss or, at least, the modification of the property’s substance, which is, in fact, claimed by some voices in literature. Thus, it may be doubted whether the World Heritage Committee is entitled to inscribe such property appearing in the World Heritage List on the List of World Heritage in Danger if it does not run the risk of being substantially damaged or destroyed but might only lose its dominant function in a city’s skyline or become restricted in its visibility from far-away distances, as it is the case of Cologne Cathedral.

By means of a wide interpretation, the phraseology “threat of disappearance caused by [...] large-scale public or private projects or rapid urban or tourist development projects” of article 11 para. 4 could be understood in the way that the property cannot be seen any more either because of destruction or because of blocking the view. Therefore, it seems to be tenable to hold that the Committee has the competence to put properties on the List of World Heritage in Danger when they are threatened by measures that will hinder people to look at them and, thus, to have the chance to admire their outstanding character.

This view may find confirmation in the examples of danger in the sense of article 11 para. 4 of the Convention, mentioned in para. 179 of the Operational Guidelines 2005. They do not only speak about a deterioration of materials, structure or ornamental features but also about “serious deterioration of architectural or town-planning coherence”, “serious deterioration of urban or rural space”, and “important loss of cultural significance”. As mere potential dangers are listed, inter alia, the “threatening effects of regional planning projects [...] and] of town planning.” These examples indicate that a realization of a threat for cultural heritage needs not always be accompanied by a deterioration or loss of historic building stock.

Another question occurring in this context is what restrictions as to the view of a world heritage monument reach such severity that they justify an inscription in the List of World Heritage in Danger. The background for this question is the insight that the World Heritage Convention cannot ensure an unobstructed line of vision on a historic

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165 Cf. F. Fechner, “Prinzipien des Kulturgüterschutzes”, in: Fechner/ Oppermann/ Prott, see note 145, 11, 27 et seq.
monument from everywhere and from any distance. There must be limits which go beyond the natural curvature of the earth’s surface. Otherwise, the development of certain areas with world heritage monuments would necessarily have to come to an end.

At first glance and quite generally, one could say that the World Heritage Committee must find a reasonable balance between the interests of effective world heritage protection on the one hand, and those of a beneficial development of the area or town on the other hand, when deciding about the inscription of a property on the List of World Heritage in Danger. That balance can only be found in the concrete case, not abstractly. If a monument, like Cologne Cathedral, is famous for its superlative dimensions, it would be tenable to demand that a new building exceeding these dimensions should not be erected in its direct neighbourhood. There must be a buffer zone so that the imposing structure of the property can be perceived as the reason for acknowledging it as world heritage. Thereby, the size of the buffer zone is not the urgent result of a mathematical equation including the monument’s length, width, and height. Instead, the World Heritage Committee has discretion as to its evaluation. By making use of that discretion in the Cologne case, the Committee could take into account that the high-rise buildings opposite the Cathedral should not reach its height and that there is a free space between the skyscrapers and the Church saved by the so-called Cathedral Slab, which is a raised place surrounding the Cathedral, and by the river. But height and the distance are not the only aspects of importance for the view of a monument; angle of vision and perspective are decisive, too. The skyscrapers of Cologne which will form a semicircle can, in that respect, give the illusion of a massive wall opposite the Cathedral and, thus, appear to be a challenging competitor to the Sacred House. After all, it seems to be justifiable in the Cologne case to come to the conclusion that the city planning concerning the right bank of the Rhine is a threat to the Cathedral in the sense of article 11 para. 4 of the World Heritage Convention; accordingly, the Committee did not obviously overstep the boundaries of its scope for evaluation when inscribing the Cathedral on the List of World Heritage in Danger.

However, a more thorough analysis of the legal situation is appropriate, not least in the Cologne case. This analysis must take into consideration the function of the List of World Heritage in Danger in the

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166 Concerning the possibility of the World Heritage Committee to determine buffer zones, cf. von Schorlemer, see note 144, 136.
system of world heritage protection under the Convention and the specific duties of the State Party which are actualized and concretized by the initial inscription of the property in the World Heritage List. Only if these aspects are clear, can the provisions on the protection of world cultural and natural heritage be applied correctly.

The first indicator for determining the function of the List of World Heritage in Danger is the wording of article 11 para. 4 of the World Heritage Convention. The article reads that only such property shall be inscribed on the List for the conservation of which major operations are necessary and for which assistance has been requested under the Convention. Thus, the inscription in the List signals that further action must be taken to maintain the item of world heritage for future generations. It is designed to inform the international community of conditions which threaten the very characteristics for which a property was inscribed on the World Heritage List, and to encourage corrective action. Inscribing a site on the List of World Heritage in Danger allows the World Heritage Committee to allocate immediate assistance from the World Heritage Fund to the endangered property.

It is, however, not a necessary prerequisite for getting international assistance because assistance can already be granted if a property forming part of the cultural or natural heritage is potentially suitable for inclusion either in the World Heritage List or in the List of World Heritage in Danger (see article 13 sentence 1 of the Convention). There are also no clues in the Convention that properties enshrined in the List of World Heritage in Danger gain priority over other properties with regard to assistance. Rather, the World Heritage Committee determines an order of priorities with regard to all properties in question, thereby considering "the respective importance for the world cultural and natural heritage of the property requiring protection, the need to give international assistance to the property most representative of a natural environment or of the genius and the history of the peoples of the world, the urgency of the work to be done, the resources available to the States on whose territory the threatened property is situated and in particular the extent to which they are able to safeguard such property by their own means" (article 13 para. 4 of the Convention). Thus, the inscription in the List can be interpreted as a measure of "reputation enforcement" which is an effective mechanism to enhance compliance in cases where other kinds of enforcement strategies either are not provided or seem to be inappropriate; the State Party that is able but not

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167 Majone, see note 34, 319, 337.
willing to take the necessary measures for the conservation of the world heritage in its territory shall be shown up in face of the world community of states in order to make it comply. This compliance mechanism takes into account that reputation and the standing in the community of states are factors playing an important role in achieving compliance, and it is, thus, in line in particular with the managerial model of compliance. Hence, an inscription in the List of World Heritage in Danger can be considered, above all, if a state violates its duties as a State Party of the World Heritage Convention.

Accordingly, in the Cologne case, it is, above all, relevant that a buffer zone was explicitly, and with the consent of the German authorities, made a precondition for the Cologne Cathedral being inscribed on the World Heritage List. The City of Cologne obviously neglected that buffer zone, which constitutes a violation of the duties of the Federal Republic under the World Heritage Convention because the acts of the City in international contexts are attributed to the state. Moreover, article 4 of the Convention obliges the State Party to ensure, inter alia, the presentation of the cultural heritage which means that the state must guarantee that the property having the status of world heritage can be looked at, which is not possible any more if it is narrowly surrounded by high-rise buildings. If the reduction of the free view onto the Cathedral is considerable, this can be rightly regarded as a violation of the Federal Republic’s duties under the Convention. Finally, a violation of Conventional duties must also be assumed if a state deliberately does not take possible measures to avert a danger for the property of world cultural or natural heritage that will lead to the disappearance of at least one criterion that had been decisive for the positive decision of the World Heritage Committee.

Concerning Cologne Cathedral, the Committee based its decision, inter alia, on the assessment that the sacred building is a powerful testimony to the strength and persistence of Christian belief in medieval

168 Cf. Caspary, see note 155, Part A, 140, speaking about the inscription on the List of World Heritage in Danger and about delisting as final “means of exerting pressure.”

169 See above in the text, at note 73.

170 Cf. above in the text, at note 10.


172 Cf. Fitschen, see note 142, 183, 194.
and modern Europe. This aspect has to do with the impression the Cathedral gives to its observers, its visual effects. If the Cathedral is no longer visible because of surrounding skyscrapers, this criterion must be dropped for the future assessment of the value of Cologne Cathedral. Thus, there is also insofar a violation of the Federal Republic’s duties under the World Heritage Convention.

Next to the substantive aspects there might be formal prerequisites for inscribing a property on the List of World Heritage in Danger. In fact, there are provisions referring to a cooperative approach of the World Heritage Convention with regard to the inclusion of property in the List of World Heritage in Danger. Although a formal nomination by the State Party is not required, article 11 para. 6 of the Convention, for instance, reads that before refusing a request for inclusion in one of the two lists, the Committee shall consult the State Party in whose territory the property in question is situated. Furthermore, article 11 para. 7 of the Convention stipulates that “the Committee shall, with the agreement of the States concerned, coordinate and encourage the studies and research needed for drawing up of the lists.” Thus, there shall be a consultation of, and cooperation with, the State Party even in cases leading to an inscription on the List of World Heritage in Danger.

Until 1992, the World Heritage Committee interpreted these provisions in the way that an inclusion in the List of World Heritage in Danger could only be undertaken after a “request” by the concerned State Party. The “regular” procedure, the state had to act in order to initiate the process aiming at the inscription of a property on the List. Later, inclusions were made as long as the State Party did not oppose the inscription on the List of World Heritage in Danger.

This practice led to a fierce controversy during the 24th session of the World Heritage Committee in 2000 with regard to the case of the Kathmandu Valley which was threatened by uncontrolled urban development. In that case, the Committee had deferred the inscription of the property in the List of World Heritage in Danger numerous times but the Nepalese authorities steadily refused their consent. Hence, the Committee underlined the need to ensure the credibility of the World Heritage Convention, of its own role and of the World Heritage List, while effectively implementing the mechanisms provided under the Convention and appropriately assisting States Parties in safeguarding

173 See above in the text, at note 8.
174 Cf. Cameron, see note 143, 20.
175 Cf. Strasser, see note 144, 215, 252 and 254.
the World Heritage properties; thus, it seemed to be adequate to change
the current policy. Most members agreed that it would be desirable to
define procedures for examining cases such as Kathmandu Valley,
where certain values or components justifying World Heritage inscrip-
tion have been, or are going to be, irreversibly lost. Nevertheless, some
delegates and the Observer of Nepal felt that the Committee was not
empowered to inscribe a property on the List of World Heritage in
Danger without the consent of the concerned State Party and without
request for assistance by the State Party. In contrast to that position,
other members of the Committee and Observers stressed that article 11
para. 4 of the Convention allowed the Committee to inscribe a prop-
erty on the List of World Heritage in Danger without the consent of
the State Party concerned, although it was preferable to have the State
Party’s consent in advance. Since the dispute could not be solved in the
session, the World Heritage Committee, finally decided to consider the
issue of the inscription of properties in the List of World Heritage in
Danger in the context of the planned revision of the Operational
Guidelines, in order to develop appropriate criteria and a procedure to
handle situations such as Kathmandu Valley.\footnote{See World Heritage Committee, Report, 24th Sess. Doc. WHC-
<http://www.natural-resources.org/minerals/CD/docs/other/whc-00-conf
204-21e.pdf>.

Not surprisingly, the question of whether or not consent by a State
Party is necessary for inscribing on the List of World Heritage in Dan-
ger was answered by the Operational Guidelines 2005 in favour of
strengthening the position of the Committee. Para. 183 of the Opera-
tional Guidelines 2005 provides that the Committee, when considering
the inscription of a property on the List of World Heritage in Danger,
shall develop, and adopt, as far as possible, in consultation with the
State Party concerned, a programme for corrective measures. Para. 184
adds that, in order to develop the programme of corrective measures,
the Committee shall request the Secretariat to ascertain, as far as possi-
ble in cooperation with the State Party concerned, the present condition
of the property, the dangers to the property, and the feasibility of un-
dertaking corrective measures. Thus, the new Operational Guidelines
make clear that there need not be cooperation or even agreement with
the State Party concerned; the State Party’s consent for the inclusion in
the List is desirable but not obligatory.\textsuperscript{177} There shall be a consultation “as far as possible” but the Committee is not forced to remain inactive if the State Party, for whatever reason, refuses cooperation. With that solution, the Committee followed a proposal of the Advisory Bodies reading that “the Committee must retain the ultimate authority to put sites on the Danger List, even against the wish of the State Party, if judged essential to help protect and preserve the [...] site.”\textsuperscript{178} In principle and under ordinary circumstances, the Committee should make efforts to get the State Party’s agreement; but if the state does not consent, the Committee can and must come to its own decision. This change in reading the norms of the Convention takes into account the function of the List of World Heritage in Danger which had been explained above. If putting a property on the “Red List” is an enforcement measure to make the state comply with international law, it is obvious that its consent or approval of the measure may, in the end, not be decisive. After all, for inscribing a property on the List of World Heritage in Danger, the procedural demands with regard to the participation of the State Party are lower than in the case of inscribing a property on the World Heritage List.

In the Cologne Cathedral case, the impetus for initiating the procedure to inscribe the Church on the List of World Heritage in Danger probably came from some private organizations aimed at the protection of historic monuments, and the press does not mention whether the Federal Republic of Germany later agreed with the inscription or not. However, even if it refused its consent, the World Heritage Committee had the competence to inscribe the Cathedral on the “Red List”. Para. 187 of the Operational Guidelines 2005 in such cases only stipulates that the State Party concerned shall be informed of the Committee’s decision.

A last problem is the participation of local authorities and private persons whose interests may be affected by the inscription. In cases


where the State Party requires inscribing a property on the List of World Heritage in Danger, the provision of para. 123 of the Operational Guidelines 2005 should find application analogously: the state is encouraged to prepare the nomination with a participation of the public or private persons who are potentially affected by the inscription. But if it is not the State Party initiating the process or if the state even opposes the inscription in the “Red List”, the whole procedure is in the hand of the World Heritage Committee which is not obliged to involve entities other than the State Party. Thus, in the case of Cologne Cathedral, it is not a procedural error or defect that the Committee did not hear the City of Cologne or the Chapter of the Metropolitan before deciding in favour of an inscription.

c. The Deletion of Properties from the World Heritage List

The deletion of property from the World Heritage List is not explicitly mentioned in the World Heritage Convention. However, article 11 para. 2 of the Convention refers to the Committee's task to “establish, keep up to date and publish” the World Heritage List. “Keeping [the List] up to date” includes both inscribing a new property on the List and deleting a property from the List in cases where the preconditions for inscription no longer exist. Accordingly, the Operational Guidelines contain further information about the deletion of a property from the List. For instance, para. 191 (c) of the Operational Guidelines 2005 reads that the Committee shall decide, in consultation with the State Party concerned, whether to consider the deletion of the property from both the List of World Heritage in Danger and the World Heritage List if the property has deteriorated to the extent that it has lost those characteristics which determined its inscription on the World Heritage List, in accordance with the procedure set out in paras 192 to 198. One important provision within these paragraphs is that the Committee shall not decide to delete any property unless the State Party has been consulted on the question (para. 196 sentence 3 of the Operational Guidelines 2005). Thus, the consent of the State Party concerned is not required; only its consultation shall be achieved, which reveals that there is a gradual reduction of procedural requirements from the inscription on the World Heritage List over the inscription on the List of World Heritage in Danger to the deletion from the World Heritage List.

On the basis of the interpretation of article 11 para. 2 of the World Heritage Convention undertaken by the Operational Guidelines, the World Heritage Committee is entitled to delete a property from the
World Heritage List if characteristics of that property which had been made the basis for the initial positive decision to inscribe it on the List have, meanwhile, got lost so that a different evaluation is necessary or, at least, justified; thus, the delisting is no more and no less than the actus contrarius to the inscription on the List, reserved for cases where the conditions for inscription exist no longer. As mentioned, Cologne Cathedral in 1996 was inscribed in the World Heritage List because it was considered that “the monument is of outstanding universal value being an exceptional work of human creative genius, constructed over more than six centuries and a powerful testimony to the strength and persistence of Christian belief in medieval and modern Europe.”179 Hence, we must examine whether one or more of these aspects have become extinct as a result of the buildings opposite Cologne Cathedral. The first element “exceptional work of human creative genius” refers to the architecture, the building stock; it is not going to disappear and it is not even touched when faced with the skyscrapers. Rather, it is an aspect strictly connected with the substance of the building. The second element is the duration of continued existence and, thus, an aspect of time. It is, by no means, going to be lost with regard to the construction project on the right bank of the Rhine. Therefore, the focus is on the third element “powerful testimony” which is, as seen above,180 directly linked with the impression the Cathedral’s outer appearance makes on its observers and, thus, with its visibility. The Cathedral’s visibility is best guaranteed if there are no other buildings in its surroundings that obstruct the free sight on it, and it becomes smaller if the view of the building is restricted by the skyscrapers. Therefore, one criterion which had been decisive for the inscription of Cologne Cathedral on the World Heritage List is disturbed by the high-rise buildings. Against this background, one could argue that the loss of a single element is not decisive if it can be compensated by other elements, for para. 77 of the Operational Guidelines 2005 reads that the Committee considers a property as having outstanding universal value if it meets one or more criteria. If one criterion had been sufficient, Cologne Cathedral would have continued to be inscribed on the List because, in its case, two out of the three elements, which played a role in the assessment that the building was of “outstanding universal value”, still remain. However, this view is too restricted. The World Heritage Committee makes its decision on the basis of a comprehensive assessment and evaluation of

179 See above in the text, at note 10.
180 See in the text, after footnote 173.
those criteria that play a role. Thereby, it does not necessarily consider all criteria as equal; single elements might have a different weight and rank. Accordingly, it cannot be overlooked that in the case of Cologne Cathedral its visibility, even from distant places, was the decisive factor for putting it on the List. Furthermore, a property fulfilling one of the criteria does not automatically qualify for inscription; it may be that only the sum of various criteria leads the World Heritage Committee to its positive decision in a particular case with the consequence that, if a certain criterion had not existed, the Committee would not have made its decision. Hence, it cannot be concluded in the Cologne case that the World Heritage Committee would overstep its responsibilities if it decided to delete the Cathedral from the World Heritage List.

Moreover, although leading to the same result, there is a second possible way to interpret the provisions of the World Heritage Convention with regard to a deletion of properties from the List: this approach, again, considers the function of the deletion from the World Heritage List in the regime of world heritage protection. For the World Heritage Convention does not provide any traditional means of enforcement, in particular sanctions such as imposing a fine or excluding the state from certain possibilities of participation, the delisting can be qualified as an ultimate compliance mechanism with the inscription on the List of World Heritage in Danger as preparatory procedure; this would also explain why the State Party’s consent or agreement is not necessary for such a requirement would be counter-productive. This interpretation does not contradict the general opinion often stressed with regard to the inscription of property on the List of World Heritage in Danger that the Committee is not allowed to use the instruments laid down in the World Heritage Convention as a punishment of, or sanction against, a State Party. Instead, the deletion of properties from the World Heritage List is an *informal means of coercion* to conserve a historic monument or site, based on the assumption that the state still wishes its property to be listed on the World Heritage List and will possibly react in favour of compliance with its Conventional duties in order to avoid the delisting or rather to regain the inscription. Accordingly, the World Heritage Committee could use the deletion of a property from the World Heritage List as a measure to enhance compliance of last re-

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sort in cases where a State Party of the World Heritage Convention either totally neglects or does not carefully fulfil its duties under the Convention. Although the Committee has, until now, never implemented the provisions about the deletion of properties from the World Heritage List; so that so far no property has ever been taken from the List,\footnote{Cf. Strasser, see note 144, 215, 219 and 254.} at least the possibility is an effective threat as the Cologne case finally indicated. Hence, the Committee could break with its tradition and set an example by delisting Cologne Cathedral in order to make the Federal Republic of Germany comply with its duties according to arts 4 and 5 of the World Heritage Convention.

A third approach could possibly rely on a breach of an international agreement. It could be argued that under the international regime of the UNESCO’s world heritage protection there exists not only the World Heritage Convention as multilateral agreement; rather, the Convention is concretized by a series of bilateral agreements which are concluded by, on the one hand, the application of the State Party to inscribe a property on the World Heritage List and, on the other hand, the acceptance of that application by the World Heritage Committee in form of a decision to inscribe the property on the List. As a consequence, the Committee could be allowed to terminate such a bilateral agreement in cases of its breach by the State Party according to article 60 para. 1 of the Vienna Convention on the Law of Treaties;\footnote{See note 113.} conversely, the State Party could have the chance to terminate such an agreement by reason of a fundamental change of circumstances according to article 62 para. 1 of the Vienna Convention. However, this model seems to be too fabricated and unrealistic. The State Party’s application is a mere procedural requirement; it is not directed to the conclusion of an additional international agreement. The Committee’s decision, on the other hand, is a mere administrative measure; it does not aim at founding new international obligations of the State Party but only concretizes duties that already exist under the World Heritage Convention. Thus, the better arguments speak against identifying the procedure of inscribing a property in the World Heritage List as an additional international agreement; therefore, the delisting of a single property cannot be justified by a breach of such an additional agreement. But it is possible that UNESCO, by a decision of its General Assembly, terminates the Conventional relationship towards a State Party breaching the Convention according to the rules of the Vienna Convention. A State Party wanting
to end its duties under the World Heritage Convention may denounce it according to article 35 of the Convention.

To sum up, arts 4 and 5 of the World Heritage Convention stipulate the general or rather action-related duties of the States Parties of the Convention. These duties are concretized with regard to a certain item of the cultural or natural heritage by the decisions of the World Heritage Committee to inscribe a property on the World Heritage List. The inscription of a property on the List of World Heritage in Danger and the deletion of a property from the World Heritage List can be understood as mechanisms to enhance compliance in the form of the so-called reputation enforcement in cases where States Parties do not fulfill their duties under the Convention. In the Cologne case, the World Heritage Committee could choose these measures to force the German authorities to comply, for they did not sufficiently take care of the protection or rather the view of Cologne Cathedral, which are part of Germany’s duties, as enshrined in arts 4 and 5 of the Convention by the decision of the World Heritage Committee of December 1996.

After explanations with regard to the international regime, I will show in the next section how and to what extent the provisions of the World Heritage Convention should be considered by the German state and local authorities according to the rules of national law.

IV. The Failed Implementation of the World Heritage Convention in the German Legal Sphere and Its Consequences

According to general international law, a state must fulfill its duties resulting from treaties, agreements, and conventions but it is, in principle, free as to how to achieve this.185 In a state in which the rule of law prevails, like in the Federal Republic of Germany, international duties such as those under arts 4 and 5 of the World Heritage Convention can only

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be fulfilled if they are introduced in the domestic legal sphere where they can bind concrete parts of the state organization. In the Federal Republic of Germany, the common opinion holds that the relationship between international and domestic law is that of moderate dualism which means that both form separate legal systems. The validity of international law in the German legal sphere is either exceptionally based on a constitutional order to apply it, namely article 25 of the German Constitution, the Basic Law (Grundgesetz), or on a special act of state, in particular a treaty law according to article 59 para. 2 sentence 1 of the Basic Law or an ordinance in the cases of article 59 para. 2 sentence 2 of the Basic Law.

Thereby, it is a matter of debate whether the provision of article 25 of the Basic Law or the legal act according to article 59 para. 2 of the Basic Law either transform the international norm into German law, which is stated by the older transformation theory, or rather issue a legal order to apply the norm, which is claimed by the enforcement theory. The dispute may gain significance when a norm of international law is repealed or amended after it has been implemented in domestic law but this is not decisive in the Cologne Cathedral case.

It is now demonstrated that the World Heritage Convention had been implemented in German domestic law neither by article 25 nor by article 59 para. 2 of the Basic Law; the result may be surprising.

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1. No Implementation by Article 25 of the Basic Law

Article 25 of the Basic Law reads that the general rules of public international law form part of the Federal law; they take precedence over the (national) laws and directly create rights and duties for the inhabitants of the Federal territory. The notion “general rules of international law” means customary law and general principles of international law, in particular *jus cogens*.\(^{188}\) The duties of the States Parties laid down in arts 4 and 5 of the World Heritage Convention do not fall under that notion.

2. No Implementation by Article 59 Para. 2 Sentence 1 of the Basic Law

Article 59 para. 2 sentence 1 of the Basic Law is a special rule for the implementation of international duties which are based on treaties. The provision states that treaties which regulate the political relations of the Federation (Bund) or relate to matters of federal legislation require the consent or participation, in the form of a federal law, of the bodies competent in any specific case for such federal legislation. Thus, the implementation of an international treaty such as the World Heritage Convention in the German legal sphere takes place by the competent legislative organs of the Federation passing a so-called consensual or treaty act relating to the international treaty (the Convention) and the President of the Federal Republic publishing it in the Federal Law Gazette.\(^{190}\)

The World Heritage Convention had not been implemented in the German legal sphere by a treaty act according to article 59 para. 2 sentence 1 of the Basic Law. The Federal Republic of Germany which is a

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\(^{188}\) Concerning international customary law concerning the protection of cultural heritage, which includes the prohibition to disturb or take away foreign cultural assets in case of military conflict, see Odendahl, see note 157, 124 et seq.


\(^{190}\) Cf., e.g., C. Engel, *Völkerrecht als Tatbestandsmerkmal deutscher Normen*, 1989, 30.
member of UNESCO191 ratified the World Heritage Convention on 23 August 1976 and published that in the Federal Law Gazette192 but a treaty act, contrary to the current unanimous basic assumption in legal literature,193 does not exist. Recent enquiries made by the Foreign Secretary revealed that the ratification of the Convention in 1976 was based on a cabinet decision of the Federal Government which had previously consulted the Federal states according to the so-called Agreement of Lindau – Agreement Between the Federal Government and the Federal States’ Chancelleries About the Federation’s Right to Conclude International Treaties of 14 November 1957194 that governs the participation of the Federal states in cases where the Federal Republic is going to ratify an international treaty relating to matters in which the Federal states have legislative competences.195 That procedure had been chosen because the then members of the Federal Government and of the Federal states’ governments held that the legal situation at that time already corresponded with the requirements of the Convention so that there was no need for further legislative measures.196 As a consequence, the World Heritage Convention has not become part of the objective legal system of the Federal Republic of Germany according to article 59 para. 2 sentence 1 of the Basic Law.

193 Cf., e.g., Caspary, see note 155, Part A, 132 et seq.; F. Fechner, Rechtlicher Schutz archäologischen Kulturguts. Regelungen im innerstaatlichen Recht, im Europa- und Völkerrecht sowie Möglichkeiten zu ihrer Verbesserung, 1991, 97 et seq.; F. Hammer, Die geschichtliche Entwicklung des Denkmalrechts in Deutschland, 1994, 347 et seq.; Hotz, see note 35, 163 et seq.; Odendahl, see note 157, 244 and passim.
196 So the telephone information given by the Foreign Secretary on 20-21 April 2006.
3. The Status of the Convention under Article 59 Para. 2 Sentence 2 of the Basic Law

For the World Heritage Convention to be a binding treaty of the Federal Republic of Germany under international law which is not covered by article 59 para. 2 sentence 1 of the Basic Law, it must be an administrative agreement in the sense of article 59 para. 2 sentence 2 of the Basic Law. That provision which must be seen in connection with article 59 para. 2 sentence 1 of the Basic Law reads that for administrative agreements the provisions concerning the Federal administration apply mutatis mutandis. This means that any other international treaties than those subsumed under article 59 para. 2 sentence 1 of the Basic Law are concluded and executed according to the provisions about the Federal administration. That the Federal Government, in fact, intended to conclude an administrative agreement is indicated by a reservation that was made when the instrument of ratification was deposited at UNESCO. At that time, the Federal Government declared that the Federal Republic of Germany should not be bound to the provisions of article 16 para. 1 of the Convention. This article rules the payment of regular contributions to the World Heritage Fund. To fulfil the financial obligations under that article, it would have been necessary according to German domestic law to write a new clause in the budget which has the legal form of a formal act; thus, a legislative measure would have been needed.

If the World Heritage Convention is to be qualified as an administrative agreement in the sense of article 59 para. 2 sentence 2 of the Basic Law, the question arises what is the status of its provisions in the domestic legal sphere. There does not seem to exist any explicit jurisdiction with regard to that point. The predominant view in legal literature is that administrative agreements do not automatically achieve domestic validity; rather, it is always required that there is a legal act of the executive.


R. Geiger, Grundgesetz und Völkerrecht, 3rd edition, 2002, 177; Niedobitek, see note 185, 154 et seq.; F.J. Jasper, Die Behandlung von Verwal-
same effect in the domestic sphere as has objective Federal law, they must, thus, be given validity by an ordinance which has the status of substantive law subordinated to adjective legislative acts; the ordinance is the legal order to apply the norm or rather the transformation act. However, as yet no ordinance concerning the World Heritage Convention has been passed, so that the Convention, thus, has not reached the status of objective law in the German domestic sphere.

Moreover, it is held that administrative agreements containing provisions that could be ruled domestically by administrative regulations are “ordered” for application by an official instruction or administrative regulation issued by the competent organs or authorities. Even administrative agreements that should have internal validity for the organ or authority itself and should not have direct legal effects in relation to citizens need such an act, for they only generate treaty obligations of the Federal Republic of Germany on the international level but not obligations of the particular organs and authorities which act domestically for the Federal Republic.202 The principle of dualism speaks in favour of this solution.

Hence, the legal nature of the introducing state act determines the administrative agreement’s legal quality in the domestic sphere.201 The World Heritage Convention has been adopted by a cabinet decision of the Federal Government, which has the legal quality of internal law, and, thus, shares this quality. After all, the Convention does not have the validity of formal Federal law. Accordingly, the Convention as such cannot bind the Federal states or the municipalities.

This does not preclude that the duties of the Federal Republic of Germany under international law have certain relevance in domestic adjudicative or administrative procedures to that extent that they must be observed by the courts and administrative authorities as “law” in the sense of article 20 para. 3 of the Basic Law. This provision reads in its second part that the executive and the judiciary are bound by the law. In jurisdiction, there does not yet exist a clear statement with regard to that aspect. However, the relevance of Germany’s international duties in the domestic sphere is a result of the principle of the Basic Law’s friendly attitude towards international law: as the Federal Constitutional Court has rightly pointed out several times, the Basic Law takes

200 Rojahn, see note 187, article 59, 56.
201 Kempen, see note 187, article 59, 107.
as a basis that the state, which is constituted by it, is integrated in the international legal system.\textsuperscript{202} Thus, the Basic Law obliges all kinds of state authorities to friendly behaviour towards international law, even those outside the general rules of international law which are covered by article 25 of the Basic Law, in particular international treaty law binding for Germany.\textsuperscript{203} An interpretation of domestic law which friendly or positively takes into consideration the provisions of international law is, to that extent required.\textsuperscript{204} The state authorities have to interpret the proper domestic law in the light of the international obligations of the Federal Republic.\textsuperscript{205} Furthermore, the principle of friendly behaviour towards international law, according to the view of the Federal Constitutional Court, obliges all state organs “to obey the norms of international law which are binding for the Federal Republic of Germany and to omit, as far as possible, violations.”\textsuperscript{206} The state and

\begin{footnotes}
\textsuperscript{202} BVerfGE 75, 1, 17; 108, 129, 137; 111, 307, 318; see in this context already the analyses of: C. Tomuschat, “Der Verfassungsstaat im Geflecht der internationalen Beziehungen”, VVDSrRL 36 (1978), 7 et seq. (16 et seq.); K. Vogel, \textit{Die Verfassungsentcheidung des Grundgesetzes für eine internationale Zusammenarbeit}, 1964, 35 et seq.


\textsuperscript{204} BVerfGE 63, 1, 20; A. Bleckmann, “Die Völkerrechtsfreundlichkeit der deutschen Rechtsordnung”, DOV 32 (1979), 309 et seq. (312 et seq.); S. Hobe, \textit{Der offene Verfassungsstaat zwischen Souveränität und Interdependenz}, 1998, 140; R. Hofmann, article 25, in: D.C. Umbach/ T. Clemens (eds), \textit{Grundgesetz (Mitarbeiterkommentar)}, Vol. 1, 2002, 20; Rojahn, article 25, see note 187, 24; Tomuschat, § 172, see note 185, 27; see also BVerfGE 59, 63, 89.


\end{footnotes}
also the municipal authorities are, thus, obliged to avoid everything that contravenes the international duties of the Federal Republic. Thus, the duties of the Federal Republic under arts 4 and 5 of the World Heritage Convention must be observed by the German domestic authorities when interpreting statutory law in the context of judicial or administrative procedures.

Finally, the question may arise whether the provisions of the Convention are not exceptionally irrelevant for the domestic sphere due to an infringement of the Constitution, i.e. of article 59 para. 2 sentence 1 of the Basic Law. The conclusion of an international treaty covered by article 59 para. 2 sentence 1 of the Basic Law is, under the perspective of constitutional law, only admissible on the basis of a treaty act. It is, thus, decisive how the definitional elements “relate to matters of Federal legislation,” which assign a treaty to the constitutional requirement of implementation by a treaty act, are to be understood. According to the common opinion in literature and the jurisdiction of the Federal Constitutional Court, a relation to matters of Federal legislation is only given if “in the concrete case an executive act requiring the participation of the legislative bodies will be necessary.”207 Thus, the rule in article 59 para. 2 sentence 1 of the Basic Law protects the legislator against being forced to take action with regard to the execution of international treaty law without his previous consent.208

When Germany ratified the World Heritage Convention, the Federation and the Federal states, as the Foreign Secretary investigated, had been in agreement that their legal situation was in accordance with the provisions of the Convention, so that actually no legislative activity need take place. If this assumption was correct, which we must suppose because there are no clues to the opposite, the World Heritage Convention does not have a sufficient relation to matters of Federal legislation according to the understanding of common opinion. As a consequence, when following that view, article 59 para. 2 sentence 1 of the Basic Law was not pertinent and the conclusion of the Convention had been possible, without the consent of the Parliament in form of a Federal act, as an administrative agreement according to article 59 para. 2 sentence 2 of the Basic Law. Thus, the World Heritage Convention was not ratified

207 BVerfGE 1, 372, 388.
by infringing the constitutional provision of article 59 para. 2 sentence 1 of the Basic Law. After all, the statement still stands that the duties under the Convention are to be considered by the state and municipal authorities within the framework and the bounds of the wording of the relevant Federal law or Federal state law provisions.

4. No Exclusion of the Duty to Consider the Convention by Article 34 (b) of the Convention

However, against a duty of the German Federal states and municipalities in general and the Federal State of North Rhine-Westphalia and the City of Cologne in particular to consider the obligations of the Federal Republic under arts 4 and 5 of the World Heritage Convention could be posited article 34 (b) of the Convention. This article stipulates with regard to federal constitutional systems that “with regard to the provisions of this Convention, the implementation of which comes under the legal jurisdiction of individual constituent States, countries, provinces or cantons that are not obliged by the constitutional system of the federation to take legislative measures, the federal government shall inform the competent authorities of such States, countries, provinces or cantons of the said provisions, with its recommendation for their adoption.” As we will see below, according to the domestic system of competences, the implementation or execution of arts 4 and 5 of the Convention is also a task of the German Federal states which have competences especially in the field of the protection of the substance of historic monuments.209 Thus, it is decisive whether the Federal states are obliged by the constitutional system of the Federation to take legislative measures. The common opinion rightly holds that there is such an obligation of the Federal states in Germany. That obligation is one aspect of the general principle of federal loyalty210 which is a guarantor of


the cohesion of the federal system. Consequently, article 34 (b) of the World Heritage Convention does not allow the German authorities to ignore the Convention when interpreting domestic law. The Federal State of North Rhine Westphalia and the City of Cologne had to consider the concerns of world heritage protection in their decisions relating to the city planning measures vis-à-vis Cologne Cathedral.

Since the World Heritage Convention is suffering from a lack of implementation in the German legal system and must, thus, only be considered within the framework and the bounds of the relevant Federal or Federal state law, we will examine in the following what progress the Federation and the Federal states have made with regard to the protection of cultural world heritage and where are possible starting points or rather links in domestic law for the provisions of the Convention.

V. The Execution of Competences with regard to World Heritage Protection on the Level of the Federal Republic of Germany

For the activities of the Federation and of the Federal states that are connected with, and based on, their prevailing legislative and administrative competences, it is necessary to give an overview of the division of competences in the field of cultural heritage protection in Germany. That division is laid down in the Basic Law. Unlike the Weimar Constitution of the year 1919,211 the Basic Law does not explicitly provide a Federal legislative competence in the field of the preservation of historic monuments. But there is a series of special titles for Federal legislation that can be linked to the protection of cultural heritage.

1. Legislative Competences and their Execution in the Field of World Heritage Protection

First, the Federation is competent in protecting German cultural treasures against removal abroad. Originally, that title was construed as a concurrent power and ruled in article 74 para. 1 No. 5 of the Basic Law; later, as a consequence of the Amendment of the Basic Law of 27 October 1994,\(^212\) it was transferred into the catalogue of the Federation's powers to pass framework legislation (see article 75 para. 1 No. 6 of the Basic Law). That reduction of Federal power aimed at strengthening the cultural sovereignty of the Federal states.\(^213\) A second important competence of the Federation is the exclusive power to legislate on foreign affairs and defence, including the protection of the civilian population (article 73 No. 1 of the Basic Law). The Federation is, furthermore, competent in all matters of private law (article 74 para. 1 No. 1 of the Basic Law) which entitles it to regulate the ownership of cultural assets. Other relevant Federal competences are the concurrent powers in the fields of war graves (article 74 para. 1 No. 10a of the Basic Law) and land law (article 74 para. 1 No. 18 of the Basic Law). The land law includes the general law on town planning\(^214\) and the law on historic monument protection in urban planning processes.\(^215\) Additionally, there exist some indirectly relevant competences concerning environmental law and the law on the care for the countryside (article 74 para. 1 No. 24 and article 75 para. 1 No. 3 and 4 of the Basic Law).\(^216\) Apart from these explicit powers, there are two implicit powers: bringing cul-

\(^{212}\) BGBl. 1994 I, 3146.


\(^{214}\) BVerfGE 3, 407, 424; 65, 283, 288; 77, 288, 299.


\(^{216}\) See in this context Fechner, see note 193, 21; W. Bülow, Rechtsfragen flächen- und bodenbezogenen Denkmalschutzes, 1986, 74, 96 et seq.
tural assets back to Germany, which had been removed abroad in times of war, falls into the Federation’s competence by virtue of the nature of the subject.\textsuperscript{217} The same goes for the power to finance culture, especially to support cultural treasures of national importance.\textsuperscript{218}

In all other fields of direct and indirect protection of cultural heritage it is not the Federation but the Federal states which are competent (cf. article 70 para. 1 of the Basic Law stating that the Federal states have the power to legislate insofar as the Basic Law does not confer legislative powers on the Federation). This is of particular concern for the protection of movable and immovable cultural treasures against modification or deterioration, and the continuing care of them. As already mentioned, the protection of historic substance as such falls into the competence of the Federal states.\textsuperscript{219} Since the World Heritage Convention mainly has the purpose of protecting world cultural heritage in its substance, the Federal states’ competence was touched when the Federal Republic of Germany became State Party to the Convention. That is the reason why the Federal Government consulted the Federal states before ratifying the World Heritage Convention (cf. para. 3 of the Agreement of Lindau). The Federal states, furthermore, prepare, for instance, the national lists for the nomination of properties and present them to the Federation.\textsuperscript{220}

\begin{footnotes}


\footnote{\textsuperscript{219} See above in the text, at footnote 209.}

\footnote{\textsuperscript{220} Cf. Vorläufige Liste der Kultur- und Naturgüter, die in den Jahren 2000-2010 von der Bundesrepublik Deutschland zur Aufnahme in die UNES-}
adequately in the German legal sphere, the Federal states would, thus, play internally, within the federal structure of Germany, an important role with regard to transformation and execution of the international obligations and standards that result from the World Heritage Convention,\footnote{Cf. Odenbach, see note 157, 260; Schweitzer, see note 208, 451 et seq.; R. Streinz, \textit{Internationaler Schutz von Museumsgut}, 1998, 65.} but even without the implementation they were not at all idle, as we will see below.

Moreover, the Federal legislator fulfils the Federal Republic of Germany’s obligations in particular under article 5 of the World Heritage Convention by a series of legal acts which enforce the concerns of world heritage protection announced by the Convention. For example, the Federal Parliament decided to pass the Act on Considering the Protection of Historical Monuments in Federal Law of 1 June 1980\footnote{BGBl. 1980 I, 649.} which did not have an independent area of application but amended or rather expanded Federal regulations relevant to public security and planning.\footnote{Cf. M. Backhaus, \textit{Denkmalrecht in Niedersachsen}, 1988, 26 et seq.} In most cases, the protection of historic sites was, thereby, explicitly declared a public concern that must be taken into consideration in the planning process, where competing concerns must be weighted and balanced against each other. While the reform, largely, did not change the substantial legal situation, it led, at least, to a clarification.\footnote{Cf. Fechner, see note 193, 22.} Furthermore, it had procedural consequences, for the authorities that are primarily competent in the protection of historic monuments, since then, had to be involved and heard in many land-related planning procedures. Moreover it was important that the reform had the function of a signal that historic monuments are of public interest and should play a role in planning processes which principally focus on the future and not on the past.\footnote{Odenbach, see note 157, 291.} Meanwhile, some acts have been replaced, for instance, the Federal Railway Act in 1993 by the General Act on Railways\footnote{BGBl. 1993 I, 2378.} and the Telegraphic Ways Act in 1996 by the Tele-
The succeeding norms, nevertheless, still call for taking account of historic monument protection concerns during the planning process, though only as one aspect of “public concerns” (sec. 18 para. 1 sentence 1 General Act on Railways) or “urban development concerns” (sec. 68 para. 3 sentence 2 Telecommunication Act) which is a very general phraseology. Hence, one could say that the norms of the World Heritage Convention are, to a certain extent, expressed indirectly by the provisions of planning law.

However, the great act on municipal development planning, the Federal Building Act, since the middle of the eighties the Town and Country Planning Code or rather Building Code, was not amended during the reform of the year 1980. The reason was that, not least against the background of the international negotiations about the protection of world heritage and the approaching ratification of the World Heritage Convention, in 1976 the protection of historic monuments had already been integrated into the law on development plans for local real estate. That measure, essentially, also had a merely affirming nature because jurisdiction had acknowledged even before that time that the protection of historic sites is a public concern which cities and towns have to consider when making plans about the future use of grounds and the development of urban areas. Later, the rules about the protection of historic monuments were transferred from the Federal Building Act into the Building Code of 1986 and partially expanded. The most important provision of the actual Building Code is section 1 para. 6 No. 5 reading that in the preparation of land-use plans attention is to be paid to the requirements relating to building culture, protection and preservation of historic monuments, to parts of a village or town, streets and public places of historic, artistic or archi-

227 BGBI. 1996 I, 1120 (see now BGBl. 2004 I, 1190).
228 Cf. Odendahl, see note 157, 291.
229 Gesetz zur Änderung des Bundesbaugesetzes of 18 August 1976, BGBI. 1976 I, 2221; see in detail about that reform Hammer, see note 193, 341 et seq.
231 Gesetz über das Baugesetzbuch of 8 December 1986 (BGBl. 1986 I, 2191).
232 See the rules concerning the protection of historical monuments in the initial version of the Building Code W. Kleiber, “Baugesetzbuch und Denkmalschutz”, Die alte Stadt (DAS) 13 (1986), 305 et seq.
233 BGBl. 2004 I, 2414.
tectural importance which warrant conservation.234 Furthermore, section 1 para. 5 of the Building Code rules that the development plans shall contribute to preserve, under aspects of building culture, the urban character of sites and the appearance of the locality or the landscape. Finally, section 35 paras 2 and 3 No. 5 of the Building Code stipulate that in undesignated outlying areas, for which a land-use plan does not exist, non-privileged development projects may be permitted as exceptional cases provided that their execution and use do not conflict with any public interests; such a conflict exists in particular where the development project is in conflict with the concerns of the protection of sites of historic interest or mars the overall appearance of the locality or of the landscape.235 These provisions enable the municipal planning authorities, so to say in a “well-known legal terrain”, to consider extensively the concerns of the World Heritage Convention in their planning processes when the Federal Republic’s obligations under arts 4 and 5 of the Convention are read into the norms of planning law concerning the weighing and balancing of interests. By the way, even without the protection of historic monuments being explicitly mentioned in the norms of planning law, Germany’s international obligations must be considered at least as a public concern or interest according to section 1 para. 7 of the Building Code because of the Constitution’s principle of friendly behaviour towards international law236 (see also sec. 1 para. 6 of the Building Code saying that the explicitly mentioned concerns must be considered: “in particular” which shows that the enumeration is not closed). Section 1 para. 7 of the Building Code contains the general rule that in preparing land-use plans, (all relevant) public and private interests are to be duly weighed.

Apart from planning law, many Federal provisions regulating the prerequisites for granting special permits read that permission is not allowed to be granted if the project for which it is applied will endanger

234 Concerning public interest in the conservation of historic monuments see J. von Faber du Faur, Der Begriff des öffentlichen Erhaltungsinteresses im Denkmalschutzrecht, 2004, 7 et seq.


236 See above in the text at footnote 202.
public welfare or important public concerns. Accordingly, permissions could or rather should be refused if the project will violate or harshly contravene obligations of the Federal Republic of Germany under international treaty law.

2. Administrative Competences in the Field of World Heritage Protection

Irrespective the Federation’s power to legislate the protection of historic monuments with regard to the specific requirements of town, city or other kind of planning, the exercise of governmental powers and the discharge of governmental functions are incumbent on the Federal states insofar as the Basic Law does not otherwise prescribe or permit (see article 30 of the Basic Law). This means that the administrative activities including both the execution of laws and other forms of administration are, in principle, a matter and concern of the Federal states and not of the Federation. That is also true for the field of heritage protection, regardless of whether the execution of national or international norms is concerned; administrative and legislative competences are, insofar, not congruent.

According to the general rule of article 83 of the Basic Law, the Federal states execute Federal laws as matters of their own concern insofar as the Basic Law does not otherwise provide or permit. Town and city planning in general, that is ruled in the Building Code, and the protection of cultural world heritage within the context of that planning in particular, are not subject to an exemption provision. As a consequence,

237 See in this context the overview by W. Durner, Konflikt v ü m l i c h e r P l a n n u n g e n . V e r f a s s u n g s - , v e r w a l t u n g s - u n d g e m e i n s c h a f t s r e c h t l i c h e R e g e l n f ü r d a s Z u s a m m e n t r e f f e n k o n k u r r i e r e n d e r p l a n e r i s c h e n R a u m a n s p r ü c h e , 2005, 270 et seq. Examples are, i.e., the permission to use a stretch of water according to section 6 para. 1 of the Law on Water Resources Management which may be relevant in cases where industrial buildings will be erected next to a river or a lake, or to build an airport according to section 6 para. 2 of the Air Traffic Act.

238 Cf. with regard to the permission according to water law, e.g., G. M. Knopp, in: F. Siedler/ H. Zeitler/ H. Dahme (eds), Wasserhaushaltsgesetz und Abwasserabgabegezetz (loose-leaf book; state: July 2005), § 6 WHG, 7 et seq., 9a.

239 Cf., e.g., H. Maurer, Staatsrecht, Vol. 1, 3rd edition, 2003, § 18, 3 et seq.

240 Cf. Odendahl, see note 157, 261.
with regard to administration, the Federal states exercise the rules in the Building Code and of other Federal acts concerning the protection of world heritage as a matter of their own concern.

However, the Federal states are not totally free to do what they want. Instead, the Federation has certain rights to supervise and influence the Federal states to ensure that they execute the Federal laws in the right way. These rights or rather competences are laid down in article 84 of the Basic Law. Preventive means to guide the Federal states are general administrative rules which contain abstract regulations with regard to a multitude of cases\textsuperscript{241} (cf. article 84 para. 2 of the Basic Law) and individual instructions which are binding orders on how to act in a particular case\textsuperscript{242} (cf. article 84 para. 5 of the Basic Law). Individual instructions are, though, only admissible as a special exception, for they are a serious infringement of the Federal states’ self-responsibility to execute the Federal laws.\textsuperscript{243} There must be an explicit authorization of the Federal Government in a Federal law requiring the consent of the Federal Council to issue individual instructions (article 84 para. 5 sentence 1 of the Basic Law). Furthermore, the individual instructions must be addressed to the highest authorities of the Federal state (which are the Federal state’s ministers) unless the Federal Government considers the matter urgent (article 84 para. 5 sentence 2 of the Basic Law). That requirement reveals the remaining respect towards the organizational power of the Federal states.\textsuperscript{244} Hence, the Federation is, in principle, not allowed to manipulate the local authorities. In any case, legal authorizations to issue individual instructions are rare in practice. There are some in the law on military service and in migration law, but not in the law on town and city planning.\textsuperscript{245} Therefore, the Federation is not empowered to issue directly to a city administration, as a means of preventive supervision, individual instructions concerning city planning measures which (could) endanger world heritage monuments.


\textsuperscript{242} Cf., e.g., T. Groß, article 84, in: K.H. Friauf/ W. Höfling (eds), \textit{Berliner Kommentar zum Grundgesetz}, Vol. 2 (loose-leaf book; state: December 2005), 35.

\textsuperscript{243} Cf. Groß, see note 242, article 84, 35 with further references.

\textsuperscript{244} A. Dittmann, article 84, in: Sachs, see note 189, 24.

\textsuperscript{245} Cf. Maurer, see note 239, § 18, 13; Dittmann, see note 244, article 84, 25 with footnote 99.
As means of repressive supervision the Constitution names the sending of commissioners (article 84 para. 3 sentence 2) and the formal reprimand (article 84 para. 4). Both procedures require that there are clues for concrete violations of Federal law. The execution of Federal law by the Federal state or local authorities must be in non-accordance with the applicable Federal rules; the Federal Government is, thus, restricted to a pure control of legality. It is not entitled to examine whether the measures or activities of the Federal state or of the local authority are suitable with regard to the purposes of the Federal norm or whether they are appropriate. Furthermore, the scopes for evaluation and discretion that are given by the norm have to be respected. Commissioners may be sent by the Federal Government to the highest authorities of the Federal state and, with their consent or, if this consent is refused, with the consent of the Federal Council, also to subordinate state and municipal authorities. The commissioners who have the position of help organs of the Federal Government can make examinations by inspecting files, questioning public servants, or other means of gathering information, but they are not entitled to give instructions; their job is merely investigative to clarify the facts.

If the Federal Government finds shortcomings in the execution of Federal law in the Federal state, it may formally reprimand the state for having violated the law. If the Federal state, thereafter, corrects the insufficient legal situation, the procedure of Federal supervision ends. But if the Federal state holds that the formal reprimand was not well-founded and does not make any corrections, both parties can apply at the Federal Council to decide formally whether the Federal state has acted unlawfully (article 84 para. 4 sentence 1 of the Basic Law). If the Federal Council does not see any fault in the execution of Federal law or does not follow the application of the Federal Government in all points, the Federal Government can, on the one hand, refer the so-

247 Cf. S. Broß, article 84, in: von Münch/ Kunig, see note 215, 31; Hermes, see note 246, article 84, 75; Maurer, see note 239, § 18, 13.
248 Cf. Maurer, see note 239, § 18, 13.
249 Dittmann, see note 244, article 84, 28.
called Federation-Federal states-dispute to the Federal Constitutional Court according to article 84 para. 2 of the Basic Law in conjunction with sections 13 No. 7, 68 et seq. of the Federal Constitutional Court Act. That litigation, in case of success and continuing refusal of the Federal state, would clear the path to the execution of Federal coercion according to article 37 of the Basic Law.\textsuperscript{251} On the other hand, the Federal Government may take the view of the Federal Council and drop the affair. In that case the procedure is also brought to an end. Otherwise, if the Federal Council confirms the shortcomings claimed by the Federal Government, there are three possibilities:\textsuperscript{252} first, the Federal state can correct the fault completely; then the procedure ends. Second, the Federal state can apply at the Federal Constitutional Court (cf. article 84 para. 4 sentence 2 of the Basic Law; sections 13 No. 17, 68 et seq. of the Federal Constitutional Court Act). Third, if the Federal state does not make any corrections and also fails to apply at the Federal Constitutional Court within the period of one month according to section 70 of the Federal Constitutional Court Act, the Federal Government can exercise Federal coercion according to article 37 of the Basic Law. That provision reads that if a Federal state fails to comply with its obligations of a Federal character imposed by the Basic Law or another Federal law, the Federal Government may, with the consent of the Federal Council, take the necessary measures to enforce such compliance by the Federal state by way of Federal compulsion. To carry out such Federal compulsion the Federal Government or its commissioner has the right to give instructions to all Federal states and their authorities. Besides, the Federal Government, for its part, can apply to the Federal Constitutional Court according to article 93 para. 1 No. 3 of the Basic Law in conjunction with sections 13 No. 7, 68 et seq. of the Federal Constitutional Court Act and, thereby, clarify the legal situation with regard to the Federation-Federal state-dispute.\textsuperscript{253} Since the procedure of the formal reprimand is complicated and the Federal government as well as the Federal states usually at first try to find an informal, mutual solution for their disputes, the supervision model according to article 84 para. 4 of the Basic Law is not used very often in practice. Moreover,

\textsuperscript{251} Cf. Dittmann, see note 244, article 84, 29 et seq.; C. Pestalozza, Verfassungsprozeßrecht, 3rd edition, 1991, § 9, 16 et seq.
\textsuperscript{252} Cf. Hermes, see note 246, article 84, 83; Pieroth, see note 215, article 84, 14.
\textsuperscript{253} Cf. Dittmann, see note 244, article 84, 29 et seq.; Hermes, see note 246, article 84, 83; Lerche, see note 250, article 84, 174; Pieroth, see note 215, article 84, 14; Groß, see note 242, article 84, 44; D. Zacharias, Staatsorganisationsrecht, 2nd edition, 2001, 130 et seq.
the addressee of the measures of the Federal Government is always and exclusively the Federal state. This applies even if a town or city has violated Federal law. The shortcomings of the local authority are attributed to the Federal state, for in the relationship between Federation and Federal states the local level is seen as a part of the organizational structure of the Federal state.254 The Federation has no immediate competence to supervise the local authorities and to force them to act in a certain way. It is, thus, not allowed to direct legally binding measures against a city or town.

After all, in the Cologne Cathedral case, the Federation, because of a lack of competence, was not entitled to request the City of Cologne to change its plans concerning the high-rise buildings on the right bank of the Rhine. Rather, it had to direct all measures against the Federal State of North Rhine-Westphalia which had to transform them into its own measures of state supervision over the municipalities. Hence, even the informal letter of the Foreign Office of the Federal Republic to the Mayor of the City of Cologne could be regarded as problematic under aspects of responsibility, because it ignored both the position of the Federal state and the stipulated sequence in which an official contact, whether having legally binding effect or not, must take place. However, this view seems to be too formalistic. The letter was not an instrument of the arsenal of formal instruments of state supervision; it was a mere appeal without legally binding consequences, revealing that the matter is of importance for the Federation. The Federal Government is entitled to make such a statement in relation to a municipality.

It is, though, surprising that the Federation or rather the Federal Government obviously did not take any supervisory steps against the Federal State of North Rhine-Westphalia. The Federal Government had the competence to force the state, to whom the unlawful actions of the City of Cologne are attributed, to comply with Federal law. Moreover, it is the task of the Federal states to supervise the local authorities. As the Federal Constitutional Court had already stated in an early decision, the Federal states must ensure, also and not least in relation to the Federation, by the means of their state supervision, that the municipal administrations execute the Federal laws lawfully.255 It may be doubted whether this also applies for the international treaties concluded by the

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254 Cf. H.P. Bul, article 84, in: Denninger/ Hoffmann-Riem/ Schneider/ Stein, see note 203, article 84, 54; Trute, see note 250, article 84, 53.
255 See BVerfGE 8, 122, 137; in literature, e.g., Hermes, see note 246, article 84, 78; Lerche, see note 250, article 84, 161; Trute, see note 250, article 84, 53.
Federation. Thus far no court has explicitly addressed the issue of treaty norms not yet implemented in the domestic legal order. But the elaborations on the principle of friendly behaviour towards international law suggest that the supervisory instruments find application. It would be bizarre if the Federation had no means to exhort the Federal states to comply with international obligations that had been made by the Federal Republic in accordance with the law.256

VI. The Execution of Competences with regard to World Heritage Protection on the Level of the Federal State of North Rhine-Westphalia

Many of the legal aspects constituting the legislative and administrative competences of the Federal states in the field of world heritage protection have already been mentioned in order to separate the Federation’s competences from those of the Federal states. Therefore, it is simply necessary to explain how the Federal states have activated, and made use of, their competences, in particular, in relation to the local level. At first, many Federal states took up the protection of historic monuments in their constitutions.257 So did the Federal State of North Rhine-Westphalia. Article 18 para. 2 of the Constitution of North Rhine-Westphalia258 reads that the memorials of art, of history, and of culture, the landscape, and the natural monuments are under the protection of the state, the municipalities and the districts. Thus, the protection of historic monuments is declared to be an objective of the state and municipal activities.

1. Legislative Measures to secure the Protection of Historic Monuments

Moreover, all Federal states passed acts on the protection of historic monuments.259 These acts contain very important provisions for immovable cultural assets. The Protection of Historical Monuments Act

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256 In that direction Dittmann, see note 244, article 84, 27.
258 GV NRW 1950, 127.
259 Cf. Odendahl, see note 157, 297 et seq.
of North Rhine-Westphalia of 11 March 1980, for instance, rules in its section 1 that historic monuments shall be protected, looked after, used sensibly, and investigated scientifically. They shall be made accessible for the public as far as possible and reasonable (para. 1). It added that the concerns for the protection of, and care for, historic monuments shall be taken into consideration in public planning processes. The authorities competent for the protection and care of historic monuments shall be involved in these processes in due time and shall also be involved in the balancing, in a way that the conservation and use of historic monuments and parts of monuments and the appropriate arrangement of their surroundings are possible. On the other hand, the authorities for their part shall work towards both the inclusion of the historic monuments in regional development planning and state planning, urban development and landscape conservation, and the devotion of these monuments to an appropriate use (para. 3). The Act defines in section 2 para. 1 sentence 1 historic monuments very broadly as such properties, greater parts of properties, or parts of properties which have to be preserved and used by reason of public interest. A public interest exists if the properties are important for the history of man, for towns and settlements or for the development of working places and production facilities and if there are artistic, scientific, folkloric or urban reasons justifying their conservation and use (sec. 2 para. 1 sentence 2 of the Protection of Historical Monuments Act).

With regard to the administrative competences section 1 para. 2 of the Protection of Historical Monuments Act stipulates that the protection of, and care for, historic monuments is a task of the state, of the municipalities and of the districts according to the detailed principles laid down in that Act. Section 11 of the Act rules that the municipalities, the districts and the authorities for the reallocation of agricultural land are obliged to guarantee that the immovable historic monuments gain protection in urban development planning, landscape planning and making of plans concerning the reallocation of agricultural land. According to section 20 para. 1 of the Act, the supreme authority in matters of the protection of historic monuments is the Minister who is competent for the preservation of historic monuments; the intermediate authority is the county government (cf. sec. 8 of the State Organization Act of North Rhine-Westphalia), with regard to the cities (which

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260 GV NRW 1980, 226; see about this act, e.g., J. Berndt, Internationaler Kulturgüterschutz, 1998, 93 et seq.
261 GV NRW 1962, 421.
themselves form a district); otherwise the intermediate authority is the
(municipal) districts; the low authorities are the municipalities. Fur-
thermore, para. 3 of section 20 provides that the authorities for the pro-
tection of historic monuments are special regulatory authorities; their
tasks are regarded as such to avert dangers. Thus, it is clear that the
tasks of the authorities competent for the protection of historic monu-
ments fall into the category of the so-called obligatory tasks to be ful-
filled according to state instruction, (see sec. 3 para. 1 of the Public Se-
curity Authorities Act of North Rhine-Westphalia\textsuperscript{262}), which is impor-
tant for the scale and the means of state supervision of the municipali-
ties (cf. sec. 9 et seq. of the Public Security Authorities Act). Section 9
of the Protection of Historical Monuments Act rules, \textit{inter alia}, that
permission of the lower authority is required if a person wants to erect,
change or dispose buildings in the direct vicinity of a historic monu-
ment and if thereby the appearance of the monument will be disturbed.
Thus, the Act recognizes that a historic monument can also suffer harm
if it is not changed in its substance but if the view is obstructed. Finally,
section 38 of the Protection of Historical Monuments Act points out
the necessity of cooperation with the Churches and (other) religious
communities in cases concerning a monument that serves religious pur-
poses. The provision reads that cooperation with the Churches and re-
ligious communities with regard to the protection of, and care for, their
historic monuments shall continue; the state and municipal authorities
shall recognize the issue of religious service that has been claimed by
the churches and religious communities, when deciding about these
monuments.

Apart from the law on the protection of historic monuments, the
construction police law of the Federal states plays an important role for
the protection of immovable cultural assets. The construction law of the
states mainly has the purpose of averting dangers. Furthermore, it tradi-
tionally contains the requirements for construction design and, in re-
cent times, also provisions of social and environmental law.\textsuperscript{263} The
norms about construction design can be useful for the protection of
valuable building stock.\textsuperscript{264} All acts of the Federal states about construc-
tion police law contain general clauses saying that buildings shall not
have disfiguring effects. In North Rhine-Westphalia this is ruled in sec-

\textsuperscript{262} GV NRW 1980, 528.
\textsuperscript{263} See the overview given by W. Brohm, \textit{Öffentliches Baurecht}, 3rd edition,
2002, 41 et seq.
\textsuperscript{264} Cf. Odendahl, see note 157, 300.
Buildings must be in harmony with their surroundings so that they do not disfigure neighbouring buildings or the view of a street, the townscape, or the natural scenery (sec. 12 para. 1 of the Construction Police Act). Thereby, the characteristics of the surroundings, which are worthy for preservation, must be taken into consideration (sec. 12 para. 2 sentence 2 of the Construction Police Act). This means for the Cologne Cathedral case that the competent authority for granting building permits had to consider the question of harm to the Church that would be caused by the skyscrapers on the right bank of the Rhine obstructing the view of the monument. The competent authority for granting building permits is, by the way, the city, large or middle seized town or the district which functions as the local authority charged with averting dangers (cf. sec. 60 para. 1 No. 3 and para. 2, 61, 62 and 75 of the Construction Police Act). Here it was the City of Cologne as the local authority in which the Church is situated (cf. sec. 60 para. 1 of the Construction Police Act in conjunction with section 4 para. 1 of the Public Security Authorities Act). The organizational structures and hierarchies are, thus, compatible with those of the authorities ruled in the Protection of Historical Monuments Act.

As on the Federal level, next to the norms explicitly ruling the protection of historic monuments, there are other provisions which can, nevertheless, be made effective starting points for the fulfilment of the Federal Republic’s duties under the World Heritage Convention. In particular, section 75 para. 1 sentence 1 of the Construction Police Act obliges the competent authority to grant a building permit only in such cases where the construction project does not contravene any provisions of public law. An important provision of public law in that context is the rule of weighing and balancing in planning processes which is laid down in section 1 para. 7 of the Federal Building Code, by which the concerns of world heritage protection are introduced into the procedure of planning and which should be interpreted according to the principle of friendly behaviour towards the international norms of the World Heritage Convention. This has recently, at least indirectly, also been acknowledged by the Administrative Court in Meiningen in a decision concerning the permissibility of a wind energy plant that a private investor wanted to erect on a mountain opposite the famous castle Wartburg in Thuringia which has the status of world heritage under the World Heritage Convention. The Court pointed out that the Wartburg

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265 GV NRW 2000, 255.
“being cultural world heritage of the UNESCO is, to an outstanding extent, worthy for protection, regardless of the question whether there is a reason to fear that this status will be deprived because of the wind energy plant.”\textsuperscript{266} Besides, the Court mentioned the importance of tourism as a factor for balancing in the context of planning processes, which may be also relevant for the case of Cologne Cathedral.\textsuperscript{267} After all, the law of the state of North Rhine-Westphalia contains rules that ensure that the concerns of world heritage protection and, thus, the provisions of the World Heritage Convention are considered by the state authorities and also by the cities, towns and districts in North Rhine-Westphalia. Accordingly, regardless of the failed direct implementation of the World Heritage Convention in the German legal sphere, there is, to a certain extent, a legal progression from the level of the UNESCO over the Federal Republic of Germany and the Federal State of North Rhine-Westphalia to the local authorities. This line does not only have a legislative aspect; moreover, it is replenished by an administrative aspect, for there are sufficient possibilities of state supervision of the municipalities that can be used as instruments to ensure that a town, city, or district does not act against the Federal Republic’s obligations under arts 4 and 5 of the World Heritage Convention.

\section*{2. State Supervision of the Municipalities}

The Federal states will regularly transform a formal reprimand of the Federal Government into their own supervisory measures towards the municipalities, unless they hold that the reprimand is, from the very beginning, not well-founded. Furthermore, the Federal states will, under normal circumstances, react to an informal advice about an unlawful behaviour of a municipality which may be given by a Federal authority. Finally, the Federal states are not only entitled, but also obliged to intervene \textit{ex officio} and without the necessity of a previous request by the Federation if there is a town or a district seriously violating Federal law.

\textsuperscript{266} Administrative Court in Meiningen, Decision of 25 January 2006, reference number 5 E 386/05 Me, sub II 3 c bb.

This obligation can be derived from the principle of Federal loyalty that is recognized in Constitutional law.\textsuperscript{268}

However, a still open question is how it can be guaranteed in detail that the local authorities really behave in accordance with Federal law and Federal state law. The answer which has to do with the executive competences of the Federal state of North Rhine-Westphalia is given by the provisions concerning the state supervision of the municipalities. These provisions distinguish between three types of supervision: general supervision in the field of self-governmental tasks, special supervision in the field of the obligatory tasks to be fulfilled according to state instruction, and, finally, qualified supervision in the field of tasks that have to be fulfilled by order of the state (cf. sec. 13 of the State Organization Act)\textsuperscript{269} that is not relevant in the Cologne Cathedral case. Thus, the kind and scale of state supervision of the municipalities depend on the qualification or category of the prevailing task.

As a consequence, to consider measures of state supervision it must, first, be clear what kind of task is affected; only afterwards can a statement be made about the available means of supervision. In the Cologne Cathedral case, the protection of historic monuments according to the provisions of the Protection of Historical Monuments Act falls, as we have seen, into the category of the obligatory tasks to be fulfilled according to state instruction. So do the activities based on the Construction Police Act, as they are qualified as tasks to avert dangers (such


dangers caused by the non-professional construction of a building which could collapse and, by doing so, hurt or even kill people). Hence, granting a building permit for the skyscrapers on the right bank of the Rhine by the City of Cologne, which is ruled in section 75 of the Construction Police Act, stands under special state supervision.

The situation is different with regard to the preparation or rather drawing and writing of land-use plans according to the provisions of the Federal Building Code. Section 1 para. 3 of the Federal Building Code reads that the municipalities have to prepare land-use plans as soon as and to the extent that these are required for urban development and regional policy planning. Additionally, section 2 para. 1 sentence 1 of the Building Code rules that the municipalities adopt land-use plans by virtue of their own responsibility. This reveals that preparing and adopting land-use plans is (under certain conditions) an obligatory task in the field of self-government. That result corresponds with the planning autonomy as part of the municipal autonomy granted to the cities, towns and districts by article 28 para. 2 of the Basic Law. Hence, when a municipality, for instance the City of Cologne, is preparing land-use plans, it only falls under general state supervision.

According to section 119 para. 1 of the Municipality Act of the State of North Rhine-Westphalia, the general supervision of the municipalities in the field of self-governmental tasks empowers the state to check whether the municipalities are administered in accordance with the law. Thus, the general supervision is a mere control of legality; an examination whether the municipal activities are reasonable or appropriate does not take place (see article 78 para. 4 sentence 1 of the

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271 GV NRW 1994, 666.

The competent state authority of first instance for executing general supervision of municipalities, which is in the case of districts and cities, like the City of Cologne, the county government, in all other cases the district authority (cf. sec. 120 paras 1 and 2 of the Municipality Act), has several repressive means at its proposal. These means may be applied gradually, according to the principle of the priority of the least intensive infringement. First, the state authority can demand that the municipality presents the files, gives an oral or written report, or sends protocols of town or city council decisions (cf. sec. 121 of the Municipality Act). Second, the authority can request the mayor of the city or town to complain to the city or town council that it has made an unlawful decision, or complain itself to the city or town council that it has made an unlawful decision, or complain itself to the city or town council that it has made an unlawful decision, or complain itself to the city or town council that it has made an unlawful decision, or complain itself to the city or town council that it has made an unlawful decision.
mayor acted unlawfully (cf. sec. 122 para. 1 sentence 1 and para. 2 sentence 1 of the Municipality Act). That complaint shall give the affected municipal organ the chance to correct its shortcomings by itself. The state authority can, furthermore, order that measures, which had been omitted contrary to a duty, must be taken by the competent municipal organ (cf. sec. 123 para. 1 of the Municipality Act). Third, the authority can cancel the unlawful measures (cf. sec. 122 para. 1 sentence 2 and para. 2 sentence 4 of the Municipality Act) and, in case of omission, carry out the obligatory measures in place of the municipality (cf. section 123 para. 2 of the Municipality Act). Fourth and finally, the authority can appoint a representative who may attend certain or even all tasks of the municipality (cf. sec. 124 of the Municipality Act), or the authority can dissolve the municipal council (cf. sec. 125 of the Municipality Act). Thus, the state authority competent in the general supervision of the municipalities, which in the Cologne Cathedral case is the County Government of Cologne, has various possibilities to react if a municipality violates Federal or Federal state law. The County Government of Cologne, for instance, could have complained to the Mayor of the City of Cologne that the City Council did not consider sufficiently either the concerns of historic monument protection mentioned in section 1 para. 6 No. 5 of the Federal Building Code nor the Federal Republic’s duties under arts 4 and 5 of the World Heritage Convention which form a public concern in the sense of section 1 para. 7 of the Building Code when preparing the land-use plan for the right bank of the Rhine. By doing so, it would have prevented the land-use plan which was passed in the form of a local statute (cf. sec. 10 para. 1 of the Federal Building Code) from coming into force (cf. sec. 122 para. 1 in conjunction with sec. 54 para. 2 sentence 2 of the Municipality Act) with the effect that, later, no building permit for the skyscrapers could have been based on it.

Regardless, according to the wording of the norms enabling state supervision, the state authority is not in any case obliged to exercise its repressive powers concerning the supervision of the municipalities. The state supervisory authority may take measures. This means that all measures of supervision are, in principle, in the authority’s discretion. The supervising authority can react if a city, town, or district violated the law but it is not forced to intervene; furthermore, it has discretion

\[278\] Cf. Knemeyer, see note 275, JuS 40 (2000), 521 et seq. (523); id., Bayerisches Kommunalrecht, 10th edition, 2000, 413 et seq.; Zacharias, see note 269, 290 et seq.
with regard to the choice of an appropriate measure in case of intervention.\textsuperscript{279} These two aspects are an expression of the so-called opportunity principle which, according to the common opinion, moulds the rules concerning state supervision of the municipalities.\textsuperscript{280} By making use of its discretion, the state authority has to find a proportionate balance between the constitutionally granted autonomy of the municipality and the conflicting interest of the public in disposing the violation of the law (see also sec. 11 of the Municipality Act). Whether there is any public interest in a state intervention in a single case and to what extent a local self-government remains healthy despite the violation of the law cannot be answered abstractly. The state authority has to consider the general behaviour of the municipality, type, scale and effects of the violation, the affected public interests, and the factual and legal possibilities to recreate lawful conditions.\textsuperscript{281}

However, the opportunity principle may be reduced in the case of a violation of the international duties of the Federal Republic because this would affect the fulfilment of legal obligations that have been undertaken towards the international community. Moreover, a national or rather domestic authority cannot ignore such obligations. Furthermore, one could argue that a violation of Federal law must lead to supervisory measures of the Federal state authority, at least if the municipality made a glaring error by executing the law, which has enormous negative effects.\textsuperscript{282} The reason is that a violation of Federal law always touches the Federal interests, and the Federation is dependent on the Federal states persecuting such a violation, for it does not have the instruments at hand to supervise the municipalities. The Federal states are obliged to exercise the Federation’s concerns and interests in that respect, which is also an aspect of the previously mentioned principle of Federal loyalty.\textsuperscript{283}

\textsuperscript{279} Cf. Federal Constitutional Court, DÖV 11 (1958), 748 et seq.; BVerfGE 8, 122; Ipsen, see note 275, 827; M. Nierhaus, Kommunalrecht für Brandenburg, 2003, 260; R. Stober, Kommunalrecht in der Bundesrepublik Deutschland, 3rd edition, 1996, 154; M. Wehr, “Das Ermessen der Rechtsaufsicht über Kommunen”, BayVBl. 50 (2001), 705 et seq. (706 et seq.).

\textsuperscript{280} Cf. Zacharias, see note 269, 296 et seq. with further references also to the dissenting opinion.

\textsuperscript{281} See Zacharias, see note 269, 297.

\textsuperscript{282} Cf. Nierhaus, see note 279, 263.

\textsuperscript{283} See above in the text, at footnote 210.
Against this background and given that the City of Cologne violated Federal law, i.e. the provisions of the Building Code, when preparing the land-use plan concerning the right bank of the Rhine, and, thereby, acted in breach of the Federal Republic’s obligations under arts 4 and 5 of the World Heritage Convention, the County Government of Cologne’s discretion with regard to the decision whether to intervene or not was reduced to zero; the County Government had to take measures against the City of Cologne. It was only free with regard to the choice of an appropriate instrument for supervision. But even if the County Government of Cologne had (some) discretion, it could only exercise it rightly by coming to the conclusion that it should intervene. Of course, the Cathedral is not affected in substance; it can still be visited by people from all over the world and it can also be seen from other directions of the city except for the right bank of the Rhine. The blocking of the view is only partial. Moreover, at least one of the skyscrapers had already been built; it would be a problem to force the owner to tear it down or remove some floors, irrespective of the potential claims for damages. Besides, there are already some other old skyscrapers on the right bank of the Rhine that obstruct the view on the Cathedral; the new skyscrapers are, thus, only an additional element to a skyline of high-rise buildings opposite Cologne Cathedral, a new spot added to a “threatening scenery.” Nevertheless, even such an additional element, if followed by others, can lead to a “death by a thousand cuts”, which means that if the incremental development is allowed to go on, it will destroy the (visual) integrity of the listed building in the long run. Furthermore, national interests must be taken into account, in particular that Germany could suffer a loss of reputation towards the international community if the land-use plan breaching the Federal Republic’s obligations under the World Heritage Convention remains in force and is going to be extensively achieved. These aspects must lead the County Government of Cologne to a positive decision in favour of an intervention. Therefore, the County Government did not duly exercise its discretion when, and if, deciding to omit any intervention – a fact which, of course, cannot be confirmed on the basis of the sparse information in the press.

Besides, the state authority has greater possibilities to influence the municipalities than merely in the field of the explained general supervision, as far as the obligatory tasks to be fulfilled according to instructions are concerned, in particular, in the case of granting a building per-
mit. The qualified supervision of the execution of these tasks is governed in special provisions (cf. article 78 para. 4 sentence 2 of the Constitution of North Rhine-Westphalia, section 3 para. 2 and section 119 para. 2 of the Municipality Act). With regard to the tasks that relate to the averting of dangers, the prevailing provisions are laid down centrally in sections 8 et seq. of the Public Security Authorities Act. According to section 9 para. 1 of the Public Security Authorities Act, the state authority supervises the legality and, according to section 9 para. 2 of the Public Security Authorities Act, also the suitability of the measures of the local security authorities. It can, thereby, issue general instructions (cf. sec. 9 para. 2 (a) of the Public Security Authorities Act), but also individual instructions if the behaviour of the local authority either does not appear to be appropriate or can endanger superior public interests (cf. sec. 9 para. 2 (b) of the Public Security Authorities Act). Moreover, section 11 of the Public Security Authorities Act makes clear that state authorities with competence in general supervision that have the power of qualified supervision can also use the instruments for municipal control in sections 121 et seq. of the Municipality Act. This means that it can make use of the whole arsenal of supervisory measures; it is not limited to giving instructions.

Hence, the County Government of Cologne which is both the general and the qualified supervising authority had a very wide range of instruments at hand to intervene when the City of Cologne acted unlawfully by granting the building permit for the skyscrapers opposite the Cathedral. It could even replace a municipal discretion with its own considerations. However, the granting of a building permit is a so-called bound decision which means that there is no discretion; the building permit has to be granted if there are no provisions of public law that speak against it (sec. 75 para. 1 sentence 1 of the Construction Police Act). Thus, the permit can only be refused if the building is contrary to provisions of public law. Such provisions are, initially, planning law and construction security law. It must be assumed that the skyscrapers opposite Cologne Cathedral correspond with the requirements of the City’s land-use plan for the right bank of the Rhine so that there is, at first glance, no violation of planning law, although the plan itself may violate the requirement in section 1 para. 7 of the Federal Building Code. Section 30 para. 1 of the Building Code essentially reads that a building to be erected in the area of application of a land-use plan is

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284 Cf. above in the text, after footnote 268.
285 See above in the text, after footnote 265.
admissible if it does not contradict the determinations of that plan. Whether the skyscrapers are, furthermore, in accordance with the construction rules for this kind of building cannot be judged here.

The planned buildings must, additionally, comply with other legal rules, like those of water law, waste law, street law, and even the law on the protection of historic monuments.\textsuperscript{286} There could be a problem with regard to sections 1 para. 1 and 11 of the Historical Monuments Protection Act ruling that historic monuments shall receive protection in urban development planning. Initially, if the concerns of historic monuments are not sufficiently recognized in planning processes, which is also important in the context of section 1 para. 6 No. 5 of the Federal Building Code, this touches directly only the legality of the final plan, not the legality of the building permit granted on the basis of the plan. The same is true with regard to an insufficient consideration of the Federal Republic’s duties under the World Heritage Convention as a public concern in the sense of section 1 para. 7 of the Building Code. However, the illegality of a plan can have an indirect effect on the legality of a building permit based on that plan. Since the land-use plan is passed in the form of a local statute, formal or material defects, in principle, lead to its ineffectiveness; such a plan is null and void.\textsuperscript{287} A building permit that is based on such a plan has, therefore, no effective legal authorization which it must have according to the Constitutional principle of the provision of legality.\textsuperscript{288} Consequently, the building permit itself is not lawful in these circumstances.

The Federal Building Code and the Municipality Act, rule various possibilities to “cure” local statutes suffering from formal or substantial flaws. For instance, section 7 para. 6 sentence 1 of the Municipality Act stipulates that, by reason of legal security, a violation of provisions of the Municipality Act concerning procedure or form cannot be asserted

\begin{itemize}
\item\textsuperscript{286} Cf. S. Muckel, \textit{Öffentliches Baurecht}, 3rd edition, 2002, 123 with further references.
\item\textsuperscript{287} Cf. F. Ossenbühl, “Eine Fehlerlehre für untergesetzliche Normen”, \textit{NJW} 39 (1986), 2805 et seq.; Zacharias, see note 269, 219 et seq. with further references.
\end{itemize}
later than one year after the statute’s proclamation, unless a required state permission is missing, the statute had not been made public in the right way, the mayor had complained of the city council’s decision, or the defect had been reprimanded towards the municipality by mentioning both the violated provision and the facts bearing the legal violation. Sections 214 and 215 of the Building Code declare a long list of flaws which could not be considered for the validity of a plan either right from the very beginning or after they had not been reprimanded towards the municipality within a certain period of time. Section 214 para. 1 sentence 1 No. 1 of the Building Code makes clear that a violation of the law cannot be simply put aside in a case where any concerns affected by the planning that had or should have been known to the municipality, were either not considered or not assessed correctly, and if the defect was obvious and would influence the outcome of the planning process. Moreover, section 214 para. 3 sentence 2 of the Building Code restricts the significance of defects of the planning process when it reads that flaws of procedure in the course of consideration are regarded as serious and, thus, not insignificant, when they have had an obvious influence on the outcome of the consideration. Hence, if there is a concern that had not sufficiently been considered in the planning process and if that shortcoming is both obvious and found its expression in the plan as the product of the planning process, the plan is, initially, not valid. However, section 215 para. 1 Nos 1 and 3 of the Building Code provide that a crucial violation of procedural and formal requirements according to section 214 para. 1 sentence 1 No. 1 of the Building Code and crucial flaws in the course of consideration according to section 214 para. 3 sentence 2 of the Building Code become insignificant if no written claim has been asserted with the municipality.

within a period of two years to commence on publication of the pre-
paratory land-use plan or the statute; the grounds for alleging violation
or the existence of flaws shall be stated in detail. Thus, a land-use plan
suffering from crucial flaws loses its uncertain status and becomes valid
if the two years have passed. A building permit based on such a plan
would have, then, a valid authorization.

As a consequence for the Cologne Cathedral case, an insufficient
recognition of the concerns of historic monument protection by pre-
paring the land-use plan for the right bank of the Rhine would cause
the initial invalidity of that plan if the defect was obvious and had
found expression in the plan. The state authority would have a time pe-
riod of two years within which it could act against the plan and, thus,
hinder it becoming valid and its effects legitimating a building permit
for the skyscrapers. However, if the period has already come to an end,
so that the plan became valid in the meantime, there is no further possi-
bility to claim successfully a violation of the requirement to consider
the concerns of heritage protection in the Building Code.290

Nevertheless, if the time period has not come to an end, the super-
vising state authority has again, in principle, discretion with regard to
the decision whether it should intervene against the building permit
based on an invalid plan. It must, thereby, in addition to the aspects
which have already been mentioned,291 take into consideration that the
building permit perpetuates an illegal situation and enables the owner
of the property on the right bank of the Rhine to create a situation
which cannot be reversed that easily. Thus, the discretion, if there is
any, can only be exercised duly in a way that the County Government
of Cologne must take supervisory measures in time against the City of
Cologne and force it to reconsider the decision concerning the granted
building permit in favour of the skyscrapers. After all, the authorities of
the Federal State of North Rhine-Westphalia had various possibilities to
make the City of Cologne comply with the Federal Republic’s obliga-
tions under arts 4 and 5 of the World Heritage Convention. It is incom-
prehensible why it did not use them.

290 Critical with regard to the constitutionality of that rule Schmaltz, see note
289, sec. 215, 7 et seq.
291 Cf. above in the text, after footnote 283.
VII. The Execution of Competences on the Level of the City of Cologne

In the previous sections most aspects of the competences of the local authority have been explained. A further question is whether the City of Cologne really did not act in accordance with the provisions of the Federal Building Code and the Protection of Historical Monuments Act of the Federal State of North Rhine-Westphalia when preparing the land-use plan for the left bank of the Rhine and granting the building permit for the skyscrapers. The standards for assessment are mainly laid down in section 1 paras 5, 6 and 7 of the Federal Building Code in conjunction with sections 1 para. 3 and 11 of the Protection of Historical Monuments Act. According to section 1 para. 5 of the Building Code, the land-use plans shall guarantee a sustainable urban development that harmonizes the social, economic and environmental requirements even with responsibility towards future generations and a use of grounds that is reconcilable with the welfare of the state. Furthermore, they shall contribute to secure a human environment, to protect and develop the natural resources for life, even with responsibility towards the general protection of the climate, and to preserve under the aspects of building culture, and protect, the urban character, the view of the town, and the natural scenery. Examples for special concerns that have to be considered in the planning process are, then, listed in section 1 para. 6 of the Building Code, in particular the protection and preservation of historic monuments in No. 6, which is also mentioned in the provisions of the Protection of Historical Monuments Act. The historic monument protection is one concern among others. Competing concerns can in a single case be, for instance, the residential needs of the population (No. 2), the social and cultural needs of the population and the concerns of the educational system, of sports, leisure activities, and recreation (No. 3), the concerns of the economy (No. 8 (a)), the concerns with regard to the maintenance, securing and creation of workplaces (No. 8 (c)), the concerns of passenger transport and transport of goods and the general mobility of the population (No. 9), or even the results of an urban development concept adopted by the municipality (No. 11). The protection of historic monuments has, insofar, no priority over other concerns.\footnote{Cf. W. Schrödter, in: H. Schrödter, see note 289, sec. 1, 92; Schmittat, see note 235, 130 et seq.} Instead, section 1 para. 7 of the Building Code reads that in preparing land-use plans, public and private interests are to be duly
weighed. This means that the municipality has to decide what weight it wants to give to each of the competing concerns that play a role in consideration, and, thereafter, it must find a proportionate balance between the concerns, which might lead to a compromise (cf. also Sec. 2 para. 3 of the Building Code). The Federal Republic's duties under the World Heritage Convention which need not be completely covered by the special provisions concerning the protection of historic monuments, therefore, do not enjoy a different, privileged position. The protection of world heritage must be taken into account when a balancing has to take place in planning processes but it does not automatically assert itself against competing interests; the competent authority still must balance comprehensively. The World Heritage Convention in its article 5 (a) only stipulates that the protection of world heritage must be “integrated” into the planning programmes which could be understood, according to the doctrine of flaws concerning balancing that had been developed in the context of the German planning law,293 that it must be introduced in the balancing with an appropriate weight, with regard to an isolated view as well as in relation to other concerns. The internationally recognized concerns, do not have urgent priority over interests that are only protected by domestic law; instead, in the context of decisions of balancing, they may step back behind national concerns. However, this must not be done carelessly, for the Constitution is based on the principle of friendly behaviour towards international law.294

Therefore, as far as the protection of historic monuments is concerned, the municipality should in general, by appropriate determinations, control the use of grounds in the surroundings of a monument in such a way that its urban quality and function will remain. This can, of course, be done by determinations that save an open area in the neighbourhood of the monument and, thus, guarantee the view of it;295 furthermore, the municipality can limit the height of new buildings in

294 See above, at footnote 202.
the surroundings. But the process of weighing and balancing does not demand measures which can be named and determined in detail abstractly and *ex ante*. The process of consideration in a concrete case can reveal that certain concerns must step back behind others which have a superior weight. Besides, the municipality, because of its constitutionally granted planning autonomy, has a prerogative with regard to giving value to single concerns and assessing their position both isolated and in relation to other concerns. This is indicated by section 2 para. 1 sentence 1 of the Building Code saying that the municipality has to prepare the land-use plans “in its own responsibility.” The municipality may decide whether concerns of the economy or of the creation of workplaces must have a superior weight in a certain planning process in relation to the concerns of historic monument protection. Furthermore, the municipality has a scope for consideration when choosing the appropriate form of compromise. For example, it may exercise a certain freedom in determining the size of an open space, the distance between the monument and other buildings to be construed in the future, that goes beyond the legal provisions concerning distances that are necessary for public security and fire protection (cf. sec. 6 of the Construction Police Act), or the admissible height of future buildings in the neighbourhood. Only if the municipality oversteps the limits of its scopes, there is a violation of the law which can lead to the invalidity of a plan. In that context, the jurisdiction recognizes four relevant defects: first, where there is no proper consideration at all; the municipality does not see that it must weigh and balance competing concerns. Second, where the municipality does not introduce all concerns into the consideration that had to be considered; it simply ignores certain concerns. Third, where the municipality misjudges the importance of individual concerns. Fourth, where the municipality puts the concerns affected by the planning into a relation (of priority and subordination) to each other that does not correspond with the weight of the individual concerns. The density of control is, though, restricted with regard to the last two groups of defects. The courts as well as the state supervising authority cannot replace the municipality’s considerations with their own ideas. Thus, they do not have to ask whether the result of a consid-

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296 Cf. Schrödter, see note 292, sec. 1, 116.
297 See the references in footnote 293.
eration deserves applause or even is optimal. Instead, the control is limited to an examination of whether the consideration misjudges the objective weight of an individual concern or rather whether there is a clear misevaluation of concerns in relation to each other.

Against this background, one could argue that the scarce information in the press does not deliver enough material for the assumption that the City of Cologne has violated the law by preparing the land-use plan for the right bank of the Rhine and perpetuated that situation by granting building permits on the basis of that plan. Quite in contrast, there are indications that the city had taken the concerns of historic monument protection into consideration but came to the conclusion either that they should be put behind the public interests of encouraging new industry, to create workplaces, and to build an appropriate, modern part of the new fair, or that there would be sufficient free space between the skyscrapers and the Cathedral. If it is true, as the Mayor said, and we do not have any other evidence, there was a heated discussion in the City Council of Cologne with regard to the buildings opposite the Cathedral. Furthermore, experts were heard, and it must be assumed that their opinions were considered in the planning procedure. These aspects, in fact, suggest that the City of Cologne did not violate the relevant provisions in the Federal Building Code and the Protection of Historical Monuments Act. However, this view would be too superficial, because it ignores the fact that the Federal Republic of Germany and the UNESCO had agreed to a buffer zone. Insofar, as they addressed, and anticipated, a part of the balancing of future planning programmes they, thereby, bound the City of Cologne. As a consequence, the City must respect this decision on the international level. It is not allowed to act against it. Therefore, the City, by neglecting the provisions about the buffer zone, overstepped the bounds of its scope for evaluation; its development plan concerning the right bank of the Rhine opposite Cologne Cathedral and the building permits granted on the basis of that plan are, thus, not in accordance with the law.

299 Cf. Federal Administrative Court, BVerwGE 45, 309, 315; 56, 283, 289 et seq.

300 For more details see Brohm, see note 263, § 13, 23.
VIII. The Position of the Cathedral and of the Chapter of the Metropolitan

The last point to be answered is the legal position of Cologne Cathedral, in particular, whether there is a possibility to seek juridical protection against the measures of the city of Cologne or rather against the omission of the state supervising authority, namely the County Government of Cologne, with the procedural aim to clarify whether these acts or non-acts are in accordance with the law. The first problem in this context is the legal status of the Cathedral. At first glance, Cologne Cathedral is only a building, though used as a place of religious worship, and, thus, an object but not a subject of legal positions. But this view is not correct. Cologne Cathedral or rather the “High Cathedralic Church of Cologne” has the status of a juridical person under public law, although it does not have any personal substance. Today, it is only possible for a mere conglomerate of assets to reach such a status with effect for the secular sphere if it is a public foundation. But article 137 para. 5 sentence 1 of the Weimar Constitution which is incorporated in the Basic Law by article 140 rules that the status of a juridical person under public law shall remain if it was owned in the time before the Weimar Constitution came into force. The special status of Cologne Cathedral must be such an old legal position. Additionally, article 13 of the Concordat between the former German Empire and the Holy See provides that the Catholic parishes, associations of parishes, and associations of dioceses, the Episcopal chairs, bishoprics, and chapters, the orders, and religious cooperative societies, and the institutes, foundations, and financial properties of the Catholic Church which are administered by ecclesiastical organs shall either keep or receive legal capacity in relation to the state according to the general provisions of state law. They shall remain corporations under public law if they had this status before; others can be granted the same rights in accordance with the

301 See concerning the protection of ecclesiastical historic monuments according to the provisions of Canon Law, e.g., M. Weber, Unveräußerliches Kulturgut im nationalen und internationalen Rechtsverkehr, 2002, 198 et seq.
302 See above in the text, at footnote 22.
303 Cf. Heritage List, see note 2, 24; also the article “Kölner Dom” in the online-encyclopedia Wikipedia, see note 3.
304 RGBl. 1919 I, 1383.
305 RGBl. 1933 II, 679.
law. That is also a recognition and affirmation of old, pre-Constitutional rights with consequences for the secular sphere.

Since the Cathedral cannot act by itself and also does not have any representative organs, there must be someone else to claim its rights and fulfil its obligations. That function is in the Cologne Cathedral case undertaken by the Chapter of the Metropolitan (cf. canon 118 of the Statute Book for the Roman-Catholic Church – Codex Iuris Canonici 1983). The Chapter of the Metropolitan is a group of priests established by the Apostolic Chair and under the supervision of the Archbishop (cf. canon 435 of the Codex Iuris Canonici 1983). That group celebrates the services in the Cathedral and fulfils all other tasks transferred on it by the ecclesiastical law or by the Archbishop (cf. canon 503 of the Codex Iuris Canonici 1983), and, thus, in Cologne also represents the Cathedral. At the present time, the Chapter of the Metropolitan of Cologne consists of 16 priests or canons with a provost and a dean at the top306 (cf. canon 507 para. 1 of the Codex Iuris Canonici 1983). Thus, Cologne Cathedral can take part in clarifying its rights; it can sue and be sued as any other juridical person of public or private law, though represented by the Chapter of the Metropolitan.

Cologne Cathedral could, at first, have the possibility to sue against the land-use plan of the City of Cologne. According to section 47 para. 1 No. 1 of the Federal Administrative Court Procedure Act,307 the Higher Administrative Court decides on the validity of local statutes that have been passed according to the provisions of the Federal Building Code. Thus, a land-use plan that is a local statute (cf. sec. 10 para. 1 of the Building Code) can be made the object of judicial review by the Higher Administrative Court.308 That is, according to the common opinion, a procedure to protect subjective rights as well as an objective complaint procedure.309 This means that the Higher Administrative

306 See the article “Kölner Dom” in the online-encyclopedia Wikipedia, see note 3.
Court has to review the land-use plan extensively; it is not restricted to the examination whether the applicant has violated his rights. However, the applicant, for being able to sue at the Higher Administrative Court, must claim to be violated now or in near future in one of his rights by either the statute or its application (cf. sec. 47 para. 2 of the Administrative Court Procedure Act). Thereby, the mere possibility of a violation is sufficient. 310

The Cathedral or rather the Chapter of the Metropolitan, though, cannot base its suit on a violation of provisions of the World Heritage Convention even if they had been duly implemented in the German legal sphere. This is because the provisions do not provide private natural or juristic persons with a legal basis for a cause of action, since their content is not directly applicable.311 Thus, the Cathedral or its executive organ cannot claim that the state or municipal authorities should act in accordance with international law. Furthermore, the domestic provisions concerning the protection of historic monuments are not regarded as aiming, at least to a certain extent, at the protection of private persons;312 hence their violation would also not be suitable for the Cathedral to base its claim on. After all, the only possibility is that the Cathedral could claim a violation of its property rights that is guaranteed in article 14 para. 1 of the Basic Law or, ultimately, of the right to flawless balancing which is, though, heavily disputed.313 But the property right does not protect against the construction of high-rise buildings in the neighbourhood if certain minimum distances which ensure the inflow of light and air are respected; moreover, the free view onto its own building is not protected. Besides, with regard to the right to flawless balancing, the Cathedral could only claim the violation of the concerns

310 Cf. BVerwGE 107, 215, 217; Federal Administrative Court, NJW 52 (1999), 592 et seq.; DÖV 52 (1999), 733 et seq. and NVwZ 19 (2000), 1296 et seq.

311 See concerning the preconditions of a direct applicability, e.g., BVerwGE 88, 254, 257; Streinz, see note 189, article 59, 68; P.E. Holzer, Die Ermittlung der innerstaatlichen Anwendbarkeit völkerrechtlicher Vertragsbestimmungen, 1998, 83 et seq.; H. Keller, Rezeption des Völkerrechts, 2003, 13 et seq.


of historic monument protection and of the international duties of the Federal Republic under the World Heritage Convention. Therefore, the Cathedral or the Chapter of the Metropolitan are not able to make the development plan of the City of Cologne an object of a judicial review by the Higher Administrative Court.

Cologne Cathedral could seek an indirect judicial review by instituting a proceeding against the City of Cologne to withdraw the building permit granted with regard to the skyscrapers. It must, therefore, choose the so-called neighbour’s suit according to section 42 para. 1 of the Administrative Court Procedure Act.\footnote{Cf. concerning the protection of neighbours in construction law, e.g., F. Schoch, “Nachbarschutz im öffentlichen Baurecht”, \textit{Jura} 26 (2004), 317 et seq.; S. König, \textit{Drittschutz. Der Rechtsschutz des Drittbetroffenen gegen Bau- und Anlagengenehmigungen im öffentlichen Baurecht, Immissionsschutzrecht und Atomrecht}, 1993, 53 et seq.; D. Mampel, \textit{Nachbarschutz im öffentlichen Baurecht}, 1994.} For that suit it must claim that it was violated in its own rights by the building permit, which leads to the same problems as previously mentioned in the context of the direct suit against the land-use plan. Finally, Cologne Cathedral could consider taking legal steps against the omission of the County Government of Cologne. But according to the common opinion in adjudication and literature, the provisions concerning the state supervision of municipalities do not protect any citizens; they exclusively serve public interests.\footnote{Cf. Gern, see note 273, 435; Knemeyer, Kommunalrecht, see note 278, 417; Nierhaus, see note 279, 264; Stober, see note 279, 151; H. Borchert, “Legitimitätsprinzip oder Opportunitätsgrundsatz für die Kommunalaufsicht?”, \textit{DÖV} 31 (1978), 721 et seq.} Therefore, citizens and also the Cathedral cannot claim that the competent state authority intervenes if a municipality violates the law.\footnote{Cf. Federal Administrative Court, \textit{DÖV} 25 (1972), 723 et seq. with reference to BVerwGE 31, 33, 40; Erichsen, see note 269, 349; J. Oebbecke, “Die örtliche Begrenzung kommunaler Wirtschaftstätigkeit”, \textit{ZHR} 164 (2000), 375 et seq. (389); P.J. Tettinger, \textit{Besonderes Verwaltungsrecht}, Vol. 1, 7th edition, 2004, 371; Wäechter, see note 274, 201.} The Cathedral only has the possibility to turn informally to the County Government of Cologne and, in this respect, to propose that it should examine the legality of the municipal measures.\footnote{Cf. Knemeyer, see note 315, 427; Becker, see note 274, 559; G. Lissack, \textit{Bayerisches Kommunalrecht}, 2nd edition, 2001, § 8, 4.
IX. Conclusion

Finally, it is quite clear why the dispute between UNESCO and the German authorities concerning Cologne Cathedral raised its dimensions but also how it could have been avoided or at least toned down in time. The World Heritage Convention creates obligations of the State Parties and, thus, also of the Federal Republic of Germany, which are concretized by the positive decision of the World Heritage Committee to inscribe a property on the World Heritage List. The State Party must fulfil its obligations under the Convention by domestic measures. However, the Federal Republic did not implement the World Heritage Convention in the German legal sphere so that its provisions can only play an indirect role towards the national authorities which have to consider the Conventional provisions in the framework and the bounds of domestic law that is related to the protection of historic monuments. Thus, the World Heritage Convention as such has no direct influence on the German administrative authorities when making planning programmes for the future use of land. Nevertheless, there are strict legal regulations from the level of the Federation over the Federal states to the local authorities to guarantee that the protection of historic monuments is considered in all kinds of planning processes. Moreover, there are provisions that entitle the prevailing higher state instance to supervise and control whether the lower level acted in accordance with the law. Thus, there are legislative as well as administrative links between the various levels in the federal structure that could ensure that local authorities do not act in a way that contravenes the Federal Republic’s duties under arts 4 and 5 of the World Heritage Convention.

Accordingly, the Federal Government could have forced the Federal State of North Rhine-Westphalia, to which the actions of the city of Cologne concerning the land-use plan for the right bank of the Rhine opposite Cologne Cathedral are attributed domestically, to comply with Germany’s obligations under international law. The Federal State in its turn could have transformed the Federal measures into Federal state supervisory measures which are directed against the City of Cologne. If this had been exercised consistently, the City of Cologne would have had no possibility in the long run to continue violating the concretized provisions of the World Heritage Convention in particular with regard to the buffer zone; it would have been forced to amend its plan and to withdraw the granted building permits for the skyscrapers. But the Federal and Federal state authorities obviously did not take “hard” measures to make the city comply with the requirements of the
World Heritage Committee; they preferred putting political pressure on the City of Cologne which was not that effective, for it led the City to the assumption that there were no legal means to push through the concerns of world heritage protection and, even worse, that it did not act unlawfully but behaved in the right way concerning the request of the World Heritage Committee.

In the end, as mentioned in the introduction, the city of Cologne which meanwhile lost an important investor for the high-rise buildings opposite Cologne Cathedral “capitulated” and offered a (very) small compromise to reveal its willingness in principal to work with UNESCO. It is not clear whether UNESCO’s World Heritage Committee will accept that compromise. Rather, it has the possibility to delete the Cathedral from the World Heritage List by reason of an insufficient cooperation of the German authorities as a means to enhance compliance; such a measure would be, at least, comprehensible. Moreover, UNESCO has another option: as it did in the case of the Yellowstone National Park, it could send a fleet of black helicopters flying over the protected area to compel the national authorities to fulfil their obligations under arts 4 and 5 of the World Heritage Convention. Probably, this would very quickly change the City of Cologne’s attitude.

Some Reflections on the Foundation of Human Rights – Are Human Rights an Alternative to Moral Values?

Romuald R. Haule *

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I. Introduction

Human rights again? Yes, but not the same as yesterday’s. Today the human rights discourse has become fashionable and often seems to be a substitute for the moral discourse. When terrorist attacks, discrimination, slavery, torture, arbitrary arrest etc. occur, it seems that there is something morally wrong. But there is no general agreement on this

* I am grateful to Prof. Dr. Rüdiger Wolfrum for his great insights and encouragement.

and so for those who are convinced that these are immoral acts, there is the challenge of rationally justifying and defending this.

This paper examines how the concept of human rights has been influenced for centuries by different philosophical trends especially from medieval times to the present. Moreover it examines the nostalgia of present humankind for lost moral values and thus, natural law. In fact it will also show the importance of founding human rights on moral values and natural law. The role of states and the United Nations as guarantors of human rights will also be analysed. The article will conclude that the human rights of today are not only used as alternative to moral values but that they also contain moral values themselves. This being the case, taking human rights seriously is the sacrosanct duty of everyone.

II. Human Rights today as a Fashionable Discourse for Moral Values

The 20th century and the threshold of the 3rd Millennium have been described by many as the age of Human Rights.\(^1\) The human rights discourse of this age seems to substitute the moral and ethical discourse.\(^2\)

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When something happens in our societies, it is more fashionable to say that it is wrong because it is a violation of human rights rather than an immoral act. Today people have an aversion to the word ‘morality’ and indeed the word has few fans. When someone does something morally wrong one of the most common answers offered today is that “it is a violation of human rights.” With such a response, human rights are being used as an ethical category in the sense that the actions are classified as morally wrong on the basis of a set of criteria supplied by, or implicit in, the idea of human rights. So human rights are used in many circumstances instead of human ethics and are taken for granted in such a way that it somehow constitutes another way of doing ethics.

The 20th century was the century of human rights and the notions of rights and human rights have become part of the basic vocabulary of people throughout the world, especially those who have struggled against tyranny and oppression. Ultimately no one wishes to be treated in an immoral manner. Thus the principle: “do unto others as you would have them do unto you” is spontaneously put into practice, implying also “Don’t do to others what you do not want to be done to you.” Underlying is not only the justice of the act but also its honesty which originates in the conscious intention of the human being indicating the interior nature of morality (the will).

A serious moral issue concerns those “who get hurt”. If this is true, a key focal point of moral discussion must be the suffering of human beings, particularly the suffering imposed on innocent human beings by the wrongdoing of others. The human rights discourse undoubtedly constitutes one of the greatest efforts in contemporary culture to respond to some of the most horrific hurts done to human beings every day, in every corner of the world. This shows that human rights in themselves contain the fundamental moral principles, such as the principal “bonum facendum et proseguendum et malum evitandum” (good should be done and pursued and bad should be avoided).

Consequently, there is a need, today more than ever, to found human rights on morality. Tibi rightly argues that in this age of human rights, there is a tremendous need for morality based on a common set of norms and values shared by the entire international community. If

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3 McKeever, see note 2, 104.

the underpinning of this indispensable international morality is not basic human rights, what else can unite humanity? Douzinas emphasizes too that the family of humankind is in need of human rights which are founded on natural law and human rights which are founded on moral values. And these human rights are individual entitlements that evolved from western modern thought on natural law. The institutionalisation of these rights to the current legal standards, was a process from natural law to natural rights and from natural rights to human rights.

III. The Concept of *ius* and the Triumph of Natural Law

Although there is interrelation between human rights, natural rights and natural law, the confusion between them is traditional and longstanding. This confusion is caused mostly by the term *ius* itself. *Ius* is often translated as either “right” or “law” and *Recht* e.g. in German can mean either right or law. This ambiguity has led jurists to make a distinction between objective *ius* and subjective *ius*.

For Romans and Greeks, *ius* was equally something lawful and something just. Thus *ius* indicates the proportional righteous thing. It is something which is mine and which is righteous in conformity with justice. And justice according to Ulpian is “*constans et perpetua voluntas ius suum unicuique tribuere*” (to give to everyone what is due to him with constant and perpetual will).

The concept of an objective right was developed in the medieval period. For St. Thomas Aquinas, the term *ius* indicated a thing in itself: “*ipsam rem*” and thus its definition was simply *ius est res*. *Ius* is the same as *suum*. This *ius* does not indicate any *res* but a just thing: *ipsam rem iustum*. In St. Thomas’ time, the terms right (*ius*) and just (*iustum*), were identical, so, they were often and commonly used with the same meaning: *ius sive iustum*, and thus right (*ius*) is what is just and the purpose of justice is to promulgate rights. Later St. Thomas used the same definition of justice with a slight modification and so justice becomes

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5 Tibi, see note 2, 277.
7 Tibi, see note 2, 278.
8 Ulpian, *Digest*, I, I, 10.
9 *Summa Theologiae*, II-II, questio 57, articulus 1.
the *habitus*, that is, the inclination to give to everyone what is owed to them with constant and perpetual will.\(^{10}\) From this St. Thomas defines law as the ordinance of reason for the common good, made by those who are entrusted with of the community and then promulgate it.\(^{11}\) Right is inherent to human beings and law is the instrument and measure to protect it. The rule and measure of human acts is the faculty of reason, for reason directs man’s activities towards their goal. But this does not mean that reason, which gives orders, is the source of obligation. The primary object of practical reason is good. From this comes the first moral principle: good is to be done and pursued and evil avoided.\(^{12}\) Obligation therefore is imposed by reason found immediately in human nature itself; moral law is rational and natural, in the sense that it is not arbitrary or capricious.

After Aquinas, justice largely abandoned its critical potential for jurisprudence and its supremacy in natural law disappeared. Social justice was transferred from law to economics and socialism. It moved from *ius* justice to *ius* freedom and equality which now became the rallying cries of modern natural law.\(^{13}\)

Nominalism, as the first scholastic school in the 14th century led by Duns Scotus and William of Ockham, reflected abstract concepts and denied general terms like law and justice. For them law is a universal word with no discernible empirical difference and has no independent meaning. With their philosophy the source and method of law started changing. It gradually moved from reason to will, pure will, with no foundation in the nature of things.\(^{14}\) The jurist’s task was no longer to find the just solution but to interpret the legislator’s commands to the loyal subjects.

The second scholastic school, argued that natural law is a branch of morality and linked religious rules of conduct with modern reason. The Spanish scholars led by Francisco Suárez, totally abandoned the idea of *ius* as an objective state of affairs and fully adopted the individualistic conception of right.\(^{15}\) Suárez continued to develop the subjective right in the modern age as a faculty, a moral faculty or *potestas moralia* and

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10 *Summa Theologiae*, II-II, questio 58, articulus 1.
11 *Summa Theologiae*, I-II, questio 90, articulus 4.
13 Douzinas, see note 6, 61.
14 Douzinas, see note 6, 62.
not a physical one. This mentality is also seen when he defines law in the words of St. Thomas, as a certain, common, just and stable precept which has been sufficiently promulgated. Hence, it is an act of a just and upright will binding an inferior to the performance of a particular act. For Suárez therefore, it is essential for law that it should prescribe what is just and that it should prescribe acts which can be justly performed by those upon whom the law is effected. Suárez also describes both a law (lex) and a right (ius). According to him, ius denotes a certain moral power which everyone has either over his own property or with respect to what is due to him. Thus the owner of a thing has a right (ius) over the thing (res), in reality a thing actually possessed, while a labourer, for example, has a right to his wages, ius ad stipendium. The foundation of this understanding about a right and a law comes from moral and natural principles and the law that determines or measures the ius should do so for the common good of all, as St. Thomas originally insisted.

Today’s human rights phenomenon – though different in emphasis – can be traced back to the beginning of this period. The Magna Carta Libertatum can be understood in the context of the right of resistance. It is also worth reflecting on the criticisms made by St. Thomas Aquinas, when criticizing the tyrannical regime. He states that the tyrannical regime is unjust because it is not ordered for the common good but for the private person who governs and therefore, disturbing or upsetting such government is not a proper uprising. In reality the tyrant is most seditious in so much as he nurtures discord in people and creates uprisings that enable him to dominate all. This is the proper essence of the tyrannical government: commanding things for the private benefit of the governors and in turn leading to the destruction of the people.

Society at the end of the medieval period, with its hierarchy of commands, namely, the categories of professional and social groups known as jura et libertates, reserved and sided with groups and not with individuals. The initiative was collective in the sense that there

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16 He argues that ius is a kind of moral power, a faculty which every man has, either over his own property or with respect to that which is due to him. Suárez, see note 15.

17 Suárez, see note 15.

18 F. Copleston, History of Philosophy, Vol. III, 1960, 382. This idea was taken from Suárez, see note 17, 1, 2, 5.

19 See H. Wagner, Magna Carta libertatum, 1951.

20 Summa Theologiae, II-II, quostio 42, articulus 2 ad 3.
were organized and recognized groups subject to rights and that society was not without rights before the king. The most famous letter of recognition of rights and liberty is that of the King John Lackland addressed to the Archbishops, the faithful and the subjects. This, after being re-promulgated, was made longer in successive years but it was one part of the 1215 version which came to be known as the Magna Carta. This shows that there has always been a need to recognize rights and liberty.

IV. Modernity: From Juridical Positivism to the Nostalgia of Human Rights

1. From *ius* justice to *ius* freedom and equality

The problem of the concept of human rights and the crisis in its ethical foundation as manifested in today’s world is rooted mainly in modern philosophy. Descartes employed a methodical approach with a view to discovering whether there was any indubitable truth. He found this truth and thus his affirmation “Cogito, ergo sum” that is: I must exist, otherwise I could not doubt. In every act of doubting my existence is manifested. When Descartes says “Cogito, ergo sum,” he is thinking of *ordo conoscendi* which is fundamental since it cannot be doubted; while with *ordo essendi*, one can always doubt or place doubt on things. The Cartesian principle begins with a subject instead of an object: “Cogito, ergo sum”. To him, reality is rational and rational is reality. Man gained extra power from his reason to the detriment of the value of nature. From unity in faith, modern man moved on to insist on the unity in common human reason. Today’s post-modern man is afraid of nature. While natural law theorists derived their ideas of rights from God, reason or *a priori* moral assumptions, positivists argued that the content of rights could be derived only from the laws of the state. It was David Hume who first raised the dichotomy between the “is” and

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23 The king affirms that he has also accorded to all the free men of the reign, and for their heirs, all the freedoms specified in the document, to be possessed and conserved by all, cf. Compagnoni, see note 21, 46.
24 Copleston, see note 18, 90.
the “ought”\textsuperscript{26} which has permeated the discourse between the naturalist and positivist schools of jurisprudence. Along with this crisis of being in its objectivity, Hobbes defines law as norm backed by sanction, which is the very means that protects a man from the caprice and violence of other men.\textsuperscript{27} So the law does not command because it is just but it is law because it commands inspiring the saying: “my rights end where the rights of others start” and removing all moral foundation.

Hobbes also developed the aspect of subjective rights i.e. \textit{ius} as a faculty, but he did not base his argument on moral law. Freedom, according to Hobbes, is no longer a disposition or auto-movement towards good as emphasized in medieval times but, it is the capacity of doing what one wants or likes. Hobbes thus argues: “A free man is he, that in those things, which by his strength and wit, is able to do; he is not hindered to do what he has a will to do”.\textsuperscript{28} So, the morality of what I do is not founded on moral values but it depends on whether the legislator has sanctioned such an act. The actions do not need to be based on but depend only on the will. Hobbes’ natural law is self-preservation. For him \textit{ius} is no longer something which is just, instead right is identified with freedom from law and all external and social impositions.\textsuperscript{29} New natural rights are born as the power to do something, and unlimited and undivided sovereignty of self and natural rights is de-

\textsuperscript{26} According to Hume “is” deals with facts which can be proved to exist empirically and which can be demonstrated to be true or false. And “ought” deals with the morality which cannot be proven to exist objectively and about which people might have legitimate differences of opinion; cf. Davidson, see note 25, 30.

\textsuperscript{27} F. Copleston, see note 18, 45. Velasio criticises this way of understanding the law as well, by stating that in today’s dominant positivistic culture, sanctions are considered essential integral elements of the law, to the extent that a law without sanctions cannot be considered complete. The law must have all necessary elements in order to be of any use; amongst these sanctions and coercion are essential. But in this case we run the risk not so much of having the force of law as such but the force of law which considers norms to be only those prescriptive rules which use force and coercion; V. De Paolis, “La Protezione Penale del Diritto alla Vita”, in: R. Lucas Lucas/ E. Sgreccia (eds), \textit{Commento Interdisciplinare alla “Evangelium Vitae”}, 1997, 504.

\textsuperscript{28} This idea is taken from Hobbes, \textit{Leviathan}, Chapter 2, 21.

fined as the liberty of man to do anything he wishes himself; liberty itself is defined as “the absence of external impediments.”

This approach caused rights to be seen as identical to law and justified only by the fact that it was passed by a legitimate authority: the maxim something is commanded because it is just, was substituted by stating that something is just because it is commanded. While the first implies that ethical foundation, and thus justice, is superior to the authority which has passed it, the latter instead affirms that it is only the legislator who makes a behaviour just or unjust: auctoritas, non veritas, facit legem (authority, not truth, makes the law).

Throughout the 17th century, the Grotian view of natural law was refined and eventually transmuted into the natural rights theory through which subjective, individual rights come to be recognised. One of the proponents of the natural rights doctrine was John Locke. Locke argued that all individuals were endowed by nature with the inherent rights to life, liberty and property; rights which were their own and could not be removed or abrogated by the state. Where the ruler of the state violated the natural rights of individuals, the subjects were free to remove the ruler and replace him or her with a government which was prepared to respect those rights. Contrary to Hobbes’ totalitarian position, Locke presented an early manifesto of liberalism. The language of both the American and French Revolutions, and the writings of the French philosopher Rousseau and German moral philosopher Immanuel Kant, demonstrate the philosophical pedigree of natural law and natural rights. While Rousseau followed the natural rights ideas of Locke, Kant developed his own idea departing from a general non-empirical natural law and natural rights tradition.

Contemporary culture, as inherited from the modern period, is characterized first by pluralism, which is a phenomenon that exists at

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30 Douzinas, see note 6, 71.
31 Davidson, see note 25, 28.
32 In this way Locke used his social contract theory to explain the English Glorious Revolution of 1688. King James II, by violating the natural rights of his subjects, had forfeited his right to rule and had legitimated the consequent change in government, cf. J. Locke, The Second Treatise of Civil Government and a Letter Concerning Toleration, edited by J.W. Gough, 1946.
33 E. Craig, “Pluralism”, in: E. Craig (ed.), Concise Routledge Encyclopaedia of Philosophy, 2000, 683. Pluralism in the late twentieth century philosophy is used to describe views that recognize many sets of equally correct beliefs.
an organizational level of society. A state which remains neutral to all religions, cultures and ethnicities often ends up compromising and marginalizing moral values and as a consequence, absolute values and truth are sooner or later rejected.

The second characteristic of modernism is secularism. This is a vision of a world in which all that which is beyond the empirical and relative vision of the world is marginalized. This was further developed by illuminists such as Voltaire and scientific positivists such as Comte. Later by the idealist dialectics of Hegel, the materialism of Marx and the naturalism of Nietzsche. One of the principles of this tendency is the principle of immanence that conceptualises man without his transcendental dimension. The divine dimension of man is not considered as such, that is, his participation in the absolute being and his truth is denied. In this way and according to this principle, man remains only in his empirical phenomenon which becomes the only possibility of knowledge and evaluation. Another characteristic of secularism is the principle of historicity, where the immanent structure of theories turn history into historicism. Here nothing is absolute. Knowledge is determined by what happens in history. These events are always new, contingent and transitional; they are brought into being, evolve themselves and die. The idea is not opposed to the real, but is realised by itself. Consequently, nothing escapes the empire of the existent. The fact or value distinction disappears, rights theories become exclusively historical and unable to grasp anything eternal, a fake antidote to legal positivism.

or evaluative standards and in this sense it is akin to relativism. Societies are sometimes called "pluralistic" meaning that they incorporate a variety of ways of life, moral standards and religions.

34 C. Thornhill, “Historicism”, in: Craig, see note 33, 355. Historicism is defined as the affirmation that life and reality are history alone, an idea developed in the 19th century by B. Croce. It is an insistence on the historicity of all knowledge and cognition and on the radical segregation of human from natural history.

35 This also puts theories of morality and rights at risk whereby rights are creations of the imaginative interpretation of a particular political, legal and moral history. They exhibit coherence in style, consistence in principle and stability over time. Douzinas, see note 6, 246.

36 L. Ferry/ A. Renaut, From the Rights of Man to the Republican Idea, 1992, 30.

37 L. Strauss, Natural Right and History, 12.
The third characteristic is that of pragmatism. What is important for a human being is no longer “being” in the sense used in the ancient and medieval periods, but rather “doing”. Therefore, doing substitutes being. Man is no longer the one who is, but the one who does – *Homo faber*. As Heidegger affirms in his ontology, the domination of technology is the result of the forgetfulness of being. All this to the detriment of humankind, as Pope John Paul II stated, “today’s man seems to be threatened by what he produces, that is, with the result of the work of his own hands and worse still, with the work of his own intelligence and with the tendencies of his own will. The result of the multiplicity of man’s activities, is not only alienation, in the sense that they are simply removed by the one who puts them, but that these effects also return to the same man and destroy him.”

New morals form yet another aspect of the modern era. Due to pluralism and secularism, ethical and moral values are relative. Therefore, neither absolute values nor absolute norms exist. The moral field becomes a private issue. Every one does what he wants and asks for recognition from the state or another institution. The international community in this modern period concentrated on the sovereignty of the state and the independence of states. In this environment, individuals were not considered. If individuals were occasionally mentioned, it was merely to say that every state was to treat the citizens of other states in a civil way. International relations were sour and states dominated. International relations were relations only among the entities of government and not among individuals.

Thus the international community was really a juxtaposition of subjects with each one preoccupied only for his own well-being and his own liberty; each one mindful only of his own economical, political and military interests. Individuals during this period wanted to consolidate and expand their own power and authority, rather than protect collective interests. Ordinary people did not have much importance and weight. It almost seemed that they did not exist and so were observed as merely objects of domination of the different sovereign states which were the only real speakers on the world scene. The awareness of human rights, which developed during this period, was mostly realized by

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41 Ibid., 7.
religious entities and renaissance philosophers from the whole of Europe; by the struggle of the English against the king and the struggle against the oppression of new peoples, by the struggle against the cruelty of slavery and the slave trade; and by the American and the French revolution.\textsuperscript{42}

Never before has man talked as much about human rights as during the modern period. Human rights are sometimes referred to as a homesickness. Man always seeks unity, a return to lost human values and morals. And so in human rights man seeks to recover the lost human values of society. However it is sad to note that sometimes, due to technical structures and different philosophical theories, man is reluctant to return to these moral values. As a result sometimes human rights seek foundations that perhaps do not exist.

2. From Natural Rights to Human Rights

Paradoxically, it was during the years following the adoption of the great declarations of rights that a decline in the popularity of natural rights occurred. The reasons for the decline were political and philosophical. Politically the great monarchies of the 19th century treated natural rights as a dangerous, revolutionary doctrine which could be effectively utilised by the emerging democratic and socialist opposition movements.\textsuperscript{43} A good example is that of the naturalist ideas which were successfully used against the old regimes in France and America. Against these Bentham argued that natural rights were not only nonsense and mere fallacies, they were also mischievous and anarchical.\textsuperscript{44}

This was an era of state and empire-building, of utilitarianism and social engineering, a time of the emergence of nationalism, racism and sexism.\textsuperscript{45}

The devastating critiques of natural rights, argues Douzinas,\textsuperscript{46} were made by some of the more famous philosophers of the late 18th and 19th centuries, like, Burke with his abstraction and rationalism, Bentham with his utilitarianism and indeterminacy and Marx with his close link to class interests. The most important philosophical force in law

\textsuperscript{43} G.M. Trevelyan, \textit{The English Revolution 1688-1889}, 1965, 36 et seq.
\textsuperscript{44} Davidson, see note 25, 29.
\textsuperscript{45} Douzinas, see note 6, 109.
\textsuperscript{46} Ibid., 110.
was positivism. The positivist approach and empiricism, its handmaiden, already dominant in the natural sciences and triumphant in technology with its many marvels, migrated to law and emerging social sciences. The beginning of all modern law which is by definition positivist law, can be traced to this: positivism, the claim that valid law is exclusively created by acts of state will, is the inescapable essence of legal modernity. This development of positivism united the major Western legal systems.47

From being eternal, natural rights were transformed into historically and geographically local inventions; from being absolute into being contextually determined; from being inalienable into relative cultural and legal contingencies. The new morality was the morality of groups, classes, parties and nations, of social intervention, legal reform and utilitarian calculations.48 Natural rights were reduced to the scrapheap of ideas. Hegel’s philosophy of history, although the antithesis of utilitarianism, further undermined natural rights. Hegel argued that clear knowledge can only be acquired within a clear historical constraints. And the historical horizon could not be transcended, because it formed the absolute presupposition of all understanding.49 The historicist rejection of natural rights meant that: “all right is positive right”, implying that what is right is determined exclusively by the legislators and the courts of the various countries.50 These critics pointed to the a priori moral or value structures and assumptions derived from the personal preferences of the various theorists and declared that natural rights could have no objective existence.

Despite the decline of natural law and natural rights, after World War II natural rights triumphed and re-emerged as human rights. The

47 In England, Austin and Dicey removed remaining naturalist fallacies from jurisprudence and proclaimed the absolute primacy of state law. A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 1885; 10th edition, 1959 with an introduction by E.C. Wade, 198 et seq. In the United States race relations were defined for a century by the apartheid principle of “separate but equal”, this was set aside as late as 1954; cf. Douzinas, see note 6, 111. And the German legal theorist Otto Gierke, in 1934, as the Nazis were taking hold, stated that in Germany, “natural right” and “humanity” have become almost incomprehensible ... and have lost altogether their original life and colour”, cf. O. Gierke, *Natural Law and the Theory of Society*, 1934, 201.

48 Douzinas, see note 6, 113


50 Ibid.
symbolic moments of the success of human rights include the Nuremberg and Tokyo Trials, the foundation of the United Nations and the adoption of the Universal Declaration of Human Rights which was followed by other international and regional human rights treaties, conventions, declarations and agreements. Although human rights had their origin in natural law, it took a system of positive law to provide a definite and systematic statement of the actual rights which people possessed.

V. Some Human Rights Approaches

1. Pragmatic Approach

In contemporary society, the human rights discourse is used whenever there is oppression, slavery, conflict, war and genocide to name but a few. The call for action in such situations has been always pragmatic, that is, the presentation of a need for an urgent humanitarian, political or juridical response. It is sufficient to recall the practice of slavery, the atrocities of World War II and the apartheid regime which all called for a political response. Thus the human rights discourse has become the most preferred idiom in which to press for almost every imaginable kind of social, political and legal reform or development. This approach is connected with utilitarianism and, for almost a century, the intellectual community e.g. in the United States has tended to support pragmatism, the philosophy in which the very idea of firm principles is regarded as unsound and tantamount to dogmatism. It treats human rights as rules of thumb, with ample room for compromise. The proliferation of human rights claims has another almost inevitable consequence: at least some of the many claims are incompatible. To concede the claim of one person or group involves rejecting the claim of another. One of the most controversial cases in this respect is that of the right to life of the unborn child which clashes with the right of the mother to choose. In contemporary culture the claims of many interest groups

52 Davidson, see note 25, 29.
53 McKeever, see note 2, 110.
have had a growing effect and influence on the political and legislative process. In view of this, there is a real danger that a new version of the classical political dynamic of might in right will prevail, in the sense that those who have the strongest lobby will be able to claim rights which weaker lobbies are not in a position to claim.

The pragmatic response to human rights claims may be considered at the level of public relations. If an individual, group or institution were simply to accept every claim of human rights as ipso facto legitimate, such parties would quickly be used to promote alleged rights which are ethically questionable. And thus, the problem of the pragmatic approach consists both in the act of judgement about which claims to accept as morally legitimate and in the public communication of the reasons for this decision in the context of a highly polemical debate. The main pragmatic issue is the judgement on how the human rights discourse should be used in a given context. The human rights discourse should be used as an ethical category which explains why it is right for the attainment of pragmatic ends. Without the foundation of human rights on an ethical underpinning it remains utilitarian and, as Douzinas points out, “when the apologists of pragmatism pronounce the end of ideology, of history or utopia, they do not mark the triumph of human rights; on the contrary, they bring human rights to an end”.

2. Semantic Approach

At a semantic level, a look at the evolution and the use of the term, human rights, reveals the nuances and resonances with which the term has become charged. The addition of the adjective human to the term rights firmly places the concerns of all human beings at the centre of rights discourses. The notion of human rights shows the close tie between the concept of right and the concept of freedom. With the use of terminologies of semiotics, one can argue that the “man” of the rights of man or the “human” of human rights, functions as a floating signifier and is

55 McKeever, see note 2, 111.
56 Douzinas, see note 6, 380.
empty of meaning. But the “humanity” of human rights is not just an empty signifier; it carries with it an enormous surplus of values and dignity bestowed upon it by revolutions and declarations and augmented by every new struggle for the recognition and protection of human rights.\textsuperscript{58}

At a semantic level, then, the use of the human rights discourse in contemporary culture constitutes something of a dilemma. It is probably no exaggeration to say that it is almost the only form of ethical discourse which finds consensus among people today and so is a necessary language in order to communicate in today’s world.\textsuperscript{59} But the acceptability of this discourse is at least partly due to the fact that it reproduces the culture in which people are living, including some of its morally doubtful aspects.\textsuperscript{60} And so the dilemma is using a discourse that is at times loaded with nuances of individualism and rationalism, but which at least finds a certain consensus.

3. Normative Approach

The normative\textsuperscript{61} perspective of human rights is just as important as the pragmatic and semantic approaches yet is often ignored due to the preferred use of the other two. An examination of the human rights discourse in a normative perspective entails asking how this form of argumentation relates to a systematic theoretical understanding of ethics.\textsuperscript{62} Thus, it is clear that many of the issues which have emerged in the other perspectives have their roots at this normative level. It is the question of the moral foundation of human rights.\textsuperscript{63}

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\textsuperscript{58} Douzinas, see note 6, 255.
\textsuperscript{59} McKeever, see note 2, 115.
\textsuperscript{60} Ibid.
\textsuperscript{61} This term refers to the norms of natural law and not directly to norms of positive law. Of course the advocates of natural law would name the age of human rights as a step toward establishing natural law features, when their protection is sought for. However, in the legal application of human rights and due to the great influence of positive law, it is not easy to refer directly to natural law. In details see, L.W. Sumner, *The moral foundation of Rights*, 1987; McKeever, see note 2, 115 et seq.
\textsuperscript{62} McKeever, see note 2, 115.
\textsuperscript{63} Sumner, see note 61, 4 et seq.
There have been a variety of declarations and conventions of human rights at an international and regional level, but the Universal Declaration of Human Rights remains the cornerstone of the human rights discourse. Its reading reveals a richness of pragmatic and semantic perspectives, but from the normative point of view it remains ambiguous and vague. The central question, which concerns normative ethics, is the manner in which one knows what is good and how this knowledge can be used in the formulation of moral precepts for the guidance of human behaviour. If one reads the Declaration, one discovers that the primary good is the dignity and worth of the human person. On the basis of this dignity and worth the text recognises the human person as the subject of “equal and inalienable rights” which determines how the person may and may not be treated, but it does not elaborate upon the source of this norm beyond the generic appeal to human dignity.\(^64\) The text does not explain how one comes to know the dignity and worth of the human person and how this knowledge leads to the recognition of human rights. This does not mean that the text is of no interest from a normative ethics point of view. Suffice it to say, the idea of the dignity and worth of the human person requires each human being to be the possessor of certain values and this implies that each human being has the ability to know what is good and to deduce the implications of this knowledge for human behaviour. Similarly when the terminology of the inherent dignity of human beings and their “equal and inalienable rights” is used implicitly there is the perception of a good – the dignity of the human person. The inherent logic of the declaration is that we are morally obliged to behave in a certain way; there are things which one may and which one may not do to a human being.\(^65\) The text indeed implies a normative ethical system, even though it does not postulate one explicitly.

The main problem with the human rights discourse at a normative level arises out of the tendency in contemporary culture to refuse, or at least to consider with suspicion, any discourse which dares to have rationalist, universalistic or absolutist premises. An alternative proposal is a pragmatic and relativistic utilitarianism: human rights help people so we should support and protect human rights here and now without delay.\(^66\) This diminishes the common response when there is violation of human rights and atrocities occur because they are invoked only when

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\(^64\) McKeever, see note 2, 118.

\(^65\) McKeever, see note 2, 119.

\(^66\) McKeever, see note 2, 120.
they are useful to us. On a normative level this response remains unsatisfactory in view of the fact that it risks falling into a nihilistic stance on ethics, which undermines the human ability to know right and wrong and to articulate that knowledge in prescriptive terms based on something more than spontaneous individual impulse.

VI. The Universality of Human Rights

Never before has there been such debate on the universality of human rights as there is now.67 As a result of the modern crisis of philosophical moral truth, whereby every truth is relative, the response to the fact of cultural heterogeneity often goes by the name of relativism.68 From the relativism of philosophical moral values to the relativism of human rights, the question, whether or not human rights declarations can be applied to all, remains. The era of globalization with its pluralistic character has been named not only as the age of human rights but also as the era of a clash of civilizations.69 This implies not only a clash of moral values,70 but also a clash of human rights,71 which in the contemporary world have become the most fashionable alternative to morality.


Since the adoption of the Universal Declaration of Human Rights in 1948, the issue of universal applicability of the international human rights documents has often been raised. In the first place it has been claimed that human rights are Western constructs, with no universal validity. In the Islamic world it has been claimed that some provisions are contrary to the Islamic culture and religion. The Universal Declaration and subsequent international documents on human rights did not and do not create human rights, rather they recognize and list them, although such a list can never be exhaustive. The human rights of the African and Asian people were proclaimed and claimed to be respected even before the Universal Declaration and other human rights documents.

In the formulation of the Declaration itself one notices that universal rights exist, when we read; “Everyone has a right to …” or “No one

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72 Already in the draft of the Universal Declaration of Human Rights (UDHR) itself the formulation of the title of the Declaration needs to be noted clearly in the sense that it has been entitled “Universal Declaration of Human Rights” and not “Declaration of Universal Human Rights”. The intention was to have a declaration, which could reach as many people as possible despite their different theories and ideologies.
73 For instance the UDHR and the two International Covenants – the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights were drafted without the participation of most African and Asian countries because they were under colonial rule. In detail see R. Pannikar, “Is the Notion of Human Rights a Western Concept?”, Diogenes 120 (1982), 75, et seq.
75 For instance the Maji Maji War of 1905 in Tanzania arose from resistance to German colonial rule, the Mau Mau war in Kenya arose from resistance to British colonial rule and many of the freedom movements especially in 1960s were expressions and claims respecting the rights of others. Mahalu points out that the way the colonial administration was effected denied peoples their human dignity and the ruthlessness accompanying the enforcement of colonial powers indicated a disregard for the lives or rights of those who, in their traditional conviction, opposed foreign authorities, cf. C.R. Mahalu, “Africa and Human Rights”, in: P. Kunig/ W. Benedek/ C.R. Mahalu, Regional Protection of Human Rights by International Law: The emerging African System, 1985, 4.
shall be ...". This shows clearly that the task of enjoying rights and responsibilities belongs to everyone without exception. The use of words like “all” and “every” demonstrate the universality of human rights. We read: “The General Assembly, proclaims this Universal Declaration of Human Rights as the common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society ...”.

The presence of the universal property of human nature that all possess, at least in its universal principles, is the same for everyone everywhere and coexists in the whole of humanity. This has universal values for all people in every time and in every place. In effect, the acknowledgement of the personal dignity of every human being demands the respect, the defence and the promotion of the rights of the human being. It is a question of inherent, universal and inviolable rights. No individual, no group, no authority, no state, can give them and no one can eliminate them as long as the human being is there.

This understanding is possible if one starts from natural law theory. With a positivistic theory discourse, the universality of human rights is problematic because each state or individual has the right to list his own human rights. And the role of the state and international bodies of human rights is not to create human rights but to recognize and protect them. But when the starting point is natural law theory, in the sense that one has rights not because an institution or individual has given them but because it originates from the very fact that one is a human being, then it is possible to talk of the universality of human rights. It is to this end that the Universal Declaration of Human Rights alludes to when it begins with: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”

Universality in the human rights discourse does not mean that all rights are identical. Human rights are as many and as different as human beings, although considering the inherent dignity and the inalienability of rights of every one, it is true that fundamental rights are common to all. The feelings of pain when one’s rights are hurt or violated

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76 Universal Declaration Preamble, para. 8.
77 Finnis, see note 15, 198.
78 Universal Declaration Preamble, see note 76, para. 1.
79 The question here regards the universality of human rights which one possesses. Of course, possession of these human rights does not automatically mean their use, but they demand to be recognized and protected, sometimes not directly but under the title of the fundamental right to freedom.
are valid for everyone. When a culture or ethnic group is given room to
draft its own human rights document, as has been rightly suggested by
Pannikar, the result will correspond to others in *grosso modo*. After
the adoption of human rights documents on a regional level and their
insertion in individual states’ constitutions, they should not be decora-
tive, but instead taken seriously and put into practice by each individ-
ual. The protection and respect of human rights must be taken seriously
otherwise it will again be too late.

Although the pragmatic approach plays a great role, it is not a suffi-
cient response to the relativism of human rights because it is usually ap-
plied as an urgent response to oppression, exploitation, war, etc. and
generally does not explain why it is right or wrong to do something. It
must be pointed out that the pragmatic perspective is closely related to
utilitarianism and so the promotion and protection of human rights
may only occur when and where there is interest in doing so. In order
to defeat relativism an ethical normative perspective is needed, as ex-
pressed by natural law, which by its nature is unwritten law, inherent in
every human being independent of his culture, religion or race. In every
culture there is a concept of good and bad, rights and wrongs. The con-
tent of good and evil or right and wrong may differ from one ethnic
group to another, but the idea of good and evil is always present. No
human culture, no matter how rich it may be, can exhaust the entire
truth regarding morality and values. Each culture is called to perfection
and the purification of its values. It is universally valid that everyone
needs to be treated well and that everyone is happier when his own
rights are recognized, respected and protected.

VII. The United Nations as Custodian of Human Rights

The idea of the promotion and protection of human rights is much
older than the United Nations. The state has been and remains the

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80 He suggests that room should be given for other traditions to develop and
formulate their own homomorphic views corresponding to or opposing
Western “right”. This is an urgent task, otherwise it will be impossible for
non-Western cultures to survive. Cf. R. Pannikar, “Is the Notion of Hu-
man Rights a Western Concept?”, in: H.J. Steiner/ P. Alston (ed.), *Intern-

81 “Those who seek to move the earth must first, as Archimedes explained,
have a place to stand. Moral clarity provides us with a place to stand, a re-
ference point from where to leverage our talents, ideas, and energies to cre-
principal guarantor and protector of human rights of its citizens. But while the state should be the principal guarantor of the human rights of its citizens, history has shown that this is clearly not always the case. Many human rights violations could be described as a breach of this basic compact between the state and its individuals. When state protection metamorphoses into state abuse, the international community, through the mechanisms of guarantees it has put in place, becomes the only recourse for the protection of the universal rights of individuals failed and abandoned by the state.\footnote{Indeed, in the aftermath of World War II, representatives of Member States of the United Nations drafted the Universal Declaration of Human Rights, against the background of the atrocities of the war. The contribution of the United Nations in the promotion and protection of human rights is enormous. Since 1948 many human rights treaties and conventions under the auspices of United Nations have been ratified. The number of treaty bodies stands at seven at the moment.\footnote{The proliferation of human rights conventions and treaty bodies in themselves does not make a difference, as experience has already shown. And because of this, the 21st century, as Viljoen rightly argues, should be the century of implementation of these human rights conventions: a move from the elaboration of human rights to their enforcement.}}

Indeed, in the aftermath of World War II, representatives of Member States of the United Nations drafted the Universal Declaration of Human Rights, against the background of the atrocities of the war. The contribution of the United Nations in the promotion and protection of human rights is enormous. Since 1948 many human rights treaties and conventions under the auspices of United Nations have been ratified. The number of treaty bodies stands at seven at the moment.\footnote{The proliferation of human rights conventions and treaty bodies in themselves does not make a difference, as experience has already shown. And because of this, the 21st century, as Viljoen rightly argues, should be the century of implementation of these human rights conventions: a move from the elaboration of human rights to their enforcement.}

1. Moral Foundation of Human Rights and the Universal Declaration in Practice

Throughout the preparation of the Universal Declaration the question of the foundation of human rights was raised. It was not easy for the Western and the Eastern blocks to reach agreement. This tension was


\footnote{See F. Viljoen, “Fact Finding by UN Human Right Complaints Bodies”, in: R. Wolfrum/ A. von Bogdandy (eds), \textit{Max Planck UNYB} 8 (2004), 49 et seq. (50).}

\footnote{Viljoen, see note 83, 50.}
due to the Western block with its liberal traditions and the Eastern block with its communist ideologies. For example, the Soviet Union and its Eastern European allies were against the draft declaration because it recognized individual rights with little reference to collective rights.\textsuperscript{85}

Another reason, which caused disagreement between the parties was the different conception of human rights due to a diversity in ideologies and theories of human rights. For this reason there was difficulty in agreeing on the Declaration since the moral relativist held that human rights could not and should not be extended to all peoples of the world.\textsuperscript{86} Islamic countries were another group which had reservations in respect of the Declaration because there were serious conflicts between human right norms and Islamic beliefs in practice.\textsuperscript{87} With people of diverse cultural traditions and moral backgrounds, the question, which was raised was a universal application of the Declaration of Human Rights.

Perceiving the disagreement dominating the Declaration, Maritain\textsuperscript{88} in his remarks, with the intention of facilitating the acceptance of the Declaration, suggested that differences in ideologies and theoretic perceptions of human rights should be left aside to focus on the practical aim. He argued that after the scourge of World War II, the centre of attention should be common practical notions rather than common speculative notions.\textsuperscript{89}


\textsuperscript{86} In fact during the debate on the draft of the UDHR a multitude of people from different cultures, religions, races, languages as well as different ideologies and philosophies raised the question on its applicability.

\textsuperscript{87} It is often argued that Islamic law stands in stark opposition to the UDHR, in the sense that the latter guarantees the freedom to choose one’s religion and spouses; both of which are restricted under Islamic law. For details Cerna, see note 74.

\textsuperscript{88} Maritain led the delegation from France to UNESCO’s second General Conference held in Mexico City in November 1947 and was elected chairperson of this Conference.

\textsuperscript{89} “How ... is an agreement conceivable among men assembled for the purpose of jointly accomplishing a task dealing with the future of the mind, who come from the four corners of the earth and who belong not only to different cultures and civilizations, but to different spiritual families and antagonistic schools of thought? Since the aim of UNESCO is a practical
The common practical conviction does not sweep away theoretical convictions as such, as Maritain argued further. Thanks also to these remarks, the Universal Declaration became the Magna Carta of human-kind. Other international\textsuperscript{91} and regional\textsuperscript{92} human rights conventions followed. Colonized territories obtained their freedom, slavery in its multi-faceted form was abolished, discrimination was undermined, apartheid was finally consigned to history. Indeed the last century was characterized as the century of triumph of human rights. However, although the 20th century was the century of the triumph of human rights and as such named as the age of human rights, still, it was the century of massive violations of human rights. The genocides in Rwanda and the former Yugoslavia, civil wars in different corners of the world, the violation of the rights of children as well as torture, terrorist attacks, and severe poverty have increased. There have been so many violations of human rights during the last century and at the beginning of this Third Millennium that some have called it the end of human rights.\textsuperscript{93}

Some of the factors for the decline of the human rights and of their violation is the utilitarian concept of human rights and the dominance of the pragmatic discourse of human rights which ignores the ethical foundation of human rights. Human rights get their ethical justification in natural law. Of course “natural rights” and human rights are closely related but they are not synonyms. If someone is considered to have a natural right, it is also a human right, but not every proponent of hu-

\textsuperscript{90}“I am fully convinced my way of justifying the belief in the rights of man and the ideal of freedom, equality, and fraternity is the only belief solidly based on truth. That does not prevent me from agreeing on these practical tenets with those who are convinced of their way of justifying them, entirely different from mine or even opposed to mine in its theoretical dynamism, is likewise the only one based on truth”, ibid., 78.

\textsuperscript{91}See for a list, Brownlie, see note 51.

\textsuperscript{92}The Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, and the African (Banjul) Charter on Human and Peoples’ Rights are examples of human rights documents which are also inspired by the UDHR.

\textsuperscript{93}Douzinas, see note 6, 371 et seq.
human rights subscribes to the theory of natural law. Even though natural right is distinguished from natural law, natural law addresses fundamental moral duties; natural right concerns itself with fundamental claims or entitlements. Wasserstrom defined human rights as a basic moral entitlement possessed only by persons. Rights are thus seen as entities that are naturally possessed rather than conferred. This implies that every person has not only rights to claim from others, but also obligations to fulfill. On the one hand, there are those with an utilitarian concept holding that rights are correlative because rights confer obligations. On the other hand there are those who claim that higher obligations themselves confer rights. Pope John XXIII, writing in the natural law tradition, sums up the inseparability of rights and obligations:

“... every fundamental human right draws its indestructible moral force from natural law, which in granting it imposes a corresponding obligation. Those, therefore, who claim their own rights, yet altogether forget or neglect to carry out their respective duties, are people who build with one hand and destroy with the other.”

Considering the ethical foundation of the human rights discourse and reflection on the triumph and violation of human rights during the age of human rights, Dalla Torre argues that the human rights discourse is the expression of the nostalgia of natural law. Despite their differences, natural law and human rights, argues Douzinas, also share common resistance and dissent to exploitation and degradation and a concern with a political and ethical utopia, the epiphany of which will never occur but whose principle can stand in judgement of the present law. The ethical foundation of human rights makes one aware of the personal responsibility of living together with others under the moral principle: “do to others what you want others to do to you.” This makes clear that every right implies a duty. The recognition of the right not to be reduced to slavery implies the responsibility of those who own others to give them their freedom. The right not to be tortured

95 Ibid., 32
96 Pope John XXIII, Pacem in Terris, n. 6, 1963.
97 G. Dalla Torre, La città sul Monte. Contributo a una teoria canonistica sulle relazioni fra Chiesa e comunità politica, 2002.
98 Douzinas, see note 6, 380.
implies the responsibility of the torturer not to torture. The exercise of
the rights and freedoms proclaimed is ‘subject to duties’. 99

The natural rights, which we have been dealing with, are however,
undeniably connected to the very person who is their subject just as
much as the respective duties; and rights as well as duties find their
source, their substance and their inviolability in natural law, which
grants or bestows them. In human society one man’s right entails a duty
for all other persons; the duty, namely, of recognizing, respecting and
protecting the right in question.

2. The United Nations and Human Rights Challenges

The role of the United Nations in the field of human rights is immense.
This has lead Malik to point out:

"the world viewpoint on human rights must be that of the United
Nations, and the reconciliation of conflicting views must be the out-
come of the patient activity of the United Nations (...). Therefore
the story of human rights at an international level is none other than
the story of human rights in the United Nations." 100

However, all efforts of the United Nations could not stop the tor-
rent of criticism concerning the efficiency of the protection of human
rights, in particular in connection with the Commission on Human
Rights. Sadly enough, the Commission over the years has devolved into
a feckless organization that human rights abusers used to block criti-
cism or actions to promote human rights. 101 The failure of the United
Nations to prevent e.g. the genocide in Rwanda or the tragedy of Scre-
brenica remains a challenge, as do some cases of abuses of human rights
which have been reported in the UN human rights system itself. Con-
sidering the tattered state of the UN’s reputation in the wake of the Oil
for Food scandal, abuses of civilians within the Peace Keeping Mission

99 Finnis, see note 15, 211.
(1950-1951), 275 et seq. (275).
101 See in this respect the discussion about a Human Rights Council, in par-
ticular the Report of the Secretary-General, “In Larger Freedom: Towards
March 2005, 45; B.D. Schaefer, ”The U.N. Human Rights Council is Not
Enough: Time for a New Approach to Human Rights, available at:
to the Democratic Republic of the Congo\textsuperscript{102} just to name a few,\textsuperscript{103} one poses the question: who can heal the physician?

The recent reform of the United Nations human rights system concerning the establishment of the Human Rights Council\textsuperscript{104} is promising and might give a new chance for the promotion and protection of human rights. However, it is questionable whether this new Council will be a really effective response to today’s situation of human rights.\textsuperscript{105} After all, the past teaches us that although there are 192 Member States many of them fail to adhere to the principles embodied in the UN Charter, including the commitment to fundamental human rights. Indeed, still many Member States actively subvert those principles and repress their own population.\textsuperscript{106} In many parts of the world, the states, instead of being guarantors of human rights, sadly have become violators instead. Regrettably some guarantors of human rights forget that the enterprise of human right is the question of “do to others what you would like others do to you”.

\textbf{VIII. Conclusion}

The human rights discourse, which has enjoyed a significant amount of support in recent times, is not only an alternative to moral values but also contains and has its foundation in moral values. The human rights discourse is both an expression of the nostalgia for natural law and for its revival. The moral values of human rights are connected to natural law by the fact that moral precepts are the precepts of natural law. Human rights, the contemporary name for what has been usually known as


\textsuperscript{104} A/RES/60/251 of 15 March 2006. The vote was 170 in favour to 4 against (Israel, Marshall Islands, Palau, United States), with 3 abstentions (Belarus, Iran, Venezuela).


\textsuperscript{106} Schaefer, see note 101, 3.
natural rights or rights of man, contain moral elements. The moral content expressed in the concept of natural law has consistently influenced legislation, being subsequently expressed with the name of natural rights and human rights rules. Human rights are part of natural rights and natural rights are that part of natural law which commonly refers to natural sources of justice.107

The age and triumph of human rights has been proclaimed, yet it has been paradoxically accompanied by grave violations of human rights. Action must be taken because all human beings are born free and equal in dignity and rights, endowed with reason and conscience and should act toward one another in a spirit of brotherhood. This can be achieved in a variety of ways but especially if humankind will have the courage to return to lost moral values and a conception of human rights according to the natural law theory. Of course, the natural law of our time cannot be that of the medieval era because, after all, natural law has been developed over time and no human culture or philosophy can exhaust the entire truth about morality, values or knowledge of natural law.108

In the move towards the age of implementation, if human rights are separated from natural law, they remain an instrument for reform and, occasionally, a sophisticated tool for analysis, but they stop being the tribunal of history.109 By founding human rights on natural law and human rights in moral values, the binding of human rights is no longer problematic whether written or unwritten.110 Considering that nowa-

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107 Natural law concepts, as a universal moral law, are the basis for natural rights and human rights transcending the law of states. When positive law coincides with natural law it has the authority of both force and conscience. Positive law is the enforcement of positive rights while natural law gives justice to natural rights and human rights. Whereas a positive right is necessarily enforceable, is written in law books, creating what is normative, a moral right differs because it is not necessarily enforceable, is not written, may consist of jurisprudential thoughts, creating what ought to be, cf. R.A. Tokarczyk, “Interrelations Between Human Rights, Natural Rights and Natural Law Concepts”, in: L. Leszczyński (ed.), Protection of Human Rights in Poland and European Communities, 1995, 34.
109 Ibid.
110 “It is true that the document, in itself, is not binding in the same sense as a treaty. However, arguably, it can now be said to be part of customary international law, and under all circumstances it incorporates in a very succinct manner rights and freedoms which later have been elaborated upon in
days some human rights are enshrined in conventions and constitutions, Brant argues that when human rights are upheld by positive law – where people have what they ought to have – natural rights and human rights are both moral rights and positive rights.\textsuperscript{111}

Problems in Connection with the Efficiency of the World Bank Inspection Panel

Elvira Nurmukhametova *

I. Introduction

Today there is an urgent need for measures to control environmental pollution and to conserve resources. Furthermore, there is a need for continued economic growth worldwide. The question of achieving environmental protection and economic growth at the same time is considered to be very problematic. Any theoretical model of sustainable development depends on a solution to this problem.

One of the important attempts to address environmental and economic problems simultaneously is the inclusion of provisions on environmental protection by the international financial institutions into

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* The author expresses her gratitude to the Max Planck Society for providing resources to write this article. I am grateful to Dr. Philipp for the assistance in the editing process.

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their policies and procedures. In order to establish an independent control of the fulfillment of these policies and procedures some institutions have established independent mechanisms. Examples are the International Bank for Reconstruction and Development (IBRD – hereinafter World Bank), the Inter-American Development Bank (IDB), and the Asian Development Bank (ADB). This article analyzes the efficiency of a mechanism established by the World Bank, the World Bank Inspection Panel. This mechanism provides a good example, considering that it was established back in 1993. With the aim of improving the efficiency of the Panel, possible reasons for the several problems which arise in the Panel’s practice, are considered.

II. The Inspection Panel: Aims and Jurisdiction

The Inspection Panel created by the Bank’s Executive Directors on 22 September 1993 is meant to “complement the responsibilities and functions of the existing systems for quality control in the project preparation and implementation,” according to the Bank’s President.1 The Panel has the competence to investigate complaints brought by private parties in borrowing countries alleging that the World Bank has failed to follow its own policies and procedures when designing, appraising and/or implementing Bank financed projects. The purpose is to carry out independent administrative reviews, not to conduct judicial proceedings. It should collect information on matters of complaint, provide an independent assessment and make recommendations to the President and the Executive Directors.2 By establishing the Inspection Panel, the Executive Directors took the lead in what has become recognized as a clear advance in the development of international institutions.3 For a financial institution, the Inspection Panel was a complete innovation, an

4 R.E. Bissell, “Institutional and Procedural Aspects of the Inspection Panel”, in: Alfredsson/ Ring, see note 3, 124 et seq. Following the example of the World Bank, as mentioned, similar Panels have been created by the IDB and the ADB. It is also necessary to note that the Inspection Panel’s
unprecedented mechanism. It was the first mechanism to introduce a non-judicial process to assist in ensuring compliance with the policies and procedures of a global international organization's operational activities, i.e. activities with direct effects on other parties. The creation of the Panel can be seen as one response to the obstacles of the application of traditional responsibility principles to organizations, especially when development institutions are concerned. However, the Panel is not a court of law where the responsibility of the World Bank can be invoked. The mechanism improved the accountability of the Bank Management and staff for the observance of its policies and procedures to enhance quality control in project design, appraisal and implementation. The Resolution establishing the Panel addresses the situation when inspection is requested by an affected party, but this is only one of three ways of activating the work of the Panel. In addition, at any time, the Board of Executive Directors can instruct the Panel to conduct an inspection. In special cases involving serious alleged violations of World Bank policies and procedures, a single Executive Director can also ask the Panel to conduct an inspection.

When a request for inspection is received by the Inspection Panel the Chairperson of the Panel shall inform the Executive Directors and the President of the Bank promptly. Within 21 days of being notified of a request for inspection, the Management of the Bank shall provide the

institutional coverage is limited to the IBRD and the IDA. It does not currently extend to private sector activities within the IFC and MIGA, for which a special mechanism, a Compliance Adviser-Ombudsman was established in 1998 (see for more information on this issue in: A.G. Gualtieri, "The Environmental Accountability of the World Bank to Non-State Actors: Insights from the Inspection Panel", BYIL 72 (2001), 213 et seq.

6 Shihata, in: Alfredsson/ Ring, see note 3, 45 et seq.
9 Resolution establishing the Inspection Panel (No. 93-10 for the IBRD and 93-6 for IDA) of 22 September 1993, circulated as document No. SecM93-988 (IBRD) and SecM93-313 (IDA). Published in ILM 34 (1995), 520 et seq.
Panel with evidence that it has complied, or intends to comply with the Bank’s relevant policies and procedures. After receipt of this notification, the Panel must decide whether the request meets the eligibility criteria and on this basis it makes a recommendation to the Board of Executive Directors as to whether the matter should be investigated.\(^\text{10}\) If the Board approves the recommendation to investigate, the inspection is carried out by one or more Panel members (the Panel consists of three members of different nationalities from Bank member countries).

After finishing the investigation the Panel sends its findings to the Executive Directors and the President. The report shall consider all relevant facts, and shall conclude with the Panel’s findings on whether the Bank has complied with all relevant policies and procedures. Management has six weeks, from receiving the findings, to submit its recommendations to the Executive Directors in response to such findings. Based on the Panel’s findings and Bank Management recommendations, the Executive Directors take the final decision on what should be done.

The initial decision of the Executive Directors as to whether to proceed with an inspection, together with copies of the request for inspection and the Panel’s recommendation thereon, is made publicly available, as is the final report of the Panel.

According to the Operating Procedures issued in August 1994, the Panel can use a variety of investigatory methods. For example: holding meetings with, or requesting submissions on specific issues from either the affected party, the Bank staff, government officials, or representatives of both local and foreign NGOs; holding public hearings in the project area; visiting project sites or any other reasonable method the Panel considers appropriate for the specific investigation.

As a minimum the affected party must consist of two or more persons with common interests or concerns who live in the borrowing country; the alleged violation of Bank policies resulting in harm must be of a serious character; it must be asserted that the subject matter has been brought to Management’s attention and that Management has failed to respond adequately. The matter in the request must not be related to procurement; the loan must still be active, with less than 95 percent disbursed. If the Panel has previously made a recommendation on

the subject matter, the request must assert that there is new evidence or circumstances not known at the time of the previous request.\textsuperscript{11}

The Inspection Panel, is clearly, a significant and praiseworthy step.\textsuperscript{12} Panel reports can influence the development of the applicable law by providing significant guidelines on the interpretation and implementation of Bank environmental safeguard policies and procedures. The activity of the Panel enhances transparency in Bank operations.\textsuperscript{13} The Panel’s findings disclose the environmental and social consequences of project deficiencies stemming from the Bank’s non-compliance with international standards, and generic problems in the project cycle of financed projects. The Panel’s activity gives individuals, non-governmental organizations, representing individuals and local communities the opportunity not only to use domestic mechanisms for protection of their rights. Panel reports can also encourage legal developments in different areas of international law, such as institutional, environmental and human rights law. In addition, the Inspection Panel has several other important functions. First of all, the affected party can bring requests prior to the commission of environmental harm, during the preparation and appraisal stages of the project cycle. Second, the Panel’s activity lays the ground for greater compliance with the Bank’s policies and procedures through both positive measures (for instance the clarification of policies and procedures) and deterrence.\textsuperscript{14}

The main subject of requests are human rights (for example, rights of indigenous people) and environmental protection.\textsuperscript{15} Nevertheless, the question of the efficiency of the Inspection Panel and its ability to

\textsuperscript{11} 1999 Clarifications; see further the commentary in: The World Bank (ed.), \textit{Accountability at the World Bank: The Inspection Panel 10 Years On}, 2003, 10 et seq.

\textsuperscript{12} H.E. Olafur/ R. Crimsson, “Democracy and Human Rights: How We Learn the Hard Way”, in: Alfredsson/ Ring, see note 3, 5 et seq.; Shihata, see note 2; Gualtieri, see note 4.

\textsuperscript{13} The main problem in this regard stems from confidentiality considerations – information can be closed because the Bank concedes that the effective functioning of the Bank necessarily requires some derogation from complete openness, cf. Gualtieri, see note 4, 224.

\textsuperscript{14} Gualtieri, see note 4, 251.

achieve its main aims according to its mandate within the framework of the World Bank is a cause of some concern. By analyzing the recent practice of the Panel and results which usually follow its findings, it might be possible to identify several reasons for existing problems.

III. Recent Cases before the Panel

1. India: Coal Sector Environmental and Social Mitigation Project

On 21 June 2001 the Inspection Panel received a request for inspection related to the India: Coal Sector Environmental and Social Mitigation Project (CSESMP). The request concerned the Parej East Mine, owned and operated by Central Coal India Ltd. (CCL), a subsidiary of Coal India Ltd. (GIL), where two villages, Parej and Durukasmar, were affected by mine expansion operations. There were several conflicting assertions and interpretations of the issues, the facts, and compliance with Bank policies and procedures from the Management on the one side and affected people and the Panel on the other. For example, the requesters claimed violation of provisions of Involuntary Resettlement (OD 4.30), Indigenous People (OD 4.20), and Environmental Assessment (OD 4.01). Under the provisions of CCL and the Parej East Resettlement and Rehabilitation Policy, CCL must have offered assistance to Project-Affected Persons (PAPs) to find replacement land. According to the Bank Management, CCL received no requests for such assistance. But according to the PAPs there were some 117 parties who opted for such assistance and 115 who qualified.16 The requesters also claimed violation of provisions of the Disclosure of Information (BP 17.50). The Panel noted that “while Management ensured that the Sectoral Environmental Impact Assessment, Parej East Environmental Action Plan and Resettlement and Rehabilitation Policy were placed in the Bank’s Public Information Centres in Washington and New Delhi before appraisal, it failed to ensure that the reports were available in Parej East at a public place accessible to affected groups and local NGOs for their review and comment. Not even a summary of their conclusions in a form and language meaningful to the groups being consulted, as required by OD 4.0/BP 17.50. The information being provided in 2001

16 The Inspection Panel Investigation Report, India: Coal Sector Environmental and Social Mitigation Project, XVI et seq.
was largely technical and inaccessible to project affected people.” The Panel noted, that Bank Management could and should have been aware of this. Then, the Panel noted that “Management’s appraisal of the Parej East RAP was not in compliance with paragraphs 13 and 19 of OD 4.30.”

Several environmental questions were also analyzed by the Panel. The requesters’ main environmental concern was the preservation of topsoil and the restoration of the surface for agricultural use. According to the report the Panel was not shown nor did it observe any topsoil conservation during its visit to the Parej East Open Pit. Although requested at the site, no documentation or information on the five-year coal sector environmental and social mitigation project mine reclamation program could be provided to the Panel team. The Panel found little evidence that the mine level staff had training and knowledge of soils and reclamation activities at the Parej East site. Mine rehabilitation and closure appears to be handled as a separate matter to mine planning and operation and staff were unable to provide the Panel with evidence that the eventual configuration and rehabilitation of mined areas were being planned. The Panel also noted that the Management must have been aware of the lack of action on reclamation at least since the 1997 report of the Environmental and Social Review Panel, findings that were repeated in their 2000 and 2001 reports. The Management must also have been aware of CCL’s position that it had no intention of reclaiming mined areas for post-mining use. The requesters also had a number of complaints about water quality monitoring commitments. The Management explained that monthly environmental monitoring reports were submitted by the Central Mine Planning and Design Institute on Air and Water Quality as well as noise level. According to the report, the Panel was shown the systems of water cleaning and water quality parameters, which except for manganese levels, were within permissible limits. The requesters complained that sewage from the CCL employee’s colony was discharged into the fields of Lupuntandi. Here the Panel found, “Parej East OCP staff showed the Panel a modern and efficiently operating sewage treatment facility in the mine employees colony. On the other hand, the Prem Nagar settlers showed the Panel a malfunctioning sewage pump station close to their site. Here raw sew-

17 Ibid., XI et seq.
18 Ibid., XXII et seq.
19 Ibid., XXII-XXIII et seq.
age was overflowing and being prevented from contaminating agricultural land by a hand constructed earth berm erected by the villagers."\textsuperscript{20}

During the investigation the Panel also “found that Management was not in compliance with paragraph 15(c) of OD 4.30 during preparations. The Panel found no evidence to indicate that during appraisal Management ensured that access would be available or that access to the forest beside Pindra would provide people who moved there with equivalent compensation for loss of their access to forest products.”\textsuperscript{21}

The Panel found also no evidence and no documentation of meaningful consultations between the Sectoral Environmental Impact Assessment and the Environmental Action Plan with the people of the area and the NGOs in Parej East, as required under OD 4.01.

According to the Bank’ s Management’s Response, “Management in the case of Parej East undertook 18 supervision missions.”\textsuperscript{22} The Environmental and Social Review Panel visited Parej East three times and its reports were reviewed by Bank supervision teams. The Environmental and Social Review Panel’s reporting on specific social issues in Parej East was largely confined to a report on the resistance to relocation in 1997. On that occasion, it recommended that the documentation of resettlement in Parej East should be prepared by an independent “consultant/NGO” as a case study so that other subsidiaries and Coal India Ltd. could understand the lessons learned. Unfortunately, this has not yet been done but, in the Inspection Panel’s view, it should be.\textsuperscript{23}

According to the 2002 Management Response, CCL had agreed to give follow-up assistance to the PAPs in Parej East who continue to suffer loss of income. In the Panel’s view, it was vital that the Bank took steps to continue to supervise the implementation of the Project after the credit had been formally closed, and the Panel noted with satisfaction the Bank’s intention to do so. This should include post-implementation monitoring and an audit to determine the effectiveness of the social mitigation measures. The Panel also suggested the forming of the Independent Monitoring Committee for Parej East.\textsuperscript{24}

In 2003 the Board discussed the findings of the Inspection Panel’s investigation report and Management’s report and recommendations.

\textsuperscript{20} Ibid., XXIII-XXIV et seq.
\textsuperscript{21} Ibid., XV et seq.
\textsuperscript{22} Ibid., 114 et seq.
\textsuperscript{23} Ibid., 119 et seq.
\textsuperscript{24} Ibid., 121-122 et seq.
The Board endorsed the findings of the Panel, while noting that “the project had positively influenced Coal India’s policies on environmental and social issues and that nearly 90 per cent of the project affected persons in the Parej East mine had improved or restored their incomes at the time of project completion.”\textsuperscript{25} The Board endorsed the Management’s action plan to continue to supervise and monitor the project to ensure that the outstanding issues relating to resettlement and environment are substantially resolved, and to report to the Board on the status of these issues at regular intervals.\textsuperscript{26} Besides the questions of rehabilitation and compensation of PAPs, the Board noted the importance of the environmental provisions implementation (especially water quality at the resettlement sites and reclamation of mine land for agricultural use).

In 2004 CCL, in cooperation with the Forest Department, hired a number of PAPs to undertake several tasks, including backfilling in mining areas, the plantation of 17,000 trees of different species and development of a drainage system at overburdened dump sites. Water quality monitoring at the resettlement sites takes place periodically. According to the Independent Monitoring Panel, the Bank’s view is that “the regular Bank Supervision missions may suffice to provide the necessary monitoring.”\textsuperscript{27}

\section*{2. India: Mumbai Urban Transport Project}

On 28 April 2004 the Panel received a request for inspection which related to the Mumbai Urban Transport Project. The request was submitted by members of the United Shop Owners Association, a nongovernmental organization located in the city of Mumbai, India, on their own behalf and on behalf of 180 residents living in the area known as Gazi Nagar in the Kurla West District of Mumbai, related to the same project.\textsuperscript{28} The objective of the project was to facilitate urban economic growth and improve quality of life by fostering the development of an efficient and sustainable urban transport system including effective in-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{26} Minutes of Meeting of the Executive Directors of the Bank and IDA of 22 July 2003.
\item \textsuperscript{27} Management Report on Status of Outstanding Issues Following the Inspection Panel Investigation Panel Report No. 24000 and Management’s Response, 10 et seq.
\item \textsuperscript{28} India: Mumbai Urban Transport Project, Credit No. 3662.
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stitutions to meet the needs of the users in the Mumbai Metropolitan Region and to provide *inter alia* for completing two major East-West road links. The request concerned the proposed construction of one of the East-West connecting roads (the Santa Cruz-Chembur Link Road (SCLR)) within this urban transport system and the proposed resettlement and rehabilitation of affected persons. The requesters claimed that “the Bank violated its policies and procedures on disclosure of information, environmental assessment, involuntary resettlement, project supervision and the rights of the locally affected people to participation and consultation.”

The Gazi Nagar requesters claimed that it had come to their attention that as a result of the project they were to be relocated to the Mankhurd area, which they alleged was a degraded environment and unsuitable for relocation. According to the requesters, Mankhurd was considered amongst the highest polluted areas in Mumbai and was near a dumping ground spread across 110 hectares of land. They claimed that around 4,000 tons of garbage from Mumbai were dumped daily on this site, spreading many diseases like malaria, asthma, etc. They also claimed that many huge, open drainages pass through this area carrying the city’s waste and drainage water to the nearby creek spreading a bad odor in the area. This situation, they asserted was evidence of the Bank having failed to prevent a violation of their rights under the Bank’s Environmental Assessment and Involuntary Resettlement policies.

The requesters followed up their request with further correspondence alleging, *inter alia*, that the drains were likely to carry radioactive wastewater from the nearby Bhabha Atomic Research Center. The requesters also alleged that they were at risk from a nuclear explosion from this center. They further referred to the health and environmental hazards from “unbearable fumes from Rashtriya Chemical Fertilizer Co., and the refineries of Hindustan Petroleum, Indian Oil, Bharat Petroleum, Union Carbide … apart from many other chemical factories there, and microbial and air pollution of the dumping ground badly affecting millions of residents of the nearby localities.”

They claimed that the Mankhurd resettlement site is nearly fifteen kilometers away from Gazi Nagar and the construction and design work on the buildings at the proposed resettlement site were of worst quality. They noted that significant damage would occur due to the

29 Ibid., 9 et seq.
30 Ibid.
31 Ibid.
failure to provide income restoration and it would destroy their livelihoods, productive sources, disperse their social, economical network and kin groups. There would be sufficient space available nearby in places such as the Premier colony area, the New Mill area, Swadeshi Mill area, and the Bandra-Kurla Complex area, but that no space was allocated in these places for their convenient relocation. They further claimed that “the Bank failed to supervise the design of the resettlement plan with respect to their livelihoods, traveling distance, education of children and their admissions in respective medium schools, destruction of their source of income, their social, economical network and infrastructure.”

According to the Management, living conditions at Mankhurd were expected to be considerably better than conditions to which requesters were currently exposed. The Management stated that “the Mumbai Metropolitan Region Development Authority collected information in addition to the baseline information relating to air, water, flora/fauna, collected as part of the Community Environmental management Plan,” and this information did not show that the Mankhurd site was excessively polluted or was at risk of being polluted. It further stated that “the Project has been supervised twelve times since it was approved two years ago.” Management also noted that “a series of consultations were held during Project preparation in 2001 and 2002, and representatives of NGOs and Project Affected Persons participated in these consultations, which focused primarily on environment and resettlement issues.” Besides, after an exchange of letters between the requesters, the Bank’s New Delhi Office and the Mumbai Metropolitan Region Development Authority, “a constructive meeting was held on July 9, 2004, and a number of specific next steps were agreed upon to address the concerns of the Requesters.”

According to the Panel’s findings, in projects requiring large-scale resettlement of affected persons, the environmental risks in a proposed resettlement site should be analyzed in the environmental assessment. In this case the Management did not address the issue of environmental assessments for the Project component, but the Panel noted that the de-

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32 Ibid., 10 et seq.
33 Management Response, Annex 1, Item 1, 23 et seq.
34 Management Response, Annex 1, Item 7, 26 et seq.
35 Management Response, Annex 1, Item 3, 24 et seq.
36 The Inspection Panel Report and Recommendation, India: Mumbai Urban Transport Project, see note 28, 21 et seq.
sign of the sub-project component was not finalized by the time of Bank appraisal. It noted further, that this raised concerns about whether the environmental assessment for the selection of the Mankhurd site complies with Bank policy. Moreover, according to the Panel, “the Request, Management’s response, the Panel’s visit to India, interviews with state and Project officials, Bank staff and affected persons, and abundant subsequent correspondence confirmed that there are sharply differing views on the issues raised by the Request.”

3. Pakistan: National Drainage Program Project

On 10 September 2004, the Inspection Panel received a request for Inspection related to the Pakistan: National Drainage Program Project. The requesters raised issues related to the project, in particular to the disposal of saline effluent and to the proposed construction of the National Surface Drainage System (NSDS), a northwards extension of the existing Left Bank Outfall Drain (LBOD) system in the Sindh Province. According to the Inspection Panel, this request may constitute violations by the Bank of various provisions of several operational policies and procedures: Environmental Assessment OD 4.01, Natural Habitats OP 4.04, Indigenous People OD 4.20, Involuntary Resettlement OD 4.30, Management of Cultural Property OPN 11.03.

The requesters claimed that the saline effluent coming down the drainage system would cause large-scale flooding which would force them to leave their ancestral villages. They claimed that such displacement “is even not considered in project documents even though it will occur due to the consequences of the project outcome.” The requesters further claimed that the design of the project was faulty and unsustainable because it had not taken into account the social and environmental difficulties inherent in the existing disposal route, and because it had not explored possible alternative routes. They stated that they had raised objections to the feasibility and sustainability of the project, but that “implementing agencies, financiers including the World Bank, and

37 Ibid., 25 et seq.
38 Pakistan: National Drainage Program Project, Credit No. 2999.
40 Ibid., 5 et seq.
the project consultants never listened to them.”

They further claimed that the environmental assessment for the project had ignored or underestimated items on the checklist for Bank financed projects. They contended that the effect of the project on marine resources, biodiversity including local coastal plants, animals, critical habitats and protected areas would be entirely negative.

The requesters also claimed that the Bank, by accepting the Drainage Sector Environmental Assessment (DSEA), violated its environmental assessment policy because this assessment focused only on general environmental issues of Pakistan’s drainage sector and did not deal with issues such as coastal ecology, safe disposal of saline effluent into the Arabian Sea, and protection of wetlands. They also claimed that although the Bank’s Environmental Assessment policy clearly requires a Project Environmental Management Plan, after six years there were no such plan. Further they noted that in spite of the Drainage Sector Environmental Assessment proposing a Wetlands Management Plan and a program of monitoring and audit, “nothing has materialized in this regard.”

The requesters stated that the wetlands affected by the project were an important natural habitat because they were part of a migratory route for waterfowl and of nesting grounds for a large number of locally and globally important bird species, including some endangered species such as the Dalmatian Pelican. Two species of marine turtles inhabit the area, including the green turtle and the loggerhead turtle. They claimed that the wetlands, channels, and creeks were also a productive fishery source including several species of commercially valuable shrimps, prawns, and crabs. The interconnected lakes known as “dhands” were the source of livelihood for forty villages of fishermen with a combined population of 12,000 to 15,000. The requesters asserted that two of these “dhands” – the Narreri lagoon and the Jubho lagoon – were internationally recognized sites under the Ramsar Convention. The degradation of these wetlands had already caused severe damage to the ecosystem, habitat, and fish catch, and if the project were implemented according to its present design, the “dhands” would disappear. The requesters also claimed that people from the Mallah tribe were adversely affected by the project. Already, according to the requesters, “the existing faulty operation of the LBOD lead to the inundation of the Mallah villages, causing loss of livelihood and life.”

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41 Ibid., 6 et seq.
42 Ibid., 7 et seq.
43 Ibid., 8 et seq.
Regarding the classification of the project as category B, Management stated that category A would have been more appropriate for the Project.\textsuperscript{44} Regarding the requesters’ claim that there is no Environmental Management Plan for the project and no Wetlands Management Plan as envisaged in the Drainage Sector Environmental Assessment, Management responded that the design of the project included preparation of an Environmental Management Plan, and that a water Sector Environmental Management Plan-Framework for Action was developed under the Project in February, 2002.\textsuperscript{45} Management stated that the Bank should now take three specific actions regarding the project: assemble a Panel of Experts to review ecological, hydrological and water quality monitoring data in the LBOD outfall area and propose a course of action; conduct a diagnostic study of livelihood improvements in the area to determine the losses suffered and formulate an assistance program; assist the Government of Pakistan with a Country Water Resources Assistance Strategy and a Strategic Country Environmental Assessment.

Management stated that it believed the project was in compliance with many of the requirements for OD 4.01 (Environmental Assessment), including preparation of a sectoral Environmental Assessment and requirements for screening subprojects. However, Management acknowledged that no report on ex-post sampling of ongoing work had yet been prepared to ensure compliance with covenants on screening, nor had the Environmental Management Plan as required by the Project Agreement been implemented. Consultations conducted in the course of producing the Drainage Sector Environmental Assessment appear to have been few, particularly with affected groups. According to the Management the project also failed to comply with the disclosure requirements for BP 17.50 (Disclosure of Information) since the DSEA was not disclosed prior to appraisal at the info shop and no records of disclosure in the country could be located. Management stated that OP

\textsuperscript{44} Ibid., 14-15. Management assigned the Project to category B, rather than A. According to Management the rationale was that “a primary objective was to address environmental issues associated with irrigation” (ibid., 40) and that significant environmental benefits were anticipated. Management notes that “such categorization appears to have reflected a premature balancing of possible adverse effects with positive effects, and a focus on individual infrastructure activities, without regard to their potential cumulative effects” (ibid., 41).

\textsuperscript{45} The Inspection Panel Report and Recommendation, Pakistan: National Drainage Program Project, 15 et seq.
4.04 (Natural Habitats), OD 4.20 (Indigenous People), OD 4.30 (Involuntary Resettlement) and OPN 11.03 (Management of Cultural Property) were not applicable to the project.46

As for protection of the two “dhands”, Management responded that the project had not supported other projects that directly affect these “dhands” designated under the Ramsar Convention, but noted that more detailed assessment was required to determine if these sites would be affected by the breaches in the Tidal Link Canal and the collapse of the Cholri Weir.

The requesters claimed that the idea of linking the Kadhan Pateji Outfall Drain with the Shah Samado creek through the Tidal Link passing through the “dhands” was unsound because the Tidal Link prevented water flowing from the Rann of Kutch into the “dhands”. They alleged that the 1989 full Environmental Impact Assessment for the LBOD foresaw that excessive drainage by the Tidal Link would affect the “dhands”, but that no mitigating measures had been taken. Management responded that this claim referred to the closed LBOD Stage 1 project and stated that the design combination of the Tidal Link canal and the Cholri Weir was intended to mitigate adverse effects on the “dhands”, but structural problems and a 1999 cyclone damaged the Tidal Link and the weir. According to Management, this severely hampered the effect of the mitigation measures and it pointed out that the 1989 full Environmental Impact Assessment indicated that the “additional, temporary inflow of drainage water from the Kadhan Pateji Outfall Drain would not have an adverse effect and could offset the loss of water from the Rann of Kutch in wet years.”47

The requesters claimed that degradation of the wetlands had caused severe damage to the ecosystem, habitat, and fish catch, especially some commercially important fish species. Management responded that the Tidal Link Fact Finding Mission recommended that no repairs have been done to the storm damage because it was beyond the limits of possible repair. The Mission also recommended a strengthened monitoring program and more data collection and analysis. Management added that “while data collection coordinated by the Water and Power Development Authority of Pakistan has continued ... the strengthened program of monitoring and analysis has not been undertaken as recommended, and as a result, mitigation measures have not been identified and de-

46 Ibid., 14 et seq.
47 Ibid., 19 et seq.
Regarding the lack of consultation, Management, in Annex 9 of the Response, set out in detail the places, dates and names of NGOs consulted.

According to the Panel, the request met all the eligibility criteria and the Panel recommended an investigation of the matters alleged in the request for inspection. The Panel noted the conflicting assertions regarding the relationship between the LBOD Project and the National Drainage Program Project. Management stated that the requesters’ concerns related not to the National Drainage Project but rather to the LBOD Project, which was closed. According to the Panel’s findings, these two projects were closely connected.

In the Panel’s opinion, the contradictions in the assertions of the requesters and Management were substantial and bear close relation to the sources and extent of the harm alleged by the requesters. According to the report, the request, Management’s response, the Panel’s team’s visit to Pakistan, and discussions with project officials and affected persons, confirmed that the differing views on the issues raised by the request cannot be easily reconciled since they involve conflicting assertions and interpretations about the issues, the facts, and compliance with Bank policies and procedures.


On 20 April 2004 the Inspection Panel received a request for inspection related to the Colombia: Cartagena Water Supply, Sewerage and Environmental Management Project. The objectives of the project were to

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48 Ibid., 20 et seq.
49 Ibid., 22 et seq.
50 Ibid., 24 et seq. As it was, for example, in the case concerning Pakistan, when regarding the classification of the project as category B, Management confirms that category A would have been more appropriate for the project.
51 Loan Agreement (Cartagena Water Supply, Sewerage and Environmental Management Project) between the IBRD and Distrito Turistico y Cultural de Cartagena de Indias, Loan No. 4507-CO, 1999; Panel Report and Recommendation on Request for Inspection—Colombia: Cartagena Water Supply, Sewerage and Environmental Management Project, IBRD Loan No. 4507-CO.
improve the water and sewerage services in the territory of the borrower and the sanitary conditions of the borrower’s poorest population; facilitate the environmental cleanup of water bodies surrounding the territory of the borrower (Cartagena Bay, Caribbean beaches, and Ciénaga de la Virgen lake), and improve the sustainability of water and sewerage services in the borrower territory through a private sector participation model.52

The project included the following components: expansion of the water supply system, expansion of the sewerage system in the Ciénaga Basin; construction of the main conveyance system of the wastewater to the treatment plant; construction of treatment installations; construction of a submarine outfall for the discharge of the treated effluent to the Caribbean Sea near Punta Canoa; industrial wastewater discharge control; environmental and social component; project management.

The request53 concerned the proposed construction of the submarine outfall mentioned above. According to the Project Appraisal Document, the outfall would be built at Punta Canoa, a village located some 20 km North of Cartagena. The conveyance system would begin with a 72 inch in diameter pipeline to be built from Cartagena to the preliminary treatment works inland from the shore at Punta Canoa. Thereafter, another pipeline would carry the effluent to the shoreline where a submarine outfall would be constructed. The requesters claimed that the proposed submarine outfall to be constructed off the coast of Punta Canoa would pollute the marine environment in the area. They argued that the coastal zone supported fisheries that supply the people of the area with their primary source of food and income. They believed that, as a result of the project, “untreated wastewater” would be discharged into the sea and would contaminate marine life and have a serious and permanent impact on the people’s health and livelihood, especially the indigenous people of Punta Canoa, Arroyo de Piedra and Manzanillo whose lives are inextricably linked to the health of the Caribbean Sea. They pointed out that the men and boys of the affected villages fish each morning and evening in the waters close to the end of the proposed outfall. The requesters claimed that biological and chemical contamination would deplete the fish stocks and could have

52 Loan Agreement, Schedule 2.
53 Corporation Cartagena Honesta, a local non-governmental organization, submitted the Request on behalf of 125 residents of Punta Canoa, 139 residents of Arroyo de Piedra, 41 Residents of Manzanillo, and 119 residents of Cartagena.
severe human health impacts for fishermen and anyone else exposed to the tainted fish or water. The requesters claimed inter alia that the Bank violated OP 4.01 Environmental Assessment because the environmental assessment carried out by the borrower failed to adequately consider potential damage to human health and the marine environment.\(^\text{54}\)

According to the Panel, after its visit to Colombia the request did assert in substance that a serious violation by the Bank of its operational policies and procedures had or was likely to have material adverse effect upon the requesters. The Panel’s visit to Colombia and interviews with national, local and project officials confirmed that there were sharply differing views on alternatives for treating and disposing waste, the risks, and the costs involved. However, all parties involved concurred that the provision of water and sanitation services for the poor neighborhoods of Cartagena were an essential undertaking for the city and its citizens. As the request and Management response contained conflicting assertions and interpretations about the issues, the facts and compliance with Bank policies and procedures in the light of the foregoing, it was recommended that an investigation be conducted.

5. Cambodia: Forest Concession Management and Control Pilot Project

On 28 January 2005, the Inspection Panel received a request for inspection, related to the Cambodia: Forest Concession Management and Control Pilot Project (FCMCPP).\(^\text{55}\) The NGO Forum on Cambodia submitted the request on its own behalf and on behalf of affected local communities living in the area. The requesters claimed that the Bank had violated a number of its operational policies. According to them the

\(^{54}\) Under OP 4.01 (Environmental Assessment) the Bank requires an environmental assessment by the borrower of proposed projects which are likely to result in adverse environmental impact. For these purposes, the Bank classifies each project into one of four categories, depending on type, location, sensitivity, scale, and nature and magnitude of its potential environmental impact. Also mentioned in the request were OD 4.04 (Natural Habitats); OD 4.07 (Water Resources Management); OD 4.15 (Poverty Reduction); OD 4.20 (Indigenous People); OP/BP 10.02 (Financial Management); OP/BP 10.04 (Economic Evaluation of Investment Operations) and OD 13.05 and OP/BP 13.05 (Project Supervision).

\(^{55}\) Cambodia: Forest Concession Management and Control Pilot Project, Credit No. 3365-KH.
Bank did not comply with its policy on Environmental Assessments because it classified the project as a Category B project, rather than Category A. In their view, the project should have been categorized as A because the concession system caused significant adverse environmental impacts, such as immediate degradation and damage to watershed. Management noted that the decision to classify this project as Category B was correct and appropriate, because a forestry project is typically classified as A when it involves plantation activities or forestry production. Management challenged one of the main allegations in the request – that the Bank had promoted the interest of the logging concessions and the concessionaires – and declared that on the contrary, the project tried to assist the government of Cambodia to regulate the forestry sector in a more effective and equitable way. It was explained that the Cambodian forest concession system was established in 1994 without Bank assistance. However, as it became clear in Cambodia and in the international community that the country needed a transparent and accountable system to control and manage the concession system, the Bank decided to assist the government in this effort. Project funding helped to build capacities within the government for forest crime monitoring and reporting in general and to control illegal logging. Therefore this project was categorized as B because of its interventions, such as strengthening the capacity of Cambodia and for assisting with forest crime monitoring and reporting.

The request also claimed that Cambodia’s indigenous people, notably the Kouy minority were directly affected by the logging concessions. The requesters stated that these people live in the forests in the north and northeastern part of the country – the heart of Cambodia’s logging concession system. Their livelihood and culture were intrinsically linked to the forests. In the requester’s opinion, the Bank seemed not to have identified issues related to indigenous peoples and no indigenous people’s plan had ever been formulated. Acknowledging that the Bank was not in full compliance with OD 4.20, Management responded that the policy was deemed applicable during preparation though no efforts were made to develop policies and plans in ac-

56 The Inspection Panel Report and Recommendation, Cambodia: Forest Concession Management and Control Pilot Project, 5 et seq.
57 Management Response, Annex 1, Item 1, 25 et seq.
58 The Inspection Panel Report and Recommendation, Cambodia: Forest Concession Management and Control Pilot Project, 11 et seq.
59 Ibid., 7 et seq.
cordance with OD 4.20. It added that the project approach was to develop, together with and as part of the general consultation process, criteria and guidelines for community engagement in concession areas with local people and admitted that “in hindsight, screening studies and a framework Indigenous Peoples Development Plan, along with more discussion of the issue, would have been more appropriate during project design.” Management also claimed that “the importance of this issue has been later recognized in Aide Memòries in 2003 and 2004, which recommended to revise comprehensive guidelines for community consultations” to include specific provisions for indigenous peoples and the protection of cultural and spiritual resources.

The requesters on the other hand claimed that “it is not clear what consultation, if any, took place before the project began.” The response noted that the Bank consulted NGOs in 1998 when it assisted the Government in the design of the forest planning system and drafting of regulations, guidelines and codes. A workshop with NGOs was also organized in 1999 to discuss forest certification. Management acknowledged that the quality of consultations may have been affected by the presence of high level officials, although it maintains that at the time of the project appraisal there was sufficient information about the social and environmental aspects of the concession management system to design a process to address these aspects.

As to the lack of consultation during the preparation of the environmental and social impact assessments, the response emphasized that the Bank did not finance any activities of the concessionaires. However, the response claimed that such consultations had been conducted because of the Bank’s effort to improve the government’s management and control over the concession system. When according to the response the Bank realized that the concessionaires were not carrying out adequate consultations, the Bank recommended the government to hire

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60 Ibid., 15 et seq.
61 Management Response, Annex 1, Item 12, 35 et seq.
62 According to the requesters, the Bank had also violated OPN 11.03. the (Management of Cultural Property). Although the six logging concession areas approved under the project contain both spirit forests and sites of archeological importance that undoubtedly constitute cultural property, no survey of these sites was carried out during project preparation, The Inspection Panel Report and Recommendation, Cambodia: Forest Concession Management and Control Pilot Project, 8 et seq.
63 Ibid., 5 et seq.
an international consultant to prepare a “step by step manual” for community consultations. Furthermore, Management added that the Bank had monitored the consultation process and pointed out its weaknesses to the government. Management stated that consultations with affected communities in each concession area were the responsibility of the concessionaires when they prepared their compartment and annual plans. Management also believed it was in compliance with OP 4.04 (Natural Habitats) because no degradation of critical habitats has occurred due to the project. It added that no concessions over new areas had been approved because the project and the planning guidelines for existing concessions prevented the issuance of cutting permits before completing the forest management planning process, which required the preparation of several plans.

The response claimed that no cutting permits had been issued to date. With respect to biodiversity issues, the response stated that the Bank had always identified biodiversity concerns. Under the project, the government had adopted guidelines for the management of the forest. Management also claimed that the project developed guidelines to identify and designate Special Management Areas, which include sacred groves, spirit forests and archeological sites. However, because of inadequate consultations, archeological sites may not yet have been identified. According to the Management, as a step-by-step consultation a manual is under preparation. Cultural resources, to the extent that these are known to local communities, will be considered so that areas of cultural resources will be excluded from commercial logging operations. In response to the allegation of non-compliance with the Bank policy on forestry, Management reiterated that the project did not finance logging operations, including in areas of high ecological value, nor had the concessionaires received any Bank funds. The response again emphasized that the project had supported activities permitted by OP 4.36 (Forestry), such as inventory and fields control, capacity building and system development.

Management response alleged that “neither the four local communities who submitted the letter nor their representative had previously communicated with the Bank on the specific claims asserted in the letter.

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64 Management Response, Annex 1, Item 12, 32 et seq.
65 Ibid., Item 19, 38 et seq.
66 Ibid., Item 21, 40 et seq.
67 Ibid., Item 14, 36 et seq.
ter." However, according to the Panel's finding, the request provided a list of letters and meetings between the NGO Forum on Cambodia and the Bank, and minutes of meetings between the two. According to the Panel, the Bank had been aware from the outset of concerns from civil society about the project's adverse effects on villages in concession areas, and that for the last four years numerous complaints about the project, including from people represented in the request for inspection, had been brought to the Bank's attention.

The Panel noted the importance of undertaking risky projects for economic development and acknowledged that the Bank had been willing to provide financing in difficult situations. The Panel welcomed Management's willingness to take risks in supporting activities in a complex and controversial area like the forestry sector in Cambodia. In the present request, however, the Panel noted in the allegations that the credit had led to support a system of private logging concessions, which was perceived by many as causing serious harm. The Panel was also not satisfied that a number of remedial actions contained in Management's response, "would ensure compliance with, inter alia, the applicable environmental and indigenous peoples policies."

IV. Reasons for Existing Problems and Possible Solutions

In 1993 the World Bank established the Inspection Panel in response to a growing public debate over the social and environmental effects of Bank lending. The Panel's activity should lead not only to environmental and human rights protection during preparation, appraisal and implementation of the projects financed by the Bank, but also to transparency in Bank operations in general. Recognizing sustainable development principles, the Bank must fulfill the related obligations. The Inspection Panel helps to discover problems, involving the failure by the Bank to follow its own policies and procedures.

Nevertheless the above examples demonstrate that despite the existence of the Inspection Panel, the World Bank still does not always follow its policies and procedures. For example, in the case of Pakistan.

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68 Ibid., 4.
69 The Inspection Panel Report and Recommendation, Cambodia: Forest Concession Management and Control Pilot Project, 19 et seq.
70 Ibid., 20 et seq.
After the claim and the Panel’s findings, Management confirmed that classification of category A would have been more appropriate for the project, instead of B. This mistake is a serious one, because an environmental assessment depends on the category of the project. Mistakes can be found also, for example, in the case of India: Coal Sector Environmental and Social Mitigation Project, when the Panel saw deficiencies in the appraisal process. Moreover, staff were unable to provide the Panel with evidence that the eventual configuration and rehabilitation of mined areas were being planned. In the case of Cambodia an indigenous people’s plan was not foreseen at all.

Further, Management’s responses sometimes include inaccurate information. For example, in the case of Cambodia, the Management response alleged that neither the four local communities which submitted the letter nor their representative had previously communicated with the Bank on the specific claims asserted in the letter. However, the Panel was able to confirm that the Bank had been aware from the outset of public concerns about the project’s adverse effects on villages in concession areas. Other mistakes of this kind can be found, for example, in the case of India: Coal Sector Environmental and Social Mitigation Project. There, according to the Management response, CCL received no requests for assistance, but according to the Panel’s findings, there were 117 parties who opted for such assistance, and 115 who qualified.

All these findings raise questions about the ability of the Management to apply the respective rules at all. One reason may be seen in the fact that in the Bank’s view its policies and procedures are flexible guidelines applicable with a certain margin of appreciation, while the Panel’s findings prove that these norms require uniform application, especially where environmental protection is concerned. Despite the need for a certain flexibility to accommodate particular circumstances, the application of environmental standards should not be discretionary, and standards, which are contained in binding documents should be treated as such by Bank staff. The Bank must clarify its policies and procedures, especially in the environmental protection field, where they should not be flexible. These policies and procedures must be clear to be understood and implemented.

Further, under the Resolution, the Panel is supposed to determine whether or not Management has been in compliance with all relevant Bank’s policies and procedures and has to make recommendations

71 Ibid., 19 et seq.
72 Galtieri, see note 4, 245.
whether to proceed with the investigation of a request. But it is not supposed to provide recommendations on the subject itself. This is one major obstacle. Analyzing this or that case for a long time, in much detail, the Panel could easily give very useful recommendations relating to the case at hand. As a consequence problematic issues that have been discussed have only short-term benefits as a result of the added attention brought by filing a Panel claim but this attention does not necessarily translate into long-term sustainable benefits.\footnote{A. Umana, \textit{The World Bank Inspection Panel: The First Four Years (1994-1998)}, 1998; I. Tjardes, \textit{Das Inspection Panel der Weltbank}, 2003, 178 et seq.} Too often the Panel’s recommendations and the subsequent Board decision provide only for a brief period of change. The main reason for this problem is the Panel’s mandate, according to which the Panel’s remedies are limited.

In connection with the mandate the following must also be noted. The Panel’s mandate should be broadened. It should also include a post-investigation control. In this respect it is necessary to underline a possible problem relating to the Management’s \textit{ad-boc} remedial plans. In presenting its remedial action plans to the Panel and the Board just prior to the meetings, or at the same meeting at which the Board addresses the Panel’s recommendations for investigation, Management has made it impossible for the Panel and the Board to determine whether the plans do, in fact, address the concerns of the requesters and the findings of the Panel. Besides, given the speed with which these plans are developed, effective consultation seems almost to be precluded. If Management chooses to present a remedial action plan, the Inspection Panel’s role must be to assess the consistency of plans with Bank policies, including participation by affected people and adequate consultation and to evaluate Management’s supervision of remedial action plans.\footnote{Umana, see note 3, 133.} \footnote{Bissell also mentioned that last-minute introduction of “action plans” interferes with the Panel’s work, Bissell, see note 4, 125.}

Finally the Panel should also have a “preventive” function allowing it to analyze projects that are likely to develop problems during implementation.\footnote{A. Boyle, “Remedying Harm to International Common Spaces and Resources: Compensation and Other Approaches”, in: P. Wetterstein (ed.),} That environmental harm should be prevented rather than
repaired or compensated *ex post* indeed represents a mantra of environmental law, because such harm is often irreversible and difficult to assess in terms of monetary compensation. In such cases the President of the Bank could send projects that are experiencing difficulties or posing particular risks to the Inspection Panel for its further investigation.\(^77\)

Finally a request can at present be brought only by a person affected by the Bank financing project and not by external non-governmental organizations acting on their own behalf. However, there is no doubt today about the existence of public interests which must be protected when environmental protection or the common heritage of mankind are concerned. This is especially true in cases where there is no specific party particularly affected by the project, but rather the project’s implementation will lead to general environmental harm. Non-governmental organizations, whether national or international, must have the right to protect public interests, especially in the framework of international organizations.

If the Panel’s mandate was broadened in this respect the Panel could work much more effectively.

The proposal that effective compliance with the Bank’s policies and procedures requires an additional problem-solving unit within the Bank is no solution. It is suggested that this unit would be responsible for remedying the social and environmental policy violations identified by the Panel and would help to ensure that displaced and aggrieved communities were adequately compensated and assisted to improve their standard of living.\(^78\) However, a new additional unit would only cause new problems. The Panel would have to communicate not only with Management but also with this unit. Instead, it would be more effective to broaden the Panel’s mandate and to give it the powers necessary to carry out these functions itself.

Still the successful solution of all these issues depends on the World Bank’s willingness. If the Panel’s mandate is not altered, the work of the Inspection Panel will continue to be highly controversial and divisive.

\(^77\) Umana, see note 3, 137.

The Internationalized *Pouvoir Constituant* – Constitution-Making Under External Influence in Iraq, Sudan and East Timor

*Philipp Dann/ Zaid Al-Ali*

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* The views expressed by the author are entirely his own.

2. External Influence and Constitutional Legitimacy
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IV. Conclusion

Constitution-making, traditionally the hallmark of sovereignty and the ultimate expression of national self-determination, is increasingly becoming an object of international law. Be it Bosnia-Herzegovina, Afghanistan or most recently Iraq, several instances spring to mind in which international actors were not only instrumental in bringing about a new constitution from a factual point of view but in which international law played an important role in governing the process of constitution-making. Foreign influence on constitution-making processes is hardly a novel phenomenon. However, the extent to which the international community has become involved and the increasingly legalized forms of its involvement add a new dimension to the traditional concept of constitution-making.

A number of scholars have begun to highlight different aspects of this development. They have analyzed the legal structures of international administrations, which create the framework for constitution-making in post-conflict situations;\(^1\) they have examined the political and sociological conditions of constitution-making as a tool of post-conflict reconstruction;\(^2\) they have considered substantial standards for constitution-making;\(^3\) and, last but not least, they have debated the legitimacy of such foreign influence on the political self-determination of a people.\(^4\)

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This article builds on these contributions but tries to add a more comparative and conceptual perspective focusing on the processes of constitution-making. It connects the debate on international involvement with established constitutional theory and traditional concepts of constitution-making. Drawing on such theoretical material and comparing a variety of cases, the aim here is to develop a more systematic understanding of how external influence impacts constitution-making and to consider whether the concept of what might be called an internationalized *pouvoir constituant* is evolving.\(^5\)

In order to achieve this goal, it will first be necessary to set out the traditional notion of constitution-making and distinguish between different types of international influence based on the degree of such influence. Particular emphasis will be given to those cases which can be understood as instances of an internationalized *pouvoir constituant* (I.). Within this conceptual framework, we will engage in a detailed study of the constitution-making processes that took place in East Timor, Iraq and Sudan. These cases exemplify different types of international influence and illustrate the ways in which such influence impacts the constitution-making processes (II.). Based on the case studies, it will be possible to explore in more general terms whether there exists a legal regime that governs the external influence on constitution-making and to what extent such influence is itself legitimate and impacts the legitimacy of a particular constitution (III.).

I. Framing External Influence: Concepts and Categories

1. The Traditional Concept of Constitution-Making

Two traditions and concepts of constitution-making are regularly distinguished.\(^6\) According to the first ‘revolutionary’ tradition, constitution-making stands for the foundation of an entirely new order. Making a new constitution eradicates the old political system and establishes the

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\(^5\) On the notion of the *pouvoir constituant*, see under Part I.1.

rules and institutions of a new one.\textsuperscript{7} The second tradition presents a more evolutionary concept of constitution-making, which is understood as being the incremental juridification of politics and as the ongoing process of limiting the powers of the existing and persisting government.\textsuperscript{8} For the purpose of this article, the first tradition is of more relevance. International influence on constitution-making normally occurs at clear turning points of constitutional history in the respective countries, be it at the end of foreign rule, dictatorship or civil strife. It is therefore worth taking a closer look at the ‘revolutionary’ tradition and its key elements.

As already pointed out, constitution-making in the ‘revolutionary’ concept implies a moment of political rupture that erases the old and creates the new. Central to this concept is the subject of this act, the \textit{pouvoir constituant}. It is the nation, which is to say the people as a political body. Only the nation is understood to have the force to create a new order.\textsuperscript{9} This tradition of constitution-making and the concept of the \textit{pouvoir constituant} is thus an inherently democratic concept. It encapsulates the most fundamental act of self-determination of a people. Its final vanishing point is the individual, the citizen of the country.

Constitution-making within this concept can take place according to different procedures.\textsuperscript{10} Firstly, a constitutional convention, which drafts a text that is then ratified by the people, can be established. A constitutional assembly, which is vested with the task of writing and adopting a new constitution is another option. A new constitution can also be approved through a referendum on a constitutional text that has been conceived in any number of ways. The political elite of the constitution-making society typically plays a vital role in each of these scenarios, but always as an agent and representative of the entire nation. Its powers are ultimately rooted in the people and hence in the individual.

\textsuperscript{7} This tradition is based on the examples of French and U.S. American history.
\textsuperscript{8} British and German history provides examples for this second tradition and concept.
Two more elements are crucial for this concept of constitution-making. First the result: constitution-making creates a text, a single written document, the Constitution. While constitutional change in the evolutionary concept can occur in various documents or even in the unwritten form of new practices, in the revolutionary concept it comes as a unified document. Secondly, this document enjoys supreme normativity. Inherent in this concept is the constitution’s rank as supreme law of the land, thus able to establish new and overriding standards for the legal order. This aspect also reflects the somewhat paradoxical nature of the revolutionary concept of constitution-making. It is an act of politics, ultimately unrestricted by the old legal order, but it creates a new normative order, binding new actors.

One aspect, however, is obviously absent from this concept, namely the participation of external actors in the constitution-making processes. In fact, since the exclusive subject of constitution-making is the nation, any external influence can be regarded as a dilution or attenuation of the democratic nature of the process. The very notion of the pouvoir constituant in this traditional perspective is thus tantamount to a national endeavor and a nation taking its political fate into its own hands and exercising its most fundamental and sovereign right.

The observation that external actors and international law have become increasingly involved in the constitution-making of sovereign nations is therefore a somewhat unsettling thought. Nevertheless, one has to acknowledge that external influences have often (if not always) played a role in constitution-making processes in the past. The difference today, however, is the intensification and, even more importantly, the legalization of these influences. These have to be placed in a two-fold context.

Firstly, for the most part, external influence takes place in the context of a post-conflict settlement. The concerned nation is considered not to be capable of overcoming its predicament alone. External influ-

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13 Böckenförde, see note 9, 99.
ence is therefore not intended as a way to simply interfere in a national constitutional process but rather as a tool through which international support is provided and as a type of contribution to the restoration of peace, security and the self-determination of peoples. It is, in fact, typically intended to restore the sovereignty of the people at hand.\textsuperscript{15}

The other context is less situational and more fundamental. It has been described as the internationalization of constitutional law.\textsuperscript{16} It refers to the fact that international law is increasingly setting standards for and shaping domestic constitutional law, most prominently in the area of human rights, but to a growing degree also with respect to the domestic systems of government.\textsuperscript{17} External influence on a constitution-making process and its legal framework can be seen as a procedural extension of this development.

2. Categories of External Influence

The different instances of external influence on constitution-making processes can be classified according to different criteria. One such criterion is the degree of external influence, another criterion is the actors and legal form in which such influence occurs. The application of these criteria leads to different yet complementary categories of external influence.

The first criterion, the degree, refers to the extent to which external actors influence the procedure and the substance of the constitution-making process. Three categories can be distinguished, namely total, partial and marginal degrees of influence. The recent constitutional his-

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\textsuperscript{15} Wolfrum, see note 1, 675-678.
\textsuperscript{16} B.O. Bryde, “Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts”, \textit{Der Staat} 2003, 61 et seq.
The Internationalized Pouvoir Constituant of Bosnia-Herzegovina provides an example of total influence. In that case, the constitution was neither drafted nor adopted by national actors, but was the result of international peace negotiations which were conducted between the presidents of the warring parties (Bosnia-Herzegovina, Croatia and Yugoslavia) and did not even take place in Bosnia-Herzegovina. The constitution itself is actually Annex IV to the peace agreement which came into force not through a popular referendum but by the signing of the peace deal by the same warring parties. In effect, the concept of pouvoir constituant was completely absent in the Bosnian case, since the nation as such was basically excluded from the constitution-making process.

On the other side of the spectrum, one can discern those situations in which constitutional processes were affected only by marginal influence. Here, the external influence consists only of advice from external experts, which is sought voluntarily by the domestic actors while control over process and substance of the constitution remains clearly in the hands of the nation at hand. South-Africa or the multiple processes of constitution-making in Eastern Europe in the early 1990s are recent examples in which such marginal influence was exercised. One could add to this group any form of constitutional inspiration or borrowing, in the sense that the drafters of constitutions draw regularly, necessarily and more or less extensively on the examples of constitutional experiences in other countries. But with respect to the concept

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20 J. Elster, “Constitution-Making in Eastern Europe”, Public Administration 71 (1993), 169 et seq. (192-193). This is not to say that such influences are not organized and that constitutional assemblies are not lobbied by external actors (like the Venice Group). However, it is decisive that the ultimate control over process and substance remains in national hands.
21 For the example of India, G. Austin, The Indian Constitution, 1966, 321-323; in a more general perspective Schauer, see note 14; L. Epstein/ J. Knight, “Constitutional borrowing and nonborrowing”, International Journal of Constitutional Law 1 (2003), 196 et seq. and the other contribution in that volume.
of constitution-making, the national *pouvoir constituant* in these cases is not restrained. It would thus make no sense to classify these as cases of an internationalized *pouvoir constituant*.

The third category of external influence is clearly more complex. These cases of *partial influence* fall in between the two categories just described. Here, international influence is stronger than the voluntarily requested but limited consultation of foreign experts, but it is weaker than the international take-over of the entire constitution-making. Instead, the constitutional process is to a certain degree directed by external forces in a procedural and/or a substantial way, while the ultimate power of drafting and adopting remains in domestic hands. Instances of such partial influence are plenty and encompass several of the more recent cases. More importantly for our purposes here is that, in these cases, the *pouvoir constituant* is neither entirely surrendered nor is it kept entirely intact. Instead, control over the constitutional process is shared. A better understanding of the way in which this phenomenon plays itself out in practice may be achieved by analyzing the actors and legal forms of such external influence in a select number of cases.

II. Describing External Influence: Three Case Studies

External influence on constitution-making processes is most often exerted to a partial degree, producing a blend of national and international control over the process itself. The purpose of this section is to explore the different forms that partial influence can take, which will then allow us to derive whatever normative lessons exist from these recent experiences: (1) The first example that we set out here is the East Timorese process, where external influence was exercised by an international, UN-led administration. (2) Second, in Iraq, the constitutional process was at first administered by a foreign occupation and was then influenced by individual external actors. (3) Finally, in Sudan, the process took the form of peace negotiations that were mediated by a regional organization and a group of states. Each of these cases differs from the rest, and can be regarded as exemplifying a specific type of influence. Such a typology and the study of all three cases will hopefully allow for a better understanding of the current state of the law in this area.
1. Constitution-Making Under International Administration
   – East Timor

a. Factual Context

East Timor provides the most transparent example of how international actors and their regulations can instigate and govern the constitution-making process in a foreign country. When East Timor’s quest for independence gained new momentum in the late 1990s, the UN played a major role in encouraging a peaceful transformation from Indonesian occupation to independence. First, it helped to organize a referendum on independence on 30 August 1999, which resulted in overwhelming support amongst the East Timorese people for independence. To quell the ensuing violence and political vacuum after the referendum, East Timor was put under international administration. Security Council Resolution 1272 of 25 October 1999 created the United Nations Transitional Administration in East Timor (UNTAET), which was “endowed with the overall responsibility for the administration of East Timor.” It was given comprehensive legislative as well as executive powers and entirely substituted the previous Indonesian authorities.

UNTAET’s tasks were the establishment of peace and security, the delivery of humanitarian aid, reconstruction and, last but not least, the creation of local and democratic institutions. UNTAET was headed by a Special Representative of the UN Secretary-General who served as Transitional Administrator of the UN. The legal framework for the administration of UNTAET was determined by its Regulation 1999/1, which was issued on 27 November 1999.

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22 For a concise analysis of the historical background as well as the international intervention see M. Benzing, “Midwifing a New State: The United Nations in East Timor”, Max Planck UNYB 9, see note 1, 295 et seq. (302-305).
b. Legal Framework for the Constitution-Making

Constitution-making was not expressly part of the UNTAET mandate, but it was soon recognized that a successful transition to an independent East Timor would require a new constitutional basis. After considerable discussion about the most legitimate and accepted procedure, in March 2001 UNTAET issued Regulation 2001/2, which established the legal framework for the constitution-making process and thus is the fundamental text in relation to the constitutional process that took place in East Timor. The Regulation is remarkable in that it is as detailed in procedural terms as it is restrained in substantial terms. This was intended. Considering the limited democratic legitimacy of UNTAET itself, most observers agreed that international influence should be as limited as possible and that it should be limited to organizing the process only.

Regulation 2001/2 establishes a clear procedural framework. Section 3 of the Regulation provides that the Constitutional Assembly should be composed of 88 members, 75 of whom were to be elected in a nationwide election, and the remaining 13 were to be elected in regional constituencies. This structure was designed to prevent the country’s largest political group, the Frente Revolucionária do Timor-Leste Independente (Fretilin), from dominating the new Assembly in a way that would stifle effective deliberation. Section 2.2 of the Regulation also determined that the Assembly could only adopt a Constitution by an affirmative vote of at least 60 of the 88 members of the Assembly, hence applying the conventional rule of a two thirds majority for constitutional amendments. In relation to the timeframe within which the drafting process was actually to take place, Section 2.3 of Regulation 2001/2 states that the Constitutional Assembly had 90 days to adopt a final text.

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26 On the constitutional process Benzing, see note 22, 363-365; Morrow/White, see note 23, 33-43.
28 UNTAET/REG/2001/2 was complemented by UNTAET/REG/2001/11 of 13 July 2001, which defined the rules of electoral offences and thus aimed to ensure the free, fair, safe and secret ballot.
29 Morrow/White, see note 23, 36-39.
30 See also Section 5 and the detailed regulations for the elections.
31 Chesterman, see note 1, 216.
Regulation 2001/2 is much less explicit in terms of the actual substantive content of the constitution. Section 2.1 provided that the mandate for the Constituent Assembly was merely to “prepare a Constitution for an independent and democratic East Timor”. Otherwise, Section 1.1 of the Regulation provides that convening the Assembly should contribute to the goal of “protect[ing] the inalienable human rights of the people of East Timor including freedom of conscience, freedom of expression, freedom of association and freedom from all forms of discrimination.” But this is less an explicit mandate and more a general description of the purpose of the Assembly. Any further specifications as to the structure of government or other aspects of the constitutional system were avoided.

UNTAET also wanted to make sure that the Timorese people and civil society would have a direct voice in the constitutional deliberations. The Special Representative therefore issued a Directive requiring the authorities to consult the East Timorese people in relation to the contents of the constitution. Constitutional commissions were established through which the population could formulate their interests and opinions. This Directive is complemented by Section 2.4 of the Regulation, which sets out that the Constitutional Assembly should give due consideration to popular consultations.\(^\text{32}\)

c. Actual Process of Constitution-Making

While the legal framework for the constitution-making process was provided for by international actors and their law, the actual proceedings, e.g. the drafting and debate in the Constitutional Assembly, were in the hands of Timorese.\(^\text{33}\) There seems to have been hardly any direct international influence on the Constitutional Assembly’s proceedings. Whatever external influence was exerted appears to have been made through the provision of expert advice and through a consultative mechanism, which had been intended to allow members of the East Timorese public to voice their standpoints to the Constitutional Assembly. Even the procedural safeguards that UNTACT established were less rigid than what was originally envisioned. For example, the tight time limit of 90 days was extended by three months in order to allow

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\(^{33}\) Benzing, see note 22, 365; Morrow/ White, see note 23, 40-42; Chesterman, see note 1, 140-142.
the Assembly to complete its work.\textsuperscript{34} Also, a letter by the Special Representative of the Secretary-General to the heads of the political parties in the Assembly voiced some procedural, as well as, substantial problems with the draft, but the remarks were variously accepted and ignored.\textsuperscript{35}

The main difficulty that the drafting process faced seems to have been less the interference of international actors than a rather authoritarian tendency within the Timorese leadership. The \textit{Fretlin}, which was by far the largest group in the Constitutional Assembly, was successful in pushing through its own constitutional proposals. The constitutional commissions, which were set up to ensure bottom-up input for the constitutional deliberations, seem to have had a very limited impact on the final outcome.\textsuperscript{36}

In sum, we can observe a clear distinction between the instigation and regulation of the constitutional process on the one side, and the actual process on the other side. The international administration set the legal framework for the process, but determined little with respect to the substance. Within this framework, the actual constitution-making and its adoption remained in Timorese hands. There was almost no meddling of UNTAET or other foreign actors in the actual process. The internationalized part of the pouvoir constituant is thus the instigation and framework-setting of the constitutional process.

2. Constitution-Making Under Foreign Occupation – Iraq

a. Factual Context

As is well known, Iraq’s constitutional process would most probably not have taken place were it not for the military invasion and the subsequent foreign occupation of the country. This is the main characteristic that distinguishes the Iraqi constitutional process from the other case studies set out in this article.

Another result of the invasion was the subsequent lack of consensus that existed amongst Iraq’s population and political elites throughout

\begin{itemize}
  \item \textsuperscript{34} Morrow/ White, see note 23, 37/38, Footnote 155.
  \item \textsuperscript{35} Morrow/ White, see note 23, 41.
  \item \textsuperscript{36} See H. Charlesworth, “The Constitution of East Timor”, \textit{International Journal of Constitutional Law} 1 (2003), 325 et seq. (327/328); also Chesterman, see note 1, 141/142.
\end{itemize}
the constitutional process. Indeed, although a majority of the Iraqi elites who came to power after 2003 were clearly in favor of the war and its outcome, a large number of the country’s political leaders decided to boycott the political process altogether, including the drafting of the new constitution.37

Generally speaking, the Iraqi constitutional process took place in two stages. The first phase began during the period immediately following the initial invasion of the country in March 2003 by the United States and the United Kingdom (the “Coalition”) and ended with the election of a Transitional National Assembly (TNA) in January 2005. During that time, the framework for the drafting of the permanent constitution was established mostly by the occupation authorities, but also in collaboration with a number of appointed Iraqi actors. The second phase, during which the constitution was actually drafted, began after the elections on 30 January 2005, and ended with the referendum that took place on 15 October 2005.

b. Legal Context

The question of which legal regime governed the Iraqi constitution-making process is complicated by the fact that the country was under a state of occupation when the process began, but that it officially regained its sovereign status before the drafters actually sat down to start writing the constitution itself. The effect is that the drafting process was actually governed by two separate and successive legal regimes.38

On 22 May 2003, the United Nations Security Council passed Resolution 1483 which explicitly recognized the United States and the United Kingdom as “occupying powers”.39 The Coalition was called upon “to promote the welfare of the Iraqi people through the effective administration of the territory”, while creating the conditions for Iraqis to “freely determine their own political future”. The effect of this Resolution was therefore twofold. Firstly, it indisputably established that the United States and the United Kingdom were occupants and that therefore the international law of belligerent occupation was applicable in

38 See generally, R. Wolfrum, “Iraq: From Belligerent Occupation to Iraqi Exercise of Sovereignty”, Max Planck UNYB, see note 1, 1 et seq.
the circumstances. Secondly, the Resolution complemented the general law of occupation by imposing a number of positive obligations on the occupying powers.

The Coalition responded by establishing the Coalition Provisional Authority (CPA), which was given the task of administering Iraq during the official period of occupation from 2003 to 2004 and which was responsible for setting Iraq on the path to drafting a new constitution.\(^40\) The CPA's initial plan was to appoint a national conference that would be responsible for drafting the constitution, rather than holding democratic elections.\(^41\) However, under pressure from Iraq's most senior religious authority\(^42\) and the United Nations,\(^43\) it accepted that direct elections would in fact be held, and that a transitional law should be written in order to establish the framework within which the country's permanent constitution would be drafted. This document, which was eventually entitled the Law of Administration for the State of Iraq for the Transitional Period (TAL), was drafted between January and April 2004, which is to say, while Iraq was under occupation.\(^44\)

The TAL was officially drafted by the Iraqi Governing Council (IGC), which was an appointed body that was established by the CPA.\(^45\) At the same time though, U.S. officials were involved in the drafting process through the CPA, and made use of this position firstly in order to ensure that the document was completed within a short period of time given, and secondly to call for the inclusion of particular provisions in the final document. This is reflected for example by the fact that the TAL's bill of rights articulates rights as if they are absolute, thereby mimicking the U.S. Bill of Rights.


\(^41\) L. Diamond, Squandered Victory, 2005, 41.

\(^42\) Feldman, see note 4, 857, footnote 2.


The TAL covers a wide-ranging number of issues, including the basic rights of Iraqi citizens, as well as the provisional structure of the government. Most importantly for the purposes of this article, the TAL sets out the mechanism according to which the country’s permanent constitution was to be drafted. These rules provide in relevant part that:

- the first phase of the transitional period “shall begin with the formation of a fully sovereign Iraqi Interim Government that takes power on 30 June 2004” (article 2(b)(1));
- the second phase of the transitional period “shall begin after the formation of the Iraqi Transitional Government, which will take place after elections for the National Assembly have been held as stipulated in this Law, provided that, if possible, these elections are not delayed beyond 31 December 2004, and, in any event, beyond 31 January 2005” (article 2(b)(2));
- in the context of this second phase, “[t]he National Assembly shall write the draft of the permanent constitution by no later than 15 August 2005” (article 61(a)). Note that this gave the Iraqis exactly six months to draft the entire text;
- “The draft permanent constitution shall be presented to the Iraqi people for approval in a general referendum to be held no later than 15 October 2005” (article 61(b));
- “The general referendum will be successful and the draft constitution ratified if a majority of the voters in Iraq approve and if two-thirds of the voters in three or more governorates do not reject it” (article 61(c)).

Most of the rules and provisions set out in the TAL were reached through common accord between all the parties that were involved in the process – most of whom, it should be recalled, were appointed by the CPA. However, some of the provisions – notably article 61(c), which was considered by some political leaders to be anti-democratic – caused a serious breakdown in consensus that was in fact never resolved.47

By virtue of Security Council Resolution 1546 that was adopted on 8 June 2004,48 the international community endorsed the framework established by the TAL, although, ambiguously, the text is not actually

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46 Law of Administration for the State of Iraq for the Transitional Period, see note 44.
47 Diamond, see note 41, 177.
mentioned in the Resolution. Also, Resolution 1546 provided that the United Nations Assistance Mission for Iraq (UNAMI) should “promote national dialogue and consensus-building on the drafting of a national constitution by the people of Iraq”.

The state of occupation officially came to an end and sovereignty was transferred to an appointed Iraqi government on 28 June 2004. Thus, when the actual drafting process began, the international law of occupation no longer applied. The only applicable rules were therefore those contained in Resolution 1546 and those contained in the TAL.

c. Actual Process of Constitution-Making

The actual process of constitution-writing in Iraq took place in three distinct stages: to begin with, the first three months after the elections of the National Assembly on 30 January 2005 were spent by selecting the makeup of the body that was eventually appointed to draft the constitution; secondly, the actual drafting process itself lasted for three months, and ended on 15 August 2005 in accordance with the provisions of the TAL; and thirdly, after the drafting process officially and legally came to an end, protracted and ad hoc negotiations took place between a group of the country’s most senior politicians (the Leadership Council), in the presence of U.S. officials, and continued until two days before the referendum. Different actors and different ideas were aired at various points during the drafting process.

aa. Which Actors?

After the Transitional National Assembly (TNA) was elected in January 2005, it was decided that a committee (the Constitutional Committee) made up of members of parliament who would be answerable to the TNA should be constituted. The Committee was at first made up of 55 members, who were allocated proportionally to the various political parties that were represented in parliament.

However, as a result of the fact that the Sunni community had by and large boycotted the elections, they were under-represented in both

the TNA, and the Constitutional Committee.\footnote{Shia majority for Iraq parliament', BBC News, available at: <http://news.bbc.co.uk/2/hi/middle_east/4273931.stm>.} This, coupled with the fact that the ongoing insurgency in Iraq was largely attributed to disaffection in the Sunni community, made it important for many of the parties involved in Iraq’s political transition to reach out to the Sunnis. It was eventually agreed that 15 Sunni Arabs would join the two Sunni members already sitting on the Committee and that an additional 10 Sunni Arabs would also join the deliberations, but only in an advisory capacity.\footnote{‘Parliament, Sunnis reach deal on Iraq’s constitutional process’, USA Today, available at: <http://news.yahoo.com/s/ap/20050616/ap_on_re_mi_ea/iraq_constitution_2__;_ylt=AktZKe7Z3PTp6b5RQW7Cd3cJX6GMA__;_ylu=X3oDMTBbMW04NW9mBHNiYwMlJVRPUCUb>.} These 25 individuals were finally elected and approved by all the relevant governmental institutions on 5 July 2005.\footnote{“The constitutional committee starts with the Sunni members ‘from zero’ – Attacks are driving away diplomats from Iraq”, Al-Safir, 6 July 2005.} Significantly however, because of a number of delays, and another short-lived boycott, the Sunni community was actually only engaged in the drafting process for little more than three weeks. One can conclude however that the Constitutional Committee did manage to evolve into a relatively representative body.

As soon as control over the draft passed to the Leadership Council in mid-August 2005, all attempts at reaching a nation-wide consensus were abandoned with a view to ensuring that the drafting process was completed on time. The Leadership Council’s membership, procedures and responsibilities were for the most part left undefined as a result of which U.S. officials were able to play a major role in the negotiations. Indeed, at least one of the Leadership Council’s plenary sessions was actually held at the U.S. Ambassador’s residence. Also, because the Leadership Council’s meetings were by nature informal, the U.S. Ambassador attended negotiation sessions regularly, and other American officials became implicated in the negotiations in order to accelerate a final draft constitution.\footnote{Interview with Khalid Ahmed, Legal Officer, Office of Constitutional Support, United Nations Assistance Mission for Iraq, 18 November 2005 (according to whom there were at least three officials from the U.S. embassy that were directly implicated in drafting particular provisions); ‘Draft constitution gained, but an important opportunity was lost’, see note 37.} The main interest of the U.S. officials that were involved was to ensure that the process was not extended beyond
the referendum date for domestic U.S. political reasons. U.S. officials therefore encouraged the exclusion of the Sunni community at the Leadership Council phase, with a view to facilitating agreement between the other negotiators. Thus, consensus-building was sacrificed in order to satisfy external political concerns.

bb. Which Ideas?

During the Constitutional Committee phase of the process, all foreign and international experts were specifically forbidden from participating in the drafting process. Nevertheless, the Committee was subjected to a number of direct and indirect external influences. For example, experts from the United Nations – through its Office of Constitutional Support – provided commentary to a number of the drafts that were being produced, which sometimes led to certain changes in the constitution’s wording. Also, many of the drafting sessions started on the basis that the TAL – which was heavily influenced by officials from the United States as well as the United Kingdom – was a blueprint for the constitution.

That being said, the Constitutional Committee’s draft was evolving in a way that incorporated principles that were based on Iraqi societal norms, and modern constitutional best practice. So for example, whereas the TAL’s bill of rights was mostly based on the United States model, the Constitutional Committee’s draft contained a well developed section on socio-economic rights, in accordance with Islamic and Arab custom. The Committee’s draft also contains guidelines relating to the permitted grounds of statutory limitation of rights, which was con-

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55 Representatives of the Sunni community complained that they were excluded from the negotiations and that they were not being made aware of the substance of the discussions, which caused them to officially withdraw from the negotiations on 28 August 2005 (see International Crisis Group, “Unmaking Iraq: A Constitutional Process Gone Awry”, Middle East Briefing, Number 19, 26 September 2005, 4, available at: <www.crisisgroup.org>); a number of other Constitutional Committee Members also expressed their bewilderment that the negotiations were proceeding in a secretive and restrictive manner (see International Crisis Group, ibid., 3).

56 See also International Crisis Group, “Iraq: Don’t rush the constitution”, Middle East Report, Number 42, 8 June 2005, 7.
sidered to be in line with international best practice. In addition, the Committee was in favor of establishing a constitutional court for the first time in Iraq and was in the process of negotiating the details of the court’s mission, jurisdiction and composition when control over the draft was passed to the Leadership Council. This idea was subsequently abandoned as there was insufficient time to complete the negotiations.57

The dynamics of this semi-independent drafting process suddenly changed when the Leadership Council took over responsibility of the draft. The U.S. officials that were involved in the negotiations focused on a limited number of substantive issues, which were those that were significant for U.S. domestic politics, especially, amongst others, women’s rights and the role of Islam.58 Another example is that a previous version of article 44, which related to international human rights standards, was removed from the final version of the draft constitution, reportedly at the request of U.S. officials.59

Secondly, the fact that one of the communities was not represented at the Leadership Council phase also had a profound effect on the draft. At the Constitutional Committee stage of the negotiations, a balance was struck between the Kurds (who favored the establishment of a highly decentralized state), the Shi’a (who were relatively indecisive and at times even indifferent), and the Sunni (who favored a strong central state). Once the Sunni were excluded from the process at the Leadership Council phase, the negotiations were obviously tilted towards strong decentralization, and the result was therefore that consensus was not reached between the country’s various communities.60

In conclusion, the United States and other foreign authorities intervened throughout Iraq’s constitution-writing process in a number of

59 The article that was eliminated provided that: “All individuals shall have the right to enjoy all the rights mentioned in the international treaties and agreements concerned with human rights that Iraq has ratified and that do not contradict with the principles and provisions of this constitution”.
different ways, including at least the following: (i) the occupation au-
thorities selected the makeup of the commission that was charged with
drafting Iraq’s transitional law; (ii) they determined the procedural
framework within which the constitution was to be drafted; (iii) they
influenced the manner in which the Iraqi Constitutional Committee
proceeded within that framework; and (iv) officials from the U.S. em-
bassy in Baghdad intervened directly in order to safeguard its interests
in the context of the constitutional negotiations.

3. Constitution-Making through International Moderation
– Sudan

a. Context

The adoption of a new constitution for the Sudan in 2005 marked the
end of a 20-year civil war between the central government in Khartoum
and various rebel movements in the South, most notably the Sudan’s
People Liberation Movement/Army (SPLM/A). A number of reasons
sparked the conflict, chief among them a long history of neglect of the
South by successive governments in Khartoum, the religious divide be-
tween a mainly Islamic north and a mainly Animist and Christian South
and the conflict over oil and water.\(^61\) After Sudan became an Islamic
Republic in 1983 and the Khartoum government introduced an Islamic
Constitution in 1998, it was clear that any settlement of the conflict
would have had to provide for a new constitutional basis of govern-
ment.\(^62\) However, this would necessarily have to be preceded by a peace
agreement between the North and the South.

\(^61\) D. Johnson, *The Root Causes of Sudan’s civil wars*, 2003; International Cri-
sis Group, *God, Oil and Country: Changing the Logic the War in Sudan*,

\(^62\) A. el-Gaili, “Federalism and the Tyranny of Religious Majorities: Chal-
lenges to Islamic Federalism in Sudan”, *Harv. Int’l L. J.* 45 (2004), 503 et
seq. (531); on the background briefly A. Loyd, “The Southern Sudan: A
Compelling Case for Secession”, *Colum. J. Transnat’l L.* 32 (1994), 448 et
seq. and extensively L. Lauro /P. Samuelson, “Toward Pluralism in Sudan”,
National efforts to negotiate a peace and find a constitutional settlement began in the late 1980s, but had little success despite a significant effort on the part of individual regional and international actors to encourage a peace agreement. The negotiations that finally lead to a peace agreement and the ensuing constitution, which were unthinkable without strong external support, began only in 2002. However, in contrast to the cases of East Timor and Iraq, these external involvements were entirely diplomatic and were in no way military. During the entire civil war and during the course of the country’s constitutional reform, Sudan was a sovereign entity, even though the central government had lost actual control over most of the South.

To understand the constitution-making process and to assess the external influence that was exercised, one has to distinguish two phases of the process. The first phase encompasses the negotiations and conclusion of the peace agreement, the so-called Comprehensive Peace Agreement (CPA), signed on 9 January 2005 which ended the civil war. The actual drafting and enactment of a new constitution took place only afterwards, in a second phase mainly between May and July 2005. While this second phase was an almost entirely internal process, the negotiation and conclusion of the CPA was considerably influenced by external factors. And it was the CPA that determined the procedural and substantial framework for the constitution-making process.

b. The Peace Negotiations

The peace negotiations were organized and hosted by a regional, East African organization called the Intergovernmental Authority on Development (IGAD). IGAD was first approached in 1993 by the Sudanese government and the SPLM/A to help resolve the Sudanese conflict, but

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65 It is available at: <http://www.mpil.de/shared/data/pdf/cpa_complete.pdf>

66 The Intergovernmental Authority on Development (IGAD) was established in 1996 and superseded the Intergovernmental Authority on Drought and Development (IGADD), which had been founded in 1986. Members of IGAD are Djibouti, Ethiopia, Kenya, Somalia, Sudan, Uganda and Eritrea. For further information, see under <http://www.igad.org/>.
the negotiations that commenced soon afterwards proved unsuccess-
ful.\footnote{67} Negotiations resumed in 2002, apparently as a result of the excep-
tional pressure that was exerted by the U.S. government.\footnote{68} These peace
negotiations, however, were not governed by any formal mandate, and
were not governed or even ever the subject of a UN Security Council
Resolution or the like. The only document that formed a basis for the
negotiations was the IGAD Declaration of Principles that was signed
by the negotiating parties on 20 July 1994.\footnote{69} This declaration set out
seven substantive principles to guide a negotiated solution to the con-

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lict but did not determine the role of IGAD or any procedural rules.\footnote{70}

When the negotiations first began, the two sides were represented
by a number of different officials, but senior leaders tended not to in-
volve themselves directly. As the talks progressed, however, the two
sides upgraded their respective representation as they realized the im-
portance of safeguarding their interests. Thus, midway through the ne-
gotiations, Khartoum nominated its then Vice President, Ali Osman
Mohamed Taha, to be its representative in the talks while the SPLM was
represented by its chairman, John Garang. The Government of Sudan
was tantamount to the National Islamic Front of President El-Bashir,
which had taken over power in 1988. Other political parties or groups,
be it from the South or the North, were not included in the negotia-
tions. This seriously undercut the inclusiveness and general acceptabil-
ity of the process.\footnote{71}

\footnote{67} On IGAD’s role, International Crisis Group, see note 61, 155-160.
\footnote{68} Soon after the terrorist attacks of September 2001, US President Bush sent
a Special Envoy (Senator John C. Danforth) to the Sudan in order to bring
the negotiations back on track, see International Crisis Group, “Sudan,
Capturing the Moment”, \textit{Africa Report} No. 42, 3 April 2002; also E.
Rogier, “No More Hills Ahead? The Sudan’s Tortuous Ascent to Heights
of Peace”, Security Working Paper No. 1, Clingendael - Netherlands Insti-
tute of International Relations, 2005, 45-57.
\footnote{69} See Joint Communiqué Issued on the First Session of the Political Com-
sudp_20_07_2002.htm>), on this declaration, International Crisis Group,
see note 61, 155.
\footnote{70} Kuol Deng, see note 63, 103/104.
\footnote{71} A. Al-Madhi, “The Peace Agreement of January 2005 and the draft Con-
epressrelease2005/jul30-69840.shtml>; also A.M. Flacks, “Sudan’s Transi-
tional Constitution”, \textit{The Journal of International Policy Solutions} 3 (2005),
8 \textit{et seq}.}
Three types of international actors were involved in the negotiations. First, there was IGAD, which officially hosted the negotiations in Kenya and provided a regional framework for the negotiations. It was represented by General Lazaro Sumbeiywo, a Kenyan national who served as IGAD’s Special Envoy and central mediator in the talks. General Sumbeiywo was assisted by envoys from various IGAD states, including Eritrea, Ethiopia and Uganda as well as by a number of international experts in constitutional law and mediation, including Nicholas Haysom from South-Africa and Julian Hottinger from Switzerland. Secondly, four non-African countries – Italy, Norway, the United Kingdom and the United States (sometimes referred to as the “four powers”) – were actively involved in the negotiations in a number of ways, not least by funding the negotiations. Thirdly, a number of international actors were indirectly involved in the peace negotiations. By way of example, the UN was constantly represented in the negotiations by at least one observer or liaison person. Also, a variety of international civil society actors with different roles and interests formed a background to the negotiations. For example, the German Max Planck Institute for Comparative Public Law and International Law under the guidance of Professor Rüdiger Wolfrum provided constitutional expertise to both parties of the negotiations, and in fact mediated a first formulation of a draft constitution for the Sudan.

The role of non-Sudanese actors who were directly represented at the talks was primarily organizational and procedural. Neither IGAD and its mediator, nor the observer states, nor the international experts had any formal decision-making power in the negotiations and say over the outcome. Instead, their task was to moderate, mediate and help to bring about a solution. More concretely, one can say that the role of IGAD and of the observer countries was firstly to keep the parties at the negotiating table and secondly exert enough pressure to prevent a breakdown of the talks. The experts might have also served to create a level playing field between the resourceful and highly skilled lawyers of

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73 These countries are Members of the IGAD Partners Forum, which is a consortium of western countries interested in supporting IGAD and its regional efforts.

74 For details on the Sudan Peace Project on this so-called Heidelberg Dialogue, see under: <http://www.mpil.de/ww/en/pub/research/details/know_transfer/sudan_peace_project/dialogue.cfm>.
the central government and the southern negotiators, who were less prepared for the negotiations as a result of their comparatively disadvantaged background.

The way in which the negotiations proceeded from a practical point of view is that the IGAD mediators worked in close collaboration with the parties, sometimes jointly and sometimes individually, with a view to producing a draft agreement.75 This required that the international experts be intimately familiar with the parties’ respective positions to formulate the agreement in a way that would be acceptable to both parties. This approach was initially successful as the international mediators managed to broker an agreement between the parties in relation to a number of key issues in a way that many observers had previously thought was impossible. Eventually however, those parties that were close to the talks, including representatives from the four powers, saw in this manner of proceeding a need to intervene so as to influence the negotiations in favor of certain outcomes in the text. For example, for the purpose of meeting the demand of their respective Christian communities, representatives from the U.S. and Norway applied significant pressure on the international mediators to tilt a compromised proposal in favor of the South, particularly in relation to issues concerning the application of Sharia law in the capital Khartoum.76 One can also trace a number of other elements in the CPA that might have been unlikely without input from external forces.77 When the skewed agreement was presented to the parties, the reaction from Khartoum was extremely negative. The international mediators were criticized as a result, and both parties reacted by upgrading their representation at the talks, and reduced the internationals to a more background role.78

75 Interview with Nicholas Haysom, Process Adviser to the IGAD Facilitator, 14 June 2006 (Madrid, Spain).
76 Interview with N. Haysom, see note 75; see also, Kornegay, see note 72, 59-61.
77 One example could be the stress on the respect for the legal obligation flowing from the signing of international human rights treaties, PSP article 1.6.1; article 2.9.11; another example could be the federal structure, even though this has taken on a highly innovative form, see R. Wolfrum, “Föderalismus als Beitrag zur Friedenssicherung: Überlegungen zu einer Verfassung für Zypern und den Sudan”, in: M. Brenner (ed.), Der Staat des Grundgesetzes, 2004, 1245 et seq. (1261-1262); also Ellisie, see note 64, 78-79; for the Sudanese quest see the contributions in H.M. Salih (ed.), Federalism in the Sudan, 1995.
78 Interview with Nicholas Haysom, see note 75.
The CPA was signed by the negotiating parties, that is, the Government of Sudan and the SPLM on 9 January 2005. In addition, the observer countries as well as some regional countries (Egypt and Djibouti, amongst others) appeared as international witnesses of the treaty, and hence serve as “trustees” of the agreement. The CPA was then ratified in accordance with Chapter II, article 2.12.4.1 of the CPA by the Sudanese parliament and the SPLM National Liberation Council.


The actual process of drafting and adopting a new constitution commenced only after the CPA was signed. It took place in Khartoum during the summer of 2005 and proceeded with almost no international involvement. However, the process and substance of the constitution was almost entirely predetermined by the CPA. In fact, the domestic constitutional process only executed what had been agreed upon in the CPA which makes it necessary to take a closer look at what the CPA actually prescribed.

The CPA is actually a compilation of several agreements that had been negotiated in the IGAD-led talk in Kenya. These cover all aspects that one would expect in a constitution, and in fact, the CPA reads more like a constitution than like a peace treaty. It contains an encompassing list of Civil Rights (Chapter II., article 1.6, including the role of religion in the new state), sets out rules for the sharing of natural resources and governmental income (Chapter III.), neatly prescribes the institutional system (Chapter II., Part II.) and, last but not least, specifies the relationship between North and South, the federal system of government and the right to self-determination (Chapter II. article 1.7, article 1.5.1; Chapter I., article 1.3).

The CPA also provided for a procedural regime for the constitution-making process. It declared that a National Constitutional Review Commission (NCRC) was to be formed and have as its first task the preparation of a new constitution (Chapter II., article 2.12.5). This body was to be made up of representatives from (el-Bashir’s) National Congress Party, the SPLM and “other political forces and civil society”

79 There was only some minor and informal international involvement in the (secretive) preparation of a Draft Constitution which would serve as basis for deliberations in the constitutional assembly.

80 Ellisic, see note 64.
(Chapter II., article 2.12.4.3). The CPA also outlined how the new Constitution was to be adopted, namely through adoption by the National Assembly and the SPLM National Liberation Council (Chapter II., article 2.12.7).

The actual constitution-making process followed this framework. The National Constitutional Review Commission (NCRC) was formed according to the CPA, but with an expanded membership. Instead of 60 members, the NCRC had 180 members during the constitutional drafting process in order to provide greater representation for other political parties. The NCRC drafted the Interim National Constitution for the Republic of the Sudan from May to July 2005, which was then adopted on 5 July 2005.\footnote{The constitution is called an “Interim Constitution” because the CPA envisages that after 6 years there shall be a referendum on the final status of the South and its relationship to the north, see Chapter I, article 2.2, 2.5 CPA. This does not limit the text’s current status as fully applicable fundamental law in any way.} In substantive terms, however, the NCRC’s contributions were very limited since most of the constitution was predetermined through the CPA.\footnote{An example of what kind of questions were left open by the CPA could be the question of how the Members of the second chamber (the Council of States) should be elected, c.f. Chapter II, article 2.2.3.2 CPA and article 85 Interim Constitution Sudan.} Article 2.12.5 of Chapter II. of the CPA reveals to what extent the CPA is actually intended to be a virtual Über-constitution of the new state. It provides that in cases of conflict between the new Constitution and the CPA, the latter will prevail.

In sum, the “real” constitution-making occurred in the guise of peace talks. The domestic constitution-making in Khartoum was a premeditated confirmation of the internationally brokered peace agreement, the CPA. However, although the CPA was brokered by international actors, its substantive content reflected the consensus that was reached between those national drafters that were involved in the process. International actors influenced the peace talks, but their influence was one of moderation and expert support only. IGAD as a regional organization and the four observer countries provided human and financial resources and pressed for a constitutional settlement, but they did not impose any rules for constitutional process (in contrast to East Timor or Iraq). Also, the CPA as well as the final constitution was adopted by representative assemblies of the two conflicting parties alone. Finally, international law had no direct influence on the constitution-making process although it might have provided argumentative
material and standards for the parties. In effect, one can thus say that the *pouvoir constituant* in Sudan remained entirely autonomous and national, but the fact that it could arrive at its decision was only possible because external actors had created the framework for negotiations and a constitutional settlement.

III. Assessing External Influence: Legality and Legitimacy

East Timor, Iraq and the Sudan present three distinct cases of how external influence on constitution-making processes has been organized and taken effect. There is first the case of the international community as external actor which confines its influence to organizing the procedural framework based on UN law (East Timor). There is second the case of the UN but more decisively of some occupying forces as external actors which not only organize the process but also work to impose substantive outcomes on the constitution-making parties (Iraq). And there is third the case of external influence through a regional organization and a group of interested states which act without a legal framework and impose neither procedural nor substantive outcomes but just serve to moderate and finance negotiations (Sudan). How can one assess these cases and what normative lessons can be derived from them? Two frameworks for assessment seem especially relevant, namely the legality and the legitimacy of such influences.

External influences over what should in principle be national constitutional processes occur in the context of international law. The first issue that ought to be determined is therefore first what kind of a legal regime governs external influence and whether such influence is exercised in conformity with those rules. A second related issue is the extent to which external influence affects the legitimacy of a particular constitution. According to the traditional concept of the constitution-making, as described at the outset of this paper, any external influence over a constitutional process dilutes a constitution’s democratic nature as well as its legitimacy in the eyes of the nation. A vital question is therefore, in a time when the *pouvoir constituant* is increasingly being internationalized, whether, and if so in what way, such internationalization affects the legitimacy of the constitution in question.
1. The Legality of External Influence

a. Applicable Law and Legal Regime

The legal regime governing external influences over constitution-making processes and providing standards for the assessment of its legality can be derived from at least two sources. Firstly, UN Security Council Resolutions have set out obligations and limitations in relation to particular constitution-making processes. Several examples have been described in the case studies set out above. Security Council Resolution 1272 provided for the establishment of UNTAET, which was responsible for the administration of East Timor, and for the creation of local and democratic institutions. Also, Resolutions 1483 and 1511 required of the occupation authorities in Iraq that they allow for a democratic process that would lead to the establishment of a new constitution. Finally, Resolution 1546 required of UNAMI that it provides assistance in the Iraqi constitutional process if so requested by the government. All these sources provide for positive obligations on the part of either international institutions or individual states and also typically call for the future constitution to respect basic human rights and establish a democratic system of government.83

The second set of norms that can affect the legality of external influence over constitution-making processes is the international law of belligerent occupation.84 For example, the Fourth Geneva Convention provides inter alia that where one state occupies another, the occupant must maintain an orderly system of government; that the resources of the occupied state may be controlled and utilized for that purpose and in order to meet the military needs of the occupant; the occupant has limited legislative powers and may not make permanent changes in fundamental institutions; and when possible the occupant must utilize already existing local laws. However, the impact of these rules is some-

83 At the same time, Security Council Resolutions can require individual states to refrain from exerting influence on the internal political processes of other states. For example, S/RES/1559 (2004) of 2 September 2004 relating to the Lebanon, demanded “a free and fair electoral process in Lebanon’s upcoming presidential election conducted according to Lebanese constitutional rules devised without foreign interference or influence”.

what limited, since they obviously only apply where there is an occupation. Also, there is little incentive for the occupant to obey international standards that require non-interference, particularly when at least one of the reasons for the occupation is regime change. The result is therefore that, in the few instances where occupation law actually does apply, it often has a minimal impact.

Aside from these two sources of legal obligations which apply only to particular cases, there is a question as to whether general rules of public international law govern external influence over constitution-making processes. Such rules could form the basis of a more general legal regime that could govern external influence on constitution-making processes anywhere and at any time. It is possible to argue, for example, that the right to self-determination or perhaps even the notion of sovereignty can be understood as limitations on external influence or as constituting an obligation on every external actor to be as unobtrusive as possible. In a more substantive perspective, one could argue that certain substantial standards of the political process, such as the right to democratic governance and certain human rights have emerged as being inalienable, and that not only domestic governments but also external actors have to respect such standards.85

However, it is difficult to consider that this actually constitutes a distinct and coherent set of rules that must be respected during constitution-making processes or even an existing right to democracy. Even though the right to self-determination is generally recognized as a universal entitlement and includes a guarantee of self-government and independence,86 it is hardly precise enough to outline effective criteria for the process of drafting a constitution and thus fails to provide concrete limits or standards for external influences. One also has to remain realistic. In the absence of a generally applicable convention, treaty or the like, we would have to prove the emergence of a legitimate rule of international law through state practice supported by an *opinio juris*.87 For both aspects, the material available seems too meager and too disparate.

85 See e.g. Franck, see note 17. See also in this respect the discussion in the article of J. Leininger in this Volume.
86 See in this respect Article 76 (b) UN Charita; H. Hannum, *Autonomy, Sovereignty, and Self-Determination*, 1990.
b. Whether Existing Rules are Respected in Practice

The question of whether the particular rules governing external influence are respected in practice can only be considered on a case by case basis. In the case of Sudan, the issue is relatively straightforward as there were in fact no international rules that were to be followed. Thus, all the external influence that was exercised by IGAD, by individual foreign states and by international experts was unregulated by international law. The only counterbalancing measure to this influence was therefore the presence and independence of mind of the constitutional drafters. As set out above, the Sudanese drafters did resist external influence on more than one occasion when they considered that the particular intervention was motivated by self-interest rather than by a desire to make a positive contribution to the constitutional process.

Similarly, in the case of East Timor, we cannot detect any breach of the legal regime that was set up for the process of constitution-making. One might ask whether UNTAET Regulation 2001/2, which established the framework for the constitutional process in the first place, went beyond the mandate that was given by Resolution 1272, since the latter did not explicitly mention a constitution-making process. However, one can convincingly argue that Regulation 2001/2 was implicitly covered by the mandate given in Resolution 1272. And also, in the actual process of constitution-making as it unfolded on the basis of UNTAET Regulation 2001/2, there is no indication that external actors violated the self-given rules.

In relation to Iraq, the question is complicated by the fact that the legal regime changed during the constitutional process. From the end of the war in May 2003 until June 2004, the country was under occupation, hence the international law of belligerent occupation applied. In addition, Security Council Resolutions 1483 and 1511 imposed a number of positive obligations on the occupying powers. After June 2004, the occupation officially came to an end and sovereignty was transferred to the Iraqi government, which meant that the involvement of external actors was then governed solely by the applicable Security Council Resolutions.

In the first phase, the occupation authorities drafted the TAL, which took the form of a temporary constitution. There is a question as to whether this process represented a violation of the pre-existing consti-

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88 See under Part II. 1. a.
89 See under Part II. 2. b.
tutional order, but the debate is somewhat academic as, in any event, the invading armies not only swept away all the institutions that would have been responsible for amending the previous constitution, it was moreover one of the very goals of the war to bring the regime of Saddam Hussein to an end. However, it seems practically beyond question that the drafting of the TAL does represent a violation of the international law of occupation and of the specific Security Council Resolutions that apply to the Iraqi situation. Indeed, not only did the TAL establish a new constitutional order, but it also reformed the structure of the state. For example, article 4 provided that Iraq is “federal”, which was a clear departure from Iraqi constitutional tradition. Security Council Resolutions 1483 and 1511 do not actually specifically allow for the possibility of drafting a temporary constitution – they merely indicate that a timetable should be set for the drafting of a new permanent constitution and the UN and “associated organizations” should support these constitutional efforts. The fact that the Security Council never acknowledged the TAL’s existence in any of its resolutions is an indication that it recognized that the document was lacking internal and international legality. It is arguable therefore that the TAL was never a valid legal document.

In the second phase, that is after sovereignty was transferred back to the Iraqi government, Security Council Resolution 1546 is the only source available and it only sets out the specific role that the United Nations was to play during the drafting process. In its operative para. 7(a)(iii) it provides that UNAMI as well as the Special Representative were to “play a leading role to: (iii) promote national dialogue and consensus building on the drafting of a national constitution by the people of Iraq”, and that this role could only be played if requested by the government of Iraq, which is what took place. More important,

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90 Article 63(b) of the 1970 Iraqi Constitution, which is the text that was in force when the war broke out, provided that “[t]his Constitution shall not be amended except by the Council of Revolutionary Command through the majority of two third [sic] of its members” [official translation], Iraqi Gazette No. 10, 13/3/1971; this body was swept away during the war, and the majority of its Members were arrested by the U.S. and the U.K.


92 The president of the Iraqi parliament, in a letter dated 18 May 2005, invited the United Nations to “provide technical assistance, including technical and logistical public affairs expertise that can help promote national dialogue […] and build consensus nationwide”, letter from Hajim M. Al-
though, is that Resolution 1546 does not set out a specific role or guidelines for the involvement of other actors, including individual external actors such as the United States and the United Kingdom. Nevertheless, there is no question that the United States influenced the drafting process. It intervened in order to prevent Iraqi officials from extending the process by six months, even though additional time was needed.\textsuperscript{93} It encouraged the exclusion of some of the negotiating parties, even when it had originally encouraged their inclusion.\textsuperscript{94} Finally, it introduced a number of substantive changes to the text itself, sometimes for the purpose of preserving its own self-interest.\textsuperscript{95} However, improbable as it may seem, these interventions do not actually represent a violation of international law, because there are no positive rules that could have been violated in the circumstances. Given the above, the intervention of individual states as external actors in what should be a sovereign constitutional process is a clear example of an area that would benefit from additional regulation or at least further consideration by the international community in order to avoid the type of outcome that was reached in Iraq.

\section*{2. External Influence and Constitutional Legitimacy}

Since the legality of external influences is hard to assess and legal rules only exceptionally provide a sharp normative yardstick, as just seen, another framework of analysis comes into play: the question of how external influences affect the legitimacy of the newly drafted constitutions. This framework is easily justified since the legitimacy of the new constitutional order is of paramount importance for whether the new order will succeed or fail.

But how to analyze constitutional legitimacy? Obviously, there is no universally accepted definition of constitutional legitimacy. It can, firstly, be understood in a sociological perspective, referring to the question of whether citizens regard the constitution as being justified and effective and thus acquiesce to the particular legal order that it es-

\begin{flushright}
Hasani, President of the Iraqi National Assembly, to Ashraf Jehangir Qazi, UN Special Representative of the Secretary-General, (unpublished).
\textsuperscript{93} See under Part II. 2. c. (i), especially note 55.
\textsuperscript{94} Ibid., see note 55.
\textsuperscript{95} See under Part II. 2. c, note 58 and 59.
\end{flushright}
tablishes. However, such legitimacy is hard to measure, especially so in the cases presented here which relate to constitutional systems that have only recently come into force. It would be difficult to predict the societal acceptance of the constitution and whether it will succeed or fail in establishing an accepted order.

Legitimacy can also be understood in a more normative perspective, referring to the (moral or normative) acceptability of the constitutional order. This acceptability rests on two dimensions. Firstly, normative or moral legitimacy can be based on the substance of the constitution, hence the acceptability of the content of the constitution. But it can also, secondly, rest on the procedural aspect of how the constitution came into being. Both dimensions will be analyzed here. We will first ask what effect the external influence has on the substance of the new constitutions. We will then analyze what effect external influences have on the process of constitution-making and hence on the sense of ownership that the affected society can have for the newly established order.

Yet, we should not only concentrate on the effects of external influences but also ask for the legitimacy of the external influence itself. In a final step, we will therefore inquire into the question of whether such external influences should be conducted in accordance with certain criteria to be legitimate in itself.

a. The Effect of External Influence on the Substance of the Constitution

External influence is typically provided in the form of technical assistance to the drafters of the constitution. Although the results were never perfect, in all three of our cases studies, external influence played a major (and mostly positive) role in supporting the national actors in preparing a technically advanced text. However, it is also possible in some circumstances to attribute failures and successes in designing a constitutional system on the impact of external influence. For example, the American push to exclude the Sunnis from the later stages of the

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constitutional negotiations certainly contributed to the fact that the constitution now imposes something akin to confederalism on a people that is not entirely committed to the idea – and the effect that the country has practically become ungovernable.

Another aspect that affects the substantive outcome is the type of external actor that is involved. One can draw a distinction between influence that is exerted by individual states on the one hand, and influence that is exerted by multilateral institutions on the other. Where an individual state influences the drafting process of a constitution-making society, it seems natural that the interests of those two can conflict with each other. At that moment, it is also natural that the influencing state will act in order to protect its interest. One way in which this strain materializes in a constitutional text is that the intervening state will favor one or a group of local factions over one or a group of others, therefore creating an unnatural imbalance in the system of government that would not otherwise have existed. This problem typically does not exist when external influence is exerted by multilateral institutions. Because of the fact that they have a varied membership that is often characterized by contradictory interests, it is often difficult for such institutions to focus on anything other than the particular missions with which they have been entrusted.

In this respect, external influence by an individual external actor can have a detrimental impact on the moral legitimacy of a constitution. In the case of Iraq, the U.S.’ main interest was to ensure that the constitutional process was completed on time and an extension avoided. Thus, whereas the UN as well as senior U.S. officials initially pushed for all communities to be represented in the Iraqi constitutional process, the U.S. ambassador eventually encouraged the exclusion of the Sunnis when it became obvious that their incorporation would prolong the negotiations in a way that was not consistent with U.S. domestic interests.98 The result was that the framework that was favored by the Kurds and that was originally intended to form an exception in an overall and comprehensive federal system was adopted as a generalized solution throughout the constitution. Many observers have expressed the concern that the implementation of this new system could very well lead to a collapse of the state in its entirety.99

98 International Crisis Group, see note 55, 3-4.
The case of Sudan is complicated by the fact that individual intervening nations involved themselves in the constitutional process through a multilateral institution, but the experience was similar. As mentioned, for domestic political reasons, the United States successfully applied pressure on IGAD to skew the draft agreement in favor of its own interests. The unbalanced sections of the draft were not actually adopted in the final text as a result of the fact that the multilateral institution in question was acting merely as a mediator and not as an occupant that had the power to impose solutions. However, the tendency that individual intervening actors attempt to skew agreements in accordance with their own interests was also borne out in the Sudanese example.

The East Timorese experience, in which the entire constitutional process was managed by the United Nations is the only case in which no allegations have been made according to which external actors had unduly impacted the substance of the constitution. It is possible to assume therefore that where the only intervening actor is a multilateral institution, the pattern of behavior tends to be more balanced.

b. The Effect of External Influence on the Process and on the Society's Sense of Ownership

External influence can also affect the process of constitution-making and thus impact the relationship between the constitution-making society and the constitution itself. Firstly, in each of our case studies, external influence affected the way in which the citizens of each country participated in the respective drafting processes. So, for example, as a result of the fact that the main interest of the U.S. was to ensure that the Iraqi

lished (quoted by Newsweek, available under: <www.msnbc.msn.com/id/9558117/site/newsweek/>; also Al-Ali, see note 57.

100 However, it has to be noted also that international institutions with particular missions, such as the IBRD and the IMF, can at times intervene in order to impress upon the constitution-making process legal and economic mechanisms that would be more advantageous to their membership than to the constitution-making society in question. For example, when constitutional drafters are considering what economic model they should adopt in relation to the exploitation of their national resources, or whether to allow for a system to let foreign investors freely enter into their domestic market, it can be possible for individual nations outside the constitutional process to secure an economic interest in that constitution-making society through advice given by such institutions.
constitutional process was completed on time, the views and opinions of the Iraqi people were at best secondary. The consequence was that although an effort was made to consult the public as to the type of state that it wanted to live in, the drafting process was already completed by the time the results of the consultation were received. On the other hand, in situations where external influence does not make its presence felt as strongly, or where it is exerted by multilateral institutions, this does not automatically translate into greater input from the citizens of the relevant countries either. With respect to East Timor and Sudan, there is very little indication that the views and opinions of their respective citizens were taken into account during the drafting process.\footnote{See under Part II.1. c. and Part II. 3.b.}

Secondly, external influence can also impact the sense of ownership of political elites over the constitution. The role of elites is an issue that increasingly forms part of the discourse of both international institutions that are involved in constitution-making, and of constitutional law scholars. Noah Feldman, for example, who acted as a legal adviser to the Coalition Provisional Authority in Iraq, argues that in order for a new constitutional order to succeed it must get off the ground through a process in which local elites adopt particular constitutional principles out of self-interest.\footnote{Feldman, see note 4.} Madhavi Sunder, on the other hand, retorts that in the current geo-political context, the West has a responsibility not to allow traditionalist or fundamentalist local elites to determine the constitutional order of a particular country, but to take sides in favor of what she sees as those who seek to institute a democracy that is respectful of egalitarianism.\footnote{Sunder, see note 4.} The question in this debate is whether or not external actors should act upon their self-interest and affect constitutional processes in a way that protects their own domestic concerns, despite the danger that such a manner of proceeding could impair the sense of ownership of local elites over a constitution.

Although Sunder mentions the danger that acting upon self-interest poses, she fails to take into account the different factors that can motivate self-interest. Her assumption is that the only reason constitution-making societies object to external influence is because intervening states do not live up to the standards that they seek to impose on others. This argument simply does not follow as it practically denies that selfish self-interest exists at all, which is particularly worrying considering what has been set out above. It is well known to all those that par-
participated in the Iraqi process that one of the U.S.’ main concerns was to ensure that the constitution’s section on human rights should not create a mechanism that would allow Iraqi citizens to bring claims against U.S. troops in Iraqi courts. The U.S. therefore intervened to ensure that what was previously article 44, which provided that “[a]ll individuals shall have the right to enjoy all the rights mentioned in the international treaties and agreements concerned with human rights that Iraq has ratified”, was dropped from the final draft of the constitution. This created an uproar in Iraq. The result of the influence of self-interested intervening state actors in this case was therefore to alienate precisely those elites that Sunder would have hoped the U.S. would favor.

But there’s more. In all three of our case studies, one of the objectives of the external actors was to ensure that the processes would be as inclusive as possible. However, this goal proved difficult to achieve. In Sudan the external actors worked towards encouraging dialogue and consensus-building between the country’s communities. However, they were ultimately unsuccessful in including negotiating parties from the North or the South other than the central government and the SPLM. This was mostly due to the fact that the external actor was in fact not administering the constitutional process, but was in fact merely acting as a mediator. In East Timor, we have seen that although UNTAET instituted a number of rules with a view to ensuring that Fretilin would have to seek compromise with some of the country’s minority parties, it was eventually unable to prevent Fretilin from dominating the discussions and imposing its will. Finally, in Iraq, although the UN and the U.S. initially pushed for Sunni negotiators to be included in the discussions, they were dropped when it became apparent that their presence would have extended the drafting process in a way that would have been inconvenient for U.S. domestic purposes. Therefore, although the external actor here did choose sides, it proceeded not in the interest of favoring progressive forces within the country as Sunder would have liked, but in order to satisfy its own narrow self-interest.

In sum, we can note that external actors have generally tried to ensure that the constitution-making processes are as inclusive as possible in order to enhance the society’s ownership over the new constitution. However, such external attempts often fail. The reasons can be located in domestic political circumstances that discourage or even prevent popular involvement (like in Sudan or East Timor) – or in the self-interest of the respective external actor (like in Iraq). Nevertheless, the failure does not diminish the value of such attempts to provide channels for more participation in the political processes in the first place. As
long as such attempts are not perceived as violating fundamental local rules or customs, any such procedural help, be it for elites or for the general public, should be seen as a legitimating and positive influence.

c. How External Influence Can Itself Be Legitimate

External influence can play a positive role in constitutional processes, sometimes directly and sometimes indirectly. An example can be drawn from Iraq. Were it not for the presence of the UN on the ground, which was responsible for the entire printing and distribution of the constitution to the Iraqi people, it is very likely that Iraqi voters would never have seen the text of the constitution before the day on which the referendum was held. However, external influence can also have a negative effect, for example, when external actors impose ideas on national actors, as witnessed in several of our case studies. This leads to the question of whether the external influence itself is legitimate – and what contributes to such legitimacy.

As we have argued above, there is no general legal regime that regulates external influences on constitution-making processes. It would need more concrete cases and more legal scholarship to argue that such a regime has evolved. However, it seems possible and worthwhile to build on the experience of our case studies in order to propose a tentative set of rules or recommendations – not in the sense that they ought to be applied with a view to granting constitutions ‘official’ approval, but rather with a view to allowing future constitutional drafters to benefit from the experience of others in as clear and systematic a manner as possible. These recommendations could not only contribute to more legitimate outcomes (i.e. the constitutions) but also legitimize the external influence itself.

The first recommendation would be that external actors ought to be as unobtrusive as possible. They should certainly not impose substantive outcomes on the parties to a constitutional process. Also, constitutional assemblies ought to be independent in terms of the internal procedures that they adopt. The only exception to this rule could be that external actors should work to ensure that a drafting process proceed on the basis of the greatest inclusion possible of the respective country’s different communities.

Secondly, with respect to the actors of external influence, individual states should, in as far as possible, be prevented from intervening in constitutional processes. The danger that external influence always poses is related to the self-interest of any external actor. This danger is
much greater in the case of individual state actors than in the case of multilateral institutions. External influence should therefore be channeled through multilateral institutions. As we have seen from the Sudanese case, multilateral institutions are also not immune from self-interest, but their involvement reduces the risk, particularly if the institution in question has no power to impose outcomes on the constitutional assembly.

Third, legal advice from foreign experts should be given publicly, in a transparent manner, and should be provided equally and to all the parties that request such advice from them. Indeed, in the same way that international attention can indirectly cause national drafters to improve their standards, the same applies to external legal experts, who would also benefit from additional scrutiny.

IV. Conclusion

External influence on constitution-making today has become much more than a mere migration of ideas or borrowing of concepts. In recent years, multilateral institutions and individual states have involved themselves in national constitutional processes in an increasingly sophisticated manner and in a number of different ways. Indeed, external actors often influence constitutional processes by making use of considerable organizational resources and sometimes even act through particular multilateral institutions in order to satisfy specific objectives. In that regard, one of the issues that has been a constant source of concern for a number of constitution-making societies is the self-interest of external actors. Even though external influence is often intended to be a source of support in a situation of post-conflict crisis, such influence can distort the constitutional process in favor of concerns that are completely foreign to the relevant country.

In this short article, we have distinguished three different categories of external influence by the degree of the influence exerted (total, marginal, and partial), and focused on the category of partial influence. In that regard, our three case studies analyzed different forms in which external influence can manifest itself. In all three cases, the respective constitution-making bodies were supported, directed or influenced by external actors, and as such one can speak of a factual internationalization of the pouvoir constituant. From a legal perspective, three variations of partial influence can be distinguished.
In East Timor, the process and the organizational framework of constitution-making were determined almost entirely by the United Nations as mandated by a Security Council Resolution. In substance, however, the external influence was minimal and choices were left to the indigenous actors. The Iraqi process was regulated by a number of Security Council Resolutions, and by the applicable international law of belligerent occupation. While the latter prohibited any interference with the domestic constitutional system, the UN resolutions provided that the United Nations should play a role in the process of constitution-making. However, a small number of individual states (most notably the U.S.) involved themselves in terms of both the process that was followed and of substance of the negotiations itself. This occurred even after the occupation ended, which meant that their interventions were not regulated by any discernable legal regime. External influence in Sudan manifested itself in the form of international mediation. The constitution-making process took place mostly in the guise of formal peace talks that were organized by a regional organization and individual states, and that were outside the context of a particular legal framework, whether provided by the United Nations or otherwise. Since the mediators could not impose any solutions, the Sudanese were autonomous from a procedural and substantive point of view, while external influence occurred mostly in the form of the expert advice.

Do these three constellations result in something that could be described as an (evolving) legal concept of an internationalized pouvoir constituant? Hardly. It seems clear that, by and large, the only source of law that regulates constitution-making is the authority of the United Nations, especially the resolutions of the Security Council. However, such resolutions have up to now regulated only specific cases, and only in relation to particular issues. There is therefore nothing like a general legal regime of external influence. The internationalized pouvoir constituant is therefore not a clearly describable legal regime of public international or international constitutional law. Instead, the resulting legal vacuum has created the space for a number of abuses to take place. With time, it may be possible to establish a more precise body of rules than the one that exists so far. For now, the rules that do exist are clearly unsatisfactory.

In that situation, and given the impossibility of regulating such an issue, we suggest that, in order for external influence to enjoy legitimacy it must satisfy a number of criteria. Firstly, it must be exercised with restraint. This goes certainly for any attempt of imposing substantial outcomes. Influence on the procedure, on the other hand, can have
a positive effect or even be itself fundamental for bringing about the constitution-making process in the first place. Nevertheless, such merely procedural influence has to be exerted in a way that avoids that the self-interest of the external actor conflicts with or even prevails over the interests of the respective nation. This relates to a second point. External influence should, whenever possible, be exercised through multilateral institutions, in order to avoid possible conflicts of interest that may exist between individual intervening states and the constitution-making society itself. Finally, any external actors that are involved in the process must observe procedural neutrality, which entails, for example, that advice is given to all parties equally and in as transparent a manner as possible. Perhaps such rules will benefit future constitution-making societies and create a setting that will allow for more serious consideration of this topic in the future.
Democracy and UN Peace-Keeper – Conflict Resolution through State-Building and Democracy Promotion in Haiti

Julia Leininger *

“Constitution is paper, a bayonet is iron.”
(Haitian saying)

“You cannot have a one-year solution to a ten-year problem.”

* The author would like to thank Claudia Zilla, Markus Rau, Pamela Jawad, and Markus Böckenförde for their valuable and sound advice on this article.

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IV. Conclusions
I. Introduction

UN peace-keeping has been subject to major changes since the end of the Cold War. A new, more comprehensive, concept of security, “human security” has emerged. With it the international community has widened its recognition of factors which may constitute a threat to peace. According to this view, internal state conflicts and other domestic situations, – in addition to the traditional recognition of inter-state conflicts – may cause a threat to peace. For instance, civil war, major diseases, natural disasters and poverty may be considered a threat to peace.¹ The United Nations is making efforts to adapt its organization to these challenges. It recently established a Peace-building Commission which will marshal resources at the disposal of the international community to advise and propose strategies for post-conflict recovery, reconstruction, institution building and sustainable development, in countries emerging from conflict.

UN peace-keeping has been in a state of continuous reform throughout the past decade. Peace-keeping missions evolved from purely military missions to so-called “integrated” missions, which have a new make-up and objective. Thus, peace-keeping now comprises military and civilian components,² and with respect to the latter, state-building and democracy promotion increasingly became instruments to build peace.

Haiti in particular seems to be a playground for the outlined evolution of peace-keeping missions. In no other country has the UN made so many different efforts to keep peace. Throughout the 1990s five UN peace-keeping missions were deployed to Haiti. In practice the mandates of these missions gradually evolved. They were slowly adapted to the Haitian context and also influenced the evolution of a general peace-keeping design as described above. In this respect state-building and democracy promotion are two instruments, which were widely used in UN peace-keeping in Haiti because they were assumed to be adequate means to build peace. Finally, democracy played an excep-

² For further explanation of the development of peace-keeping see under II. 1. in this article.
tional role in UN peace-keeping in Haiti because in 1994 the UN Security Council, for the first time, authorized coercive measures to restore democracy in a Member State. Consequently, a discussion came into being, whether a right to democracy in international law exists and could be derived from the Haitian case. By focusing on the issue of a right to democracy, one crucial aspect has been widely underexposed, i.e. the relation between democracy and the threat to peace. The latter is the necessary precondition for the authorization for the use of force by the UN Security Council. Therefore, a rupture with democracy must constitute a threat to peace, if coercive measures need to be taken in order to promote democracy.

In spite of the qualitatively and quantitatively wide-ranging efforts undertaken in Haiti, the conflict there remains unsolved and democracy is far from consolidated. That is why this article tries to trace why the effects of UN peace-keeping have been limited at best. Since democracy – in terms of its relevance for UN Security Council mandating as well as its use as a peace-building instrument – played a crucial role in the Haitian case, special attention will be drawn to it. Against this background two aspects are of major interest: first – did the rupture with democracy in Haiti constitute a threat to peace and does the Haitian case build a precedent for the emergence or indeed, existence, of a right to democracy? Second – since the restoration of democracy was the starting point of the first UN peace-keeping mission in Haiti, one must ask, whether state-building and democracy promotion were adequate means to build sustainable peace.

The article is divided into two main parts. In the first, a conceptional framework is given to examine the relation between peace-keeping, state-building and democracy promotion. Furthermore, the relevance the Haitian case has with regard to a possible right to democracy in international law will be discussed. The second part gives the empirical foundation for the examination of the evolution and outcome of UN peace-keeping in Haiti. By using state-building and democracy promotion as instruments to build peace in Haiti, the UN assumed that a functioning state, a consolidated democracy and the conflict as such were inter-related with each other. Therefore, the description of UN peace-keeping is preceded by the assessment of the Haitian state, democracy and conflict. The final part of the article will deal with an comparative evaluation of UN peace-keeping in Haiti.

II. Peace-Keeping through State-Building and Democracy Promotion

According to Article 2 (4) of the UN Charter all members shall refrain in their international relations “from the threat or use of force against the territorial integrity or political independence of any state ...”. This principle is subject to two exceptions, namely the right to self-defense pursuant to Article 51 UN Charter and the right of the UN Security Council to impose coercive measures in order to maintain peace, according to Arts 39 and 42 of the UN Charter. Against this background UN peace-keeping was created in order to assist states to maintain peace. In doing so the UN Security Council, by respecting the principle of sovereign equality pursuant to Article 2 (1) UN Charter, avoided intervention in internal state conflicts. Hence, peace-keeping was originally designed to support the cessation of hostile inter-state conflicts. However, already throughout the conflict in the Congo in the chaotic aftermath of independence in 1960, the devastating civil war with all its consequences was classified by the Security Council as a threat to the peace. But only throughout the 1990s the UN Security Council was increasingly willing to intervene in internal conflicts of states and in complex humanitarian situations, in as much as they constituted a threat to peace.

Consequently in its early days UN peace-keeping encompassed primarily military components to support the resolution of inter-state conflicts, although, support for the solution of internal conflicts, often characterized by inter-communal strife, crises of democracy, fighting marked by the struggle to control national resources and wealth, demanded a new type of peace-keeping operation. Faced with these challenges of internal conflicts, the UN started to provide technical and humanitarian assistance, civil administrative support, and support with civilian functions, in particular police functions. In short, contemporary

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4 The “enemy clause” of Article 107 UN Charter constitutes, indeed, a further exception, but it has lost its significance over time and is not applied anymore.


6 Cockayne/ Malone, see note 5, 9.
UN peace-keeping has changed in terms of its objectives and structure. Referring to its structure, a twofold composition of missions emerged, so-called “integrated missions” which comprise military and civilian components. With regard to their objectives, peace-keeping missions now pursue a multi-disciplinary approach which also integrates peace-building. The latter covers to a lesser extent military options, but rather aims at fostering socio-economic and political structures which, in turn, are presumed to strengthen peace and to avoid a relapse into conflict. One could say that UN peace-keeping has become more “political”. In this context state-building and democracy promotion evolved as instruments of UN peace-keeping. Given this evolution, it is a moot point whether these instruments are adequate means to support conflict resolution and to build sustainable peace.

1. State-Building, Democracy Promotion and Conflict Resolution

a. State-Building and Conflict Resolution

“Stateness” can be a necessary requirement for the absence or prevention of a violent conflict within a society. As defined by Max Weber, a state requires the “monopoly of the legitimate use of physical force.” Additionally following Jellinek’s concept of the state, this physical force

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7 Although this twofold composition of UN peace-keeping missions suggests a constant homogeneous structure of missions, in fact peace-keeping missions vary especially with regard to their form and mandate.
11 Though the category “post-conflict” is widely accepted, its interpretation differs from case to case.
must be exercised in a determined territory for the protection of the people living on it. In this spirit, the core function of a state consists in guaranteeing (physical) security to its citizens. Very often, internal violent conflicts correlate with a weak state because no or very poor state capacities, e.g. police forces, are available in order to prevent violent conflicts.\footnote{S. Chesterman et al., \textit{Making States Work. From State Failure to State-Building}, 2004, 16.}

Additionally, a broader understanding of the “state” includes the delivery of public goods to a state’s people (economic and social security).\footnote{A. Bogdandy et al., “State-Building, Nation-Building, and Constitutional Politics in Post-Conflict Situations: Conceptual Clarifications and an Appraisal of Different Approaches”, Max Planck UNYB, see note 5, 580 et seq. (583-584).} In states which are not capable of providing and distributing equitably public benefits to their people, social conflicts are more likely to arise.\footnote{Chesterman, see note 13, 2.} Generally it must be assumed that a lack of economic and social security might constitute a cause of conflict, while a lack of physical security complicates dealing with such conflicts.

Against this background state-building became a means of peace-building. Indeed, the outlined concepts of the “state” enjoy widespread acceptance, but they result in varying understandings of state-building.\footnote{M. Ottaway, “Rebuilding State Institutions in Collapsed States”, \textit{Development and Change} 33 (2002), 1001 et seq.} This must be considered further due to the concepts’ generally high relevance for political practice, i.e., peace-keeping measures.

First, the great variety of state-building concepts is caused by diverse comprehensions of state failure. The more broadly a concept of “state” is defined, the more factors must be considered when determining state failure. In consequence, how and to what extent state-building is implemented by specific states or organizations depends on the perception or, ideally, an analysis of the status quo on the ground by intervening actors. Therefore, state-building may cover a wide range of measures, e.g. police training or support of administrative functions.

Second, diverse intervening actors make use of different terms when alluding to state-building due to their specific historical provenance. This becomes apparent in the inconsistent use of the terms “state-building” and “nation-building”\footnote{Bogdandy et al., see note 14, 591.}. They are very often compounded...
and used synonymously. Here, the concepts of state-building and nation-building are distinguished, referring to different objectives: "State-building refers to the organization and physical infrastructure of a state whereas nation-building means to form the human beings living in a particular territory into a population sustaining a particular state-the nation."  

Finally, state-building’s relevance for peace building depends on the form and causes of the specific conflict. Therefore, whether a conflict can be effectively addressed by state-building measures depends on its very specific characteristics and must be decided on a case-to-case basis.

b. Democracy Promotion and Conflict Resolution

State-building per definitionem does not imply a specific determined form of government. By contrast democracy promotion is a strategy or instrument utilized to establish one specific type of government, which is commonly described as the "government of the people, by the people, for the people"(emphasis added). Hence, in democratic systems sovereignty emanates from a people, generally through free and fair elections. In a substantive sense democracy also includes social justice because it is presumed that democracy (re)distributes resources and creates welfare accessible to all citizens of a state.

Democracy is presumed not to be vulnerable to internal violent conflicts. This is principally based on the assumption that democracy in terms of its procedural dimension is a form of governance to resolve societal conflicts in a peaceful manner. Therefore, democracy promotion

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19 R. Wolfrum, “International Administration in Post-Conflict Situations by the United Nations and Other International Actors”, Max Planck UNYB, see note 5, 649 et seq. (653).


is increasingly regarded as one possible means to create and maintain peace in post-conflict situations.\textsuperscript{22}

Indeed, this assumption can be assured in the long-run because it refers to already consolidated democracies. But it must be questioned in the short-run. Democratization processes are characterized by their destabilizing effect because thereby power within the society is redistributed and new structures and institutions are created in order to organize this very power. However, “traditional” power holders or privileged groups are often not willing to pass on power and consequently oppose democratization. Additionally, the creation of new institutions also causes an unsettled environment vulnerable to crisis. Thus, stability is at stake and descent into conflict is feasible.\textsuperscript{23}

Against this background it is obvious that external actors, like the United Nations, are only successful if their democratization policies are agreed with the respective internal actors and widely accepted within a particular society.

Generally there are two ways to promote democracy. First, democracy can be promoted through positive measures. They primarily include technical assistance which can be directly addressed to the core of democratization, that is its institutions and governance (e.g. electoral assistance, support of parliaments, etc.) or which support democracy in an indirect way by strengthening its output capacity (e.g. economic policy programs or creation of basic services).\textsuperscript{24} Second, democracy promotion can appear through negative measures. They are implemented through political or economic conditionality, sanctions or the use of force. Coercive measures often aim at protecting democracy, e.g. in the case of a rupture with the democratic order in a specific state.\textsuperscript{25}

Regarding its legal basis, democracy promotion is generally based upon a consensus of the intervening actor and intervened state, normally a bi- or multilateral agreement.\textsuperscript{26} In contrast it is ambiguous if a rupture with a democratic order constitutes a threat to peace which allows the legal use of coercive means in order to promote or protect de-
Finally, whether democracy promotion is an effective instrument in order to build peace, or institutions for peaceful conflict resolution in society, depends on the willingness of internal actors to (re)distribute power and reform institutions as well as governance structures. Since democratization affects enrooted institutional and governance structures, a long-term commitment of external actors is indispensible.

c. An Integrated View on State-Building and Democracy Promotion

Theoretically the existence of a functioning, sovereign state is considered to be one precondition for the establishment of democracy. Hence, a sequence between state-building and the establishment of democracy is widely assumed. Although a minimum of state structures is required, sequencing of state-building and democratization is limited in practice due to a de facto concomitance of differing political, societal and economic developments in transition processes. Given these circumstances, it is impractical to pursue a linear, narrow procedure, which would automatically lead to stable state structures in a first step and to democracy in a second step. The simultaneity between both dimensions of transition lies in the objective, state-building, itself: a form of a state is normally (re)designed at the very beginning of the transition process. This also implies the form of governance reigning within it, often determined in the constitution-building process. Due to the interdependence between both processes, external efforts to support state-building often cannot be distinguished from democracy promotion and vice versa. Notwithstanding, external actors, especially the United Nations, frequently “label” their civilian measures as “state-building”, although these also include aspects of democracy promotion.

27 For a discussion of this issue see under II. 2. of this article.
29 The term “transition” is here used in a twofold way. On the one hand it refers to the process from conflict to resolution of a conflict. On the other hand in the context of democracy promotion it relates to the change of a political regime.
This derives from two circumstances. Indeed, democracy has been the only widely accepted form of government since the end of the Cold War. But it is often perceived as “the Western model” of government which should be imposed on indigenous forms of government in developing countries. Therefore democracy promotion is often opposed by political elites and populations in transition countries. Further, the right to self-determination pursuant to Article 1 (2) UN Charter forbids interference in internal matters of states. Since the form of its government is at the core of the internal matters of each state, states often remain sceptical or even reluctant to democracy promotion. Nevertheless, throughout the 1990s, the commitment of the United Nations to support democracy was much strengthened.

Finally, bringing together the triangle of conflict, state, and democracy, it can be assumed that the construction of a democracy, indeed, requires a minimum of state structures. But state-building and democracy promotion might be planned and even implemented in parallel. For instance, this becomes obvious in the case of holding democratic elections: holding elections – an activity more and more supported by peace-keeping missions – requires a state infrastructure and a stable and secure environment on election day. Hence, administrative entities are implemented while democratic rules are developed. And, state-building and democracy promotion, indeed, may be necessary, but are not sufficient means to build internal peace. Whether they can be adequate and successful means to keep and build peace greatly depends on the specific characteristics and causes of a particular conflict. Therefore only a case-to-case analysis – here below undertaken for the case of

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33 G. Crawford, “Promoting Democracy from Without – Learning from Within”, *Democratization* 11 (2003), 77 et seq. (80).
36 K. Kumar, “International Assistance for Post-Conflict Elections”, in: Burnell, see note 35, 191 et seq. (191-192). The elections in July 2006 in the Congo form a good example in this respect.
Haiti – allows an evaluation of the peace-building capacity of democracy promotion and state-building.

2. Foundations for the Promotion of Democracy in International Law

In general, democracy promotion consists of technical and financial assistance which is undertaken in agreement with the respective state and thus is beyond any dispute.\(^{37}\) In contrast, democracy promotion that uses coercive measures such as military intervention causes and has caused arguments.\(^{38}\)

Democracy – as a form of government – is assigned to be an essential internal matter of a state. Therefore democracy promotion which uses coercive means by the United Nations is assumed to be critical due to its interceding nature into the internal matters of a state. Generally, military interventions must be legalized through a mandate of the UN Security Council, which is only granted if a threat to peace predominates.

In this context, Haiti sometimes was interpreted as a precedent for a universal right for “democratic interventions”,\(^{39}\) that is military interventions mandated to promote democracy. In 1994 the UN Security Council in its Resolution 940 legalized the military, US-led intervention into Haiti in order to restore democracy in that country.\(^{40}\) It resulted in the partly successful attempt to restore the first democratically elected Government of Jean-Bertrand Aristide after its military overthrow in 1991.

Resolution 940 was one of the factors which generated a wide-ranging debate throughout the 1990s as to whether a right to democ-


\(^{38}\) Although coercive measures pursuant to Chapter VII UN Charter vary, e.g. economic sanctions, use of force, in this section reference is only made to military measures due to their significance in the case of Haiti. Other coercive measures which are widely used and were also applied in Haiti will be addressed below.


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By focusing on this material aspect of international law, scholars focused the mandate of Resolution 940 and asked whether supporting democracy can be a legal and legitimate part of a UN Security Council mandate. In doing so they neglected to ask if, and if yes, under which conditions the lack of democracy constitutes a threat to peace and is therefore a sufficient reason to intervene into a states’ domestic affairs pursuant to Chapter VII of the UN Charter.

Evidence shall be given as to whether a right to democracy is emerging in international law or does already exist. Second, a closer look into the international legal frameworks in the Americas especially of the OAS, shall give further insight on the specific Haitian case. Third, UN Security Council Resolution 940 will be examined with regard to the causes and content of the threat to peace emerging from the Haitian case.

a. Searching for Evidence: A Right to Democracy?

In 1992 Thomas Franck opened the scientific discussion on ‘democratic entitlement’, arguing that an individual right to democracy is emerging in international law. Since then a wide-ranging debate has been unfold on this subject in academia and politics. Therewith five aspects have been continuously stressed:

(1) Democracy and Self-determination. As Franck puts it, self-determination is the ‘grandfather’ of democracy. During the 1960s, the UN translated self-determination pursuant to Article 1 (2) UN Charter into a synonym of de-colonization. Therefrom self-determination aims at the sovereignty of a state vis-à-vis other states, that is at “external” sovereignty. In turn, sovereignty vis-à-vis other states is nurtured by “internal” self-determination which is the right of a people to determine independently its political and social future. Nevertheless, the practice of the United Nations during the period of de-colonization indicates that the organization was already involved in the political affairs of the

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41 Literature see below in section a. of this Chapter.
43 Franck, see note 37, 34.
newly emerged Member States. Against this background many scholars deduce a legal norm from Article 1 (2) UN Charter which could legitimize democracy promotion through coercive measures or, even further, a right to democracy. The former is based on the assumption that a people living under a non-democratic rule which expresses its independent and free will to democracy can be legally supported by intervening actors in order to establish a democratic order within the affected state. The latter goes further and assumes that an individual right to democracy can be granted on the basis of Article 1 (2) UN Charter.

Whereas self-determination was interpreted as a legal basis of coercive “democratic interventions” in order to support a people, it can be as well interpreted in the exact opposite way. Therefore it also “… includes the right of a people to freely and without external interference decide upon its political future and the economic system it will implement.” In addition referring to the practical side of the issue, no criteria exist which suggest that a people’s demand for democracy would legalize a coercive intervention. Taking also into account the principle of non-intervention pursuant to Article 2 (7) UN Charter and that the form of government, in this case democracy, constitutes a core component of internal state matters, no universal right to democracy for a people can be assumed yet.

(2) Democracy as a Human Right. Assumptions concerning an individual right to democracy are based on articles 1 and 25 of the International Covenant on Civil and Political Rights (ICCPR) and on Article 1 (2) UN Charter. Article 1 of the ICCPR states that “all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” Following a systematic interpretation, defenders of the human rights-approach to democracy argue that the word “freely” indicates the reference to an individual right of self-determination due to the emphasis on individual rights of freedom granted in the

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46 Franck, see note 37, 9. On this particular aspect see the next paragraph.
47 Wolfrum, see note 19, 679.
In addition article 25 of the ICCPR, directly referring to individuals, highlights political rights, which are interlinked with democracy: every citizen has the right “(a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) 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.”

Although participation and free elections are core elements of democracy no universal, individual right to democracy can be deduced from the text of the ICCPR due to its insufficient definition of elections. Article 25 of the ICCPR does not include the aspect of “competition” which is fundamental to a democratic order. This is also backed by a historic perspective: adopted in 1966 and entered into force in 1976 the ICCPR was supported and ratified by states, e.g. the USSR, which indeed held elections at this time, but on an affirmatory rather than competitive basis. It is very probable that these states would not have ratified a treaty obliging them to competitive elections. Nevertheless it must be considered that state practice has probably changed since then, especially since the end of the Cold War, and this suggests a rather pro-democratic electoral practice.

Although, no universal right to democracy can be traced in international law an increasing political-practical commitment to democracy of the international community of states can be stated. The latter gives rise to the assumption that the evolution of an international right to democracy cannot be excluded. In addition recent evolutions in terms of democratic norms on the regional level back this assumption.

(3) Democracy in Regional Organizations. In the Western world democracy was broadly included into Western international law. Mainly it was introduced as a condition for membership in regional organizations such as the North-Atlantic Treaty Organization (NATO), the Council of Europe, the European Union (EU), and the Organization of American States (OAS). Emanating from these provisions,
policies of democracy promotion were evolved and implemented in Member States. The European Union’s Cotonou Agreement of 2000 and the former Agreements of Lomé I-IV (1975-2000) with African, Caribbean and Pacific States (ACP states) also comprises democracy as one condition for development aid vis-à-vis third states. As will be shown below the legal provisions of the OAS go even further by providing a right to democracy on the regional level.

Although these regional, mostly legally binding, commitments to democracy give further evidence of an emerging norm of democracy in international law, no universal validity can be claimed. Since democracy has its historic roots in the “Western world” it is widely perceived as a typical Western model of government, especially in developing, Arabian and Asian countries. No evidence can be given that a universal right to democracy already exists in international law. But there are further indications that the international community of states is increasing its political commitment to democracy, which, in turn, might foster the formation of a right to democracy in international law.

(4) Democracy and the Practice of International Assistance in Elections. Since the end of the Cold War in 1989 the United Nations has played a crucial role in providing technical assistance and monitoring electoral processes. Although electoral assistance became one of the core functions of the United Nations in the field of political assistance, up to the present no universal standards have been adopted in order to provide a common understanding of democratic elections. Indeed, in 1992 the General Assembly adopted a resolution on guidelines for electoral observation. Instead of comprehending common guidelines, it states only that electoral assistance would be offered on a “case-by-case” basis. Apart from some other single documents, no further ad-

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54 Article 9 of the Cotonou Agreement of 23 June 2000.
55 The term electoral assistance is here used in a broad sense, comprising assistance of the organization and conduct, verification, coordination, technical assistance, follow-up and report as well as training of national observers.
vances have been made in this respect. But a closer look at the practice of the United Nations as well as that of the regional organizations shows that generally one specific type of election is supported: this is the support of free and fair elections which are based on competition between political parties – that is to say democratic elections.59

In conclusion, continuous electoral assistance has been widely accepted and constantly made use of by Member States of the United Nations. Thus it can be assumed that its continuous practice reflects a growing acceptance of democratic principles in the community of states. This assumption is strengthened by the fact that electoral assistance is always based on an invitation by the affected state. That is to say that Member States act positively in order to receive and provide electoral assistance.60 Thus, evidence of a rising commitment to democracy within the international community of states can be given.

(5) Democracy on the Political Agenda. In addition to the assessment made for electoral assistance, democracy became an increasingly important topic on the international political agenda. For instance, in June 1988 a series of International Conferences of New and Restored Democracies started in Manila.61 The conferences encouraged states, international organizations and civil society representatives to attempt to concentrate democratic values and elaborate common strategies to promote democracy.62 This intergovernmental process which enjoys strong support from the United Nations led to the adoption of various General Assembly resolutions referring to democracy which inter alia asked the Secretary-General to report on the actions taken by the United Nations to promote democracy.63 One outcome was, amongst others, the Agenda for Democratization of Secretary-General Boutros Boutros-Ghali. On the one hand he defines democracy promotion as a


60 For an overview of state practice in order to assist national elections see Joyner, see note 56, 344, Table 1. Joyner also provides the legal sources reflecting the opinio iuris of UN Member States.

61 Further conferences were held in Manila (1988), Managua (1994), Bucharest (1997), Cotonou (2000) and Ulaanbaatar (2003 and a follow-up conference in 2006). The next one will be in Qatar, November 2006.

62 Joyner, see note 56, 335.

core task of the organization in order to maintain world peace. On the other hand he argues that "It is not for the United Nations to offer a model of democratization or democracy or to promote democracy in a specific case ... [because there is] ... no one model of democratization or democracy suitable for all societies ...".64 Since then UN Member States increasingly backed the importance of democracy as a precondition for peace and development. In their Millennium Declaration of 2000 they agreed to implement the principles and practices of democracy.65 Finally, they confirmed this primarily rhetorical affirmation by creating the United Nations Democracy Fund in July 2005.66

To conclude, throughout the 1990s the international community of states clearly increased its commitment to democracy on a political-rhetorical level and affirmed the importance of democracy for peace and development. Although this evolution could contribute step-by-step to the formation of an international norm of democracy, the final step in this direction has not yet been taken.

To sum up, there does not exist a universal, legally binding right to democracy in international law which can generally legitimize military interventions to establish or defend democracy within a state. But taking into account the above described evolutions with regard to democracy in international law on the one hand and the practice of the UN Security Council in the past on the other, it could be stated that a legal intervention in order to promote democracy might be possible in some cases. For a close and comprehensive understanding of the Haitian "democratic intervention" it will be necessary to examine the regional context in which it took place.

66 See paras 135-137, World Summit Outcome, A/RES/60/1 of 16 September 2005. The Fund will provide assistance to governmental, non-governmental, national, regional, and international organizations, including relevant UN departments, offices, funds, programmes and agencies. The Fund will complement current UN efforts to strengthen and expand democracy worldwide.
b. Examining the Regional Level: The Democracy Clause of the OAS

Throughout the 1990s the OAS evolved a strong commitment to protect and promote democracy in the Western hemisphere. In contrast to the UN’s lack of binding legal provisions for democracy promotion, the OAS provides such binding legal foundations.\(^67\)

From its very beginning “democracy” was introduced into the organizations’ framework. Indeed the founding Charter of the OAS, adopted in 1948, refers to representative democracy as “an indispensable condition for the stability, peace and development of the region.”\(^68\) However, this provision did not promote a corresponding OAS policy during the Cold War due to the bi-polarization of world politics. Only in the middle of the 1980s – i.e. in midst of the Latin American opening to democratization – did Member States undertake a profound change of OAS policies.\(^69\)

The starting point of the organization’s reform goes back to the second amendment of its Charter in 1985 (Protocol of Cartagena de Indias). With it, democracy became a central pillar of the OAS’ general mandate, especially through the modification of article 2 of the OAS Charter. It now proclaimed the promotion and consolidation of democracy as one of the organization’s “essential purposes”. On this general ground additional provisions to protect or promote democracy were made throughout the 1990s.

In 1991 the General Assembly of the OAS adopted “Resolution 1080” in Santiago de Chile. It was first applied in the case of Haiti. “Resolution 1080” calls upon the Secretary General of the OAS to immediately convene a meeting of the Permanent Council when facing the “sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government in any of the Organization’s member states, in

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\(^68\) Preamble, OAS Charter. In accordance with article 145 of the Charter it entered into force on 13 December 1951. Further references to democracy are made in arts 2b), 3d), 3f), 9a), 9d) 31, 45f), 47 and 95c) of the OAS Charter.

order, ... , to examine the situation, decide on and convene an ad hoc meeting of the Ministers of Foreign Affairs, or a special session of the General Assembly, all of which must take place within a ten-day period.” The ad hoc meeting of Ministers of Foreign Affairs or the special session of the General Assembly “shall ... look into the events collectively and adopt any decisions deemed appropriate, in accordance with the Charter and international law.”

In 1992 the Protocol of Washington introduced the suspension of a Member State subject to the overthrow of its democratically elected government. Furthermore, a wide range of instruments to promote democracy through positive measures such as e.g. electoral assistance, support of political parties, political dialogue or the enforcement of the legislative branch were implemented. Institutionally this is reflected in the creation of a Department for the Promotion of Democracy within the OAS Secretariat in 1990, which is currently restructured and is now part of the new Department of Political Affairs. In 2001 these and other instruments to defend and promote democracy were joined together in the IADC (Inter-American Democratic Charter), adopted unanimously at the General Assembly’s special session in Lima on 11 September 2001.

In conceptual terms the IADC for the first time enhances negative (defense of democracy) and positive (promotion of democracy) meas-

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70 Doc. OAS AG/RES. 1080 (XXI-O/91), paras 1 and 2.
71 Doc. OAS AG/ACT/3 (XVI-E/92) referring to the modification of article 9 of the Charter of the OAS. The Protocol of Washington was agreed on 14 December 1992 and entered into force in 1997.
72 For instance, “Resolution 1080” was thereby strengthened. In face of coup d’états which lead to the overthrow of democratic elected governments it refers to a “… sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government.” In turn, article 19 of the IADC extends the elements defining the breach of democratic order as “… an unconstitutional interruption of the democratic order or an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state.”
73 All 34 Heads of State and Government signed the Charter. For an analysis of the decision-making process which led to its adoption see note 67 as well as A.F. Cooper/ T. Legler, “A Tale of Two Mesas: The OAS Defense of Democracy in Peru and Venezuela”, Global Governance 11 (2005), 425 et seq. (425).
ures to protect and support democracy in the Western hemisphere.\textsuperscript{74} Its most important advancement can be seen in article 1 which contains a right to democracy of the peoples of the Americas on the one hand and which urges governments to promote and defend democracy on the other.\textsuperscript{75} Thereby it establishes the first international norm – outside of Western Europe – referring to a “reciprocal contract of peoples with governments.”\textsuperscript{76} It must further be highlighted that – contrary to the vague concept of democracy of the United Nations – OAS Member States correspond to a particular model of democracy when they refer to democracy, namely to representative democracy.\textsuperscript{77}

Since the legally binding OAS Charter always contained references to democracy,\textsuperscript{78} the IADC is to be treated as a commitment to interpret the outreach of the provisions given in the OAS Charter. Moreover this is affirmed by article 1 of the IADC which states “Democracy is essential for the social, political, and economic development of the peoples of the Americas”. This is in line with the Preamble of the OAS Charter: “... Representative democracy is an indispensable condition for the stability, peace, and development of the region.” With regard to their state practice OAS Member States have been acting continuously to protect and promote democracy throughout the 1990s. They repeatedly applied Resolution 1080 as well as the IADC in several cases of a democratic

\textsuperscript{74} Up to the adoption of the Democratic Charter, reactive instruments in order to protect democracy of Member States, once overthrown, prevailed in the OAS; Ch. Hartmann, “Demokratie als Leitbild der afrikanischen Staatengemeinschaft? Zur Theorie und Praxis demokratischer Schutzklauseln in der Afrikanischen Union”, \textit{VRÜ} 38 (2005), 201 et seq. (205), differs between two functions of democracy clauses in regional arrangements. Firstly, the protection of democracy as in the case of the OAS and EU. Secondly, the assessment of the democratic quality of Member States, e.g. the African Union.

\textsuperscript{75} In the words of article 1 of the IADC: “The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it. Democracy is essential for the social, political, and economic development of the peoples of the Americas.”

\textsuperscript{76} Gaviria, see note 69.

\textsuperscript{77} See e.g. Preamble, arts 2b), 3d), 3f), 9a), 9d) of the OAS Charter. Only Venezuela opposes this definition and insists that the term “participatory democracy” should be included in the organization’s framework.

\textsuperscript{78} Since even the Preamble of the Charter of the OAS refers to democracy. It was successively completed by various amendments of the Charter in 1985, 1992 and 1995. For a more detailed description see above.
breakdown in Member States. Member States also act with opinio iuris in terms of their strong and repeated commitment to defend democracy in the Americas.

In addition, the achievement made by the adoption of the IADC must not be underestimated due to the traditionally crucial handling of the principle of non-interventionism into a member’s domestic affairs – determined by past European and U.S.-American interventionism in the Americas. Against this background the strong commitment to defend democracy, especially through negative measures as envisioned in the IADC – has been lowering the threshold for multilateral action towards Member States.

Notwithstanding, a military defense of democracy by the OAS on the territory of an American state is foreseen neither in its Charter nor in the IADC. In general, regional organizations are expected to be

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82 Ch. Fulda, Demokratie und pacta sunt servanda, 2002, 31. Furthermore Lagos/ Rudy, see note 80, 177 summarize the discussion whether the provisions of the IADC require an amendment of article 23 of the OAS Charter. The latter impairs the principle of non-intervention which is no bar to measures taken “for the maintenance of peace and security in accordance with existing treaties”. A systematic interpretation alludes to the definition of democracy which is seen as precondition for peace in the Western Hemisphere. In turn, democracy promotion is one measure to maintain peace. Therefore an amendment of article 23 of the OAS Charter can be considered as obsolete.

83 Referring to its organizational nature the OAS – founded in 1948, was the first regional organization established in terms of Chapter VIII of the UN Charter. For a comprehensive analysis of the definition of regional organizations under Chapter VIII UN Charter see Ch. Walter, Vereinte Nationen
predestined to resolve a conflict or dispute within the region due to their proximity to regional problems and their legitimacy for its resolution.84 Both the OAS as well as the United Nations were founded with the purpose of maintaining peace. Although Chapter V of the OAS Charter requests the Member States to resolve conflicts and disputes within the OAS, this does not impair any competences of UN organs.85 86 Once military measures are to be taken they must be legalized by the UN Security Council.87 Finally the OAS perceives democracy, in concordance with the United Nations’ understanding, as one precondition for peace and development in the Western hemisphere.88

c. Defining Threat to Peace: Breakdown of Democracy

The multinational military intervention “Uphold Democracy” into Haiti on 19 September 1994 as well as the following UN peace-keeping mission were authorized by Security Council Resolution 940 in order to support the “[…] restoration of democracy in Haiti and the prompt return of the legitimately elected President, Jean-Bertrand Aristide.”89

Thereby the Security Council mandated coercive measures in order to promote democracy for the first time in history.90 This provoked an extensive debate. Pursuant to Article 39 of the UN Charter, the only reason for the use of force against a state consists in a threat to peace.

85 Walter, see note 83, 149.
86 According to Article 54 UN Charter the Security Council must be informed of all measures taken to maintain international peace by regional organizations. For a detailed analysis see A. Frowein, “Zwangsmaßnahmen von Regionalorganisationen”, in: U. Beyerlin et al. (eds), Recht zwischen Umbruch und Bewahrung, 1995, 57 et seq. (66-67).
87 OAS’ sanctions against the Dominican Republic in 1960 build an exception.
88 E. Spehar, “The Role of the Organization of American States in Conflict Prevention”, International Journal on Minority and Group Rights 61 (2001), 61 et seq. (64-65) and for the relation between democracy and development see the Declaration of Managua of 10 June 1993, OAS Doc. AG/DEC/ 4 (XXIII-O/93 as well as the Preamble of the OAS Charter.
89 See note 40, Preamble.
90 Falk, see note 39, 344.
Against this background it is questionable if the rupture with the democratic order in Haiti (see below for details) constituted a threat to peace.

In its Resolution 940 the UN Security Council recognized that it remained the goal of the international community to restore democracy in Haiti and assist the prompt return of the legitimately elected President. It confirmed its readiness “to consider the imposition of additional measures if the military authorities in Haiti continued to impede the activities of the United Nations Mission in Haiti (UNMIH) or failed to comply in full with its relevant resolutions and the provisions of the Governors Island Agreement.”91

The Security Council in Resolution 940 referred explicitly to a regionally destabilizing factor of the Haitian situation. In its preamble it expresses its concern not only with regard to the “humanitarian situation” and the expulsion of the UN’s civilian mission MICIVIH, but also to the “desperate plight of Haitian refugees”,92 constituting a destabilizing factor within the Americas. Neighboring countries, especially the United States and the Dominican Republic, refused to recognize the Haitian refugees as “political” refugees. Instead, they referred to them as “economic” refugees.93 Consequently, it can be assumed that the flow of refugees constituted a destabilizing factor with regard to regional peace.94

It is interesting to note that Resolution 940 was highly influenced by regional policies. This implies that no such resolution would have been possible in an international environment where democracy was not accepted as the only valid system of government as it was in the case of the Inter-American System.95 Besides, American states understand democracy as one precondition for peace in the region (cf. Preamble of the OAS Charter).

Finally, Haiti was classified as a “unique” case requiring “exceptional response.”96 This alludes that the Security Council intended to

91 See note 40, Preamble.
92 See note 40, Preamble.
94 Falk, see note 39, 356.
95 Farer, see note 44, 51.
96 See note 40, para. 2.
prevent any attempts to generalize the Haitian case in order to establish a right to “democratic intervention.” But this Security Council practice cannot be welcomed because it undermines the evolution of universal international law and as the analysis of further military interventions into Haiti will show, the Security Council adapted its decision-making to a more universal approach. However, taking into account the specific circumstances of the intervention as well as general provisions of international law, it cannot be presumed that it constituted a precedent of an universal right to democracy, legalizing coercive measures in order to promote or protect democracy.

To sum up, the military intervention into Haiti in 1994 can be considered legal and legitimate. However, taking into account the specific circumstances of the intervention as well as general provisions of international law, it must not be presumed that it constitutes a precedent for a universal right to democracy which could later build a criterion for the legalization of coercive measures in order to promote or protect democracy.

III. The Haitian Case: Peace-Keeping through State-Building and Democracy Promotion

1. State and Democracy in Haiti

a. Historical Overview: Legacies of the Past

Political and economic instability, authoritarian leadership, as well as a culture of violence in order to resolve social conflicts dominates Haiti. Haitian society is marked by a bi-polar political, social and economic structure, which divides state and nation. Political power has been occupied by the mulatto elite, which also controls the economic resources. Power is furthermore concentrated in the urban regions, especially in the capital Port-au-Prince. The political and economic elite is French speaking, well-educated and pursues a politique du ventre, that is the use of political power based on self-interest instead of welfare orientation. The majority of the Haitians belong to the marginalized, peas-

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antry, which has always guaranteed the revenue of the Haitian state.\textsuperscript{98} Living in the rural hinterland, the peasantry has neither access to political power and economic resources nor to education. It consists of blacks who speak Creole rather than the official language, French.\textsuperscript{99} Furthermore, since the end of the “Golden Age” in the 19th century, Haitian economy has been characterized by constant underdevelopment, giving Haiti its name of “the poorhouse of the Americas.”\textsuperscript{100}

Once the Spanish (1492-1697) and French (1697-1804) colonial rule were ended by a slavery revolution in 1804,\textsuperscript{101} Haitian politics have been marked by brutal and repeated changes of mainly military leadership.\textsuperscript{102} One century of chaos and tragedy prelude the authoritarian rule exercised by the 19 years U.S. occupation of Haiti (1915-1934).\textsuperscript{103} After the occupation Haiti again was under the rule of military leaders, marked by erratic regime changes. This ended when François Duvalier came to power in 1957. He established an authoritarian system, based on personalized, centralized power and the systematic repression of the population, mainly by the so-called Tonton Macoutes, his paramilitary, presidential guard. Through a constitutional amendment, which determined a familial succession, Duvalier was followed by his son Jean-Claude Duvalier, also known as Baby Doc, in 1979. He continued the authoritarian rule of his father, although economically he was less successful. In 1985 popular protests and claims by the economic and political elite arose against the regime and finally led to the escape of Duvalier in February 1987.\textsuperscript{104}

\begin{itemize}
\item \textsuperscript{99} The peasantry comprises 90 per cent of the Haitians in total, thereof 60 per cent live in the rural areas. The remaining 10 per cent refer to the mulatto, mainly urban elite. See S. Mintz, “Can Haiti Change?”, \textit{Foreign Aff.} 74 (1995), 73 et seq. (82-83).
\item \textsuperscript{101} Mintz, see note 99, 87.
\item \textsuperscript{102} B. Weinstein/ A. Segal, \textit{Haiti. Political Failures, Cultural Successes}, 1984, 17.
\item \textsuperscript{103} Ibid., 47-49.
\end{itemize}
After Duvalier’s downfall a military junta was to lead the transition process until the implementation of democratic elections, scheduled for November 1987. In consequence, popular expectations were raised that elections would set an end to authoritarian rule. But they ceased very early when the elections in 1987 were brutally ruptured by the military. Paralyzed by coups and countercoups, the country was polarized between Duvalier’s supporters and his opponents. In 1990, military leader Prosper Avril, was finally forced to resign by popular demand and U.S.-American pressure. Finally the first free and fair elections in Haitian history took place in November 1990, under intense observation of the international community, especially the UN.

b. Development of the State and Democracy in Haiti

After the departure of the Duvaliers and the holding of democratic elections in 1990, Haitians awaited a severance from their authoritarian past, which had meant the preclusion of welfare and political life for most of Haitians. But so far, in 2006, little has changed. State structures remain underdeveloped and, consequentially, the historical cleavage between state and nation persists. The Haitian state is failing because its ability to provide physical and human security to its nation is very limited. Physical security cannot be granted due to the lack of an adequate number of trained police forces throughout the country. Conversely where police are present, they very often create violence and fear instead of security. Certain areas of the country are left to self-justice or have been controlled by private armed groups, often sustained by the local population. Due to the absence of an effective justice system, including a court system and functioning prisons,

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107 Elections were observed by the United Nations Observer Group for the Verification of the Elections in Haiti (ONUVEH). Compare Gélin-Adams/ Malone, see note 100, 296.
108 Ibid., 299-300.
rule of law is scarcely apparent in the Caribbean country. The Constitution, which was adopted in 1987, is not yet fully implemented and this hinders the establishment of state institutions. In turn, bureaucracy is inflated by 45,000 public servants who are badly or even not paid at all. Hence, corruption has been pervading public service as well as the police, who are also linked to the increasing drug trafficking activities in Haiti.\(^\text{111}\)

Human Security requires the allocation of public benefits. But the Haitian state is marked by underdeveloped infrastructures: it lacks a functioning telecommunication, electricity and road system. For instance, parts of the country cannot be reached due to the absence of roads.\(^\text{112}\) Further public benefits, such as a health and a social system are not available. Correspondingly Haiti’s socio-economic performance is weak: since the 1980s the economy has shown a negative growth rate\(^\text{113}\) and the majority of Haitians live in poverty.\(^\text{114}\)

Against this background democracy was expected to give rise to profound changes in Haitian politics at the beginning of the 1990s. Since then, Haiti has met many challenges, again moving between authoritarian rule and democratic order.

Elections have played a crucial role in Haiti since 1990. Although first the population accepted elections to legitimize power in Haitian politics, their adoption was restricted by the political elite, especially the military. In this respect they were also subject to internal conflict, mostly amongst the political elite. Later, when fraudulent elections had taken place, this acceptance also declined amongst the Haitian population. This is reflected in Haitian electoral history as follows: first, with

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\(^{111}\) Fatton, see note 106, 109.

\(^{112}\) International Crisis Group, *Haiti after the Elections: Challenges for Préval’s First 100 Days*, ICG Latin America/Caribbean Briefing No. 10 of 11 May 2006, 10-11.

\(^{113}\) UN/ World Bank et al., *Republic of Haiti, Interim International Cooperation Framework, 2004-2006*, para. 21, available at: <http://haiticci.undg.org>. Furthermore, in terms of the economic development, foreign aid and investments rather contributed to worsen than to improve the situation due to their massive investments, which very often were followed by sudden withdrawal.

the elections in 1990 formally began the democratic rule, which was soon put to an end by a military coup against Aristide in 1991. Shortly after Aristide’s return from exile Presidential elections were held in 1995. These elections were subject to conflict because many supporters of Aristide demanded the extension of the Presidents’ mandate because he had not fulfilled his Presidency during his three-years in exile. Through international and oppositional pressure, Aristide acted according to the Haitian Constitution and stepped down. His former Prime Minister, ally and also member of his party Fanmi Lavalas, René Préval was then elected President. In contrast to the free and fair, although in organizational terms deficient, Presidential elections of 1995, the following Presidential elections in 2000 were fraudulent. Aristide and his party Fanmi Lavalas declared a majority, although many political parties had refused to participate in the elections and vote counting was manipulated in order to avoid a second round of the elections. Nevertheless, the Provisional Electoral Council (Conseil Electoral Provisoire, CEP), supported by President Préval, confirmed the victory of President Aristide. In consequence, Aristide governed on a weak legitimate basis, which inter alia led to a new outbreak of the Haitian conflict by 2001.

Thus, Haiti has experienced repeated elections, the latest took place in February 2006. With it the results of national elections in Haiti are for the first time widely accepted within the population and political elite. Altogether they were strongly supported by the international community. Nevertheless, the country lacks the administrative institutions and knowledge to organize regular elections. For instance, the CEP has remained provisional since 1990. This constitutes one example of the incomplete implementation of institutions foreseen in the Constitution of 1987, re-election of the Haitian President is prohibited. An additional term is only possible after an interval of five years. A third term is interdicted. Fanmi Lavalas is a splitter of the former Movement Lavalas, which was created by Aristide and fell apart because many of his followers turned away and created a new party, called Organisation du Peuple en Lutte (Organization of the People in Battle).


Parliamentary elections in 1997 were also fraudulent and weak in technical terms.

See under III. 2. c.
stitution of 1987. Pursuant to the Constitution, the CEP should be composed of regional representatives, who are not in place yet because the respective regional and local organs have not been established.

Structural institutional blockades constricted democratization further. Since the return of Aristide in 1994, Parliament and the Executive could not agree on a candidate for the Prime Minister. Consequently Préval dissolved the Parliament by 1997. He nominated independently a Prime Minister and continued to govern on the basis of decrees, much as Aristide did before. But in addition to that he governed on unconstitutional ground,121 because, differing from other semi-presidential systems, the Haitian Constitution prohibits in its article 111 (8) the dissolution of the Parliament.122 In 2004 the Parliament was again dissolved because no parliamentary election had been held in 2003 due to the Presidents’ and Legislatives’ previous incapacity to assign the CEP. In consequence, Aristide governed again on the basis of decrees.

Besides these institutional problems, the political culture of the Haitian elite has also been retarding democratization. In general, political culture here is characterized by a winner-takes-all mentality, combined with a personalized, strong leadership. Throughout the 1990s, under formal democratic rule, Haitian politics were also personalized and polarized by focusing on the figure of Jean-Bertrand Aristide. Although he took office in order to oppose the traditional Haitian political and economic elite, featured with a pro-poor and anti-liberal rhetoric, he rapidly had changed his attitudes after his return to Haiti in 1994. When he was re-elected in 2000, he was characterized as an authoritarian leader. Consequentially Haitians grew increasingly disillusioned with democracy and were further alienated from politics, thus compounding the well-worn division between the politicized urban centre and the apolitical, non-participating rural areas.123

Finally, after the ousting of President Aristide in 2004, the Interim Government of Alexandre Boniface was indeed legally appointed. But


122 Although the Haitian Constitution of 1987 adopted many provisions of the Fifth French Republic’s Constitution, it differs in terms of restriction of executive, especially Presidential, powers. For a comparison of constitutional law in the Haitian case see L. Aucoin, “Haiti’s Constitutional Crisis”, B. U. Int’l L. J. 17 (1999), 115 et seq. (121).

as it focused on the organization of national elections in order to fill the
existent power vacuum, it missed the opportunity to implement neces-
sary reform policies, which were necessary to produce democratic sta-
ility in Haitian politics. Instead, the status quo persisted.

To sum up, the Haitian state is not able to provide physical and hu-
man security to its citizens due to a lack of resources and functioning
state institutions. In this respect it is a failing state. Unimplemented and
weak democratic institutions prevail, especially the Parliament and
elected local institutions. Furthermore Haitian political culture is char-
acterized by authoritarian behavior of the political elite and the alien-
ation of the population from politics. In consequence, Haiti lacks a de-
mocratic order which is not consolidated yet.

2. Roots, Evolution and Surfacing of the Haitian Conflict

a. 1991: Overthrow of the First Haitian Democratic Government

On 29 September 1991, only seven months after his inauguration, the
Government of President Aristide was overthrown by a military coup
d’état, which was supported by parts of the economic sector. Before-
hand, Aristide had also set alight the smoldering conflict by two impor-
tant speeches. He first addressed the UN General Assembly by agitat-
ing against the Force Armée d’Haiti (FADH) and the established politi-
cal elite. In Haiti he also called on the population to inflict self justice
against members of the military. After the coup Haiti was once more
governed by a military de facto regime which ruled constantly by
means of repressing violence. In the aftermath of the coup the military
junta, led by General Cédras, ordered the persecution and killing of Ar-
istide’s followers. In turn, Aristide went into exile to the United
States.

The OAS reacted immediately. It applied Resolution 1080, which
had been adopted merely three months before, and condemned the
break with the democratic order in Haiti:

125 Malone, see note 3, 61.
126 Estimated 200-300 people were killed in the direct aftermath of the coup.
Compare Sella, note 124, 121.
127 See note 70.
"[...] the grave events that have occurred in Haiti constitute an abrupt, violent, and irregular disruption of the legitimate exercise of power by the democratic government of that country."\textsuperscript{128}

So far, this Resolution constituted the strongest commitment made to democracy in the Americas.\textsuperscript{129} The OAS undertook various efforts to promote the restoration of democracy, e.g. delegating a fact finding mission to the Caribbean country in order to observe the situation and foster political dialogue, as well as economic sanctions.\textsuperscript{130} In February 1992 the fact finding mission was followed by the establishment of a long-term mission, which later became a joint UN/OAS mission.\textsuperscript{131} Only when OAS measures, including economic sanctions, were unsuccessful in November 1992, did the regional organization request support from the United Nations.\textsuperscript{132} Then the U.S. and the United Nations, in cooperation with the OAS, took a leading function in the restoration of the regime of Aristide.

In the period from the overthrow of Aristide in September 1991 up to the decision to intervene by military force, all negotiations – mainly between the de facto government, Aristide and a parliamentary commission – failed. Contentious issues remained unchanged during this process. They comprised the legitimacy of the de facto government; the acceptance of a Prime Minister appointed by Aristide; the time for the return of Aristide; the role of the military after the return of Aristide and whether the militias would get an amnesty when abandoning the country.\textsuperscript{133} Meanwhile the human rights situation deteriorated in Haiti.

\textsuperscript{128} OAS Doc. MRE/RES/1/91 of 3 October 1991.
\textsuperscript{131} For more information on this mission see under III. 3. c.
\textsuperscript{132} OAS Doc. CP/RES/594 of 10 November 1992.
\textsuperscript{133} Fatton, see note 106, 77-106.
Self-justice, arbitrary arrests, torture and killings of Aristide followers dominated day-to-day life in Haiti.\footnote{I. Martin, “Haiti: International Force or National Compromise?”, \textit{Journal of Latin American Studies} 31 (1999), 711 et seq. (713).} In consequence thousands of Haitians fled their country to the United States or the Dominican Republic.\footnote{M. Morley/ C. McGillion, “‘Disobedient’ Generals and the Politics of Re-democratization: The Clinton Administration and Haiti”, \textit{Political Science Quarterly} 112 (1997), 363 et seq. (364). See in this respect also the wording of S/RES/940, see note 40.}

When the Security Council authorized the military intervention in 1994, the junta handed over power in October 1994.\footnote{For a description of the events leading to the return of Aristide see below.} In consequence, President Aristide returned to the country on 15 October. Since the course of the conflict had been focused on the return of Aristide, it had became extraordinarily personalized. Thus the Haitian conflict was considered to be resolved for the time being.

With regard to the conflict’s form, issue, structure, and actors, it showed one novelty in Haiti’s history. The form to carry out the conflict – by a coup d’état – was rather ordinary than extraordinary in the Haitian context. Its issue also remained the same i.e., exercise of national power, although national power this time was linked to the exercise of democratic power, and not to authoritarian rule as in the past. The actors of the conflict and, for the time being, also its superficial structures had changed. While in the past conflicts were always carried out amongst the elite in order to maintain or gain power, now a social conflict had erupted, which had been fermenting under the surface of Haitian society for decades. This conflict was a conflict between the traditional elite and the Haitian population, represented by Aristide. Finally, it is noteworthy that the conflict was presumed to have been resolved by national as well as international actors, when President Aristide’s power was restored. At the same time the conflict’s originating structures remained.

b. 1994-2004: The Slow, but Predictable Return to Conflict

On his return in October 1994 President Aristide encountered the same, even more deepened power constellations and social structures as on his departure from the island. His opponents in the military and par-
liamentary opposition persisted. While maintaining his anti-neoliberal rhetoric he had changed his economic policies because of financial restrictions from the international community.\textsuperscript{137} With regard to former conflicting parties, the role of the military remained one major challenge for Aristide’s government as well as his successor Préval. When in exile Aristide had decided that he would reduce the FADH from 8,000 to no more than 1,500 members. Shortly after the intervention it was reported FADH “has almost ceased to exist as an organization.”\textsuperscript{138} In February 1995, on the retirement of the four most senior officers of the army, FADH was dissolved.\textsuperscript{139} Thus, ex-militias were not integrated into society due to a lack of job opportunities. Since then the “pay issue” had been a continuous subject of dispute between Aristide and his opponents. Whilst the ex-militias demanded pensions, Aristide insisted that the government was not able to pay the demobilized soldiers due to a limited budget.\textsuperscript{140} In consequence, the discontent amongst former militias grew and formed a firm opposition against Aristide, leading to the creation of armed groups.

Aristide, in turn, worked towards his retention of power. In doing so Aristide’s behavior became increasingly authoritarian. He rested his power on the Interim Public Security Forces, later the Haitian National Police (HNP) and armed gangs, the so-called Chimères. The latter were partly financed by Aristide and his supporters in order to intimidate political opponents.\textsuperscript{141} Their activities spread during the 1990s and in consequence of Aristide’s return in 2000 culminated in a systematic repression of regime opponents.\textsuperscript{142} The conflict re-emerged again when the legitimacy of Aristide’s power was at stake in 2000. After his re-election in the fraudulent elections of 2000, the polarization between Aristide and his political opponents increased further because the latter did not accept the electoral results and therefore rejected Aristide’s presidency. In consequence, tensions grew steadily, the number of armed quarrels mounted. In response to the discerning follow-up to the elections in 2000 the OAS had established an \textit{OAS Special Mission to Strengthen Democracy in Haiti After Aristide: Still on the Brink}, \textit{Current History}, February 2005, 83 et seq. (84-85).
Haiti in order to facilitate a national dialogue between the conflicting parties. Nevertheless, on 17 December 2001 armed groups attacked the Presidential Palace in Port-au-Prince. In a counter-attack Aristide supporters set houses and offices of opposition parties on fire. The OAS reacted again immediately by condemning the events which had taken place in Haiti. But despite all negotiation efforts by the OAS and national parties the situation deteriorated further.

c. 2004: Ousting of President Aristide’s Government

In February 2004 the conflict between Aristide supporters and his opponents worsened significantly. Armed rebel groups, composed of mainly ex-militias and former supporters of the military junta of 1991, such as the Front Révolutionnaire Armé pour le Progrès d’Haiti (FRAPH), demanded Aristide’s resignation. His return to presidency through manipulated elections in 2000 and his constant refusal to re-establish the army or to pay the ex-soldiers were the main accusations against him.

On 5 February 2004 armed rebels occupied the city of Gonaïve, in Northern Haiti. By 24 February 2004 they already controlled half of the country. All over Haiti police stations were occupied by rebel groups. Rebel groups consisted in large part of former Tonton Macoutes and soldiers. Aristide failed to regain control over the state’s territory because the HNP either refused to fight against the rebels or retreated. In turn, in many parts of the country, the rebels assumed police functions. In Port-au-Prince some slums were also dominated by armed, partially criminal, groups. Furthermore, popular demonstrations

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143 OAS Doc. CP/RES/772 (1247/00) of 4 August 2000.
146 Various groups, also the Armée Cannibale, which formerly worked together with Aristide, formed the alliance Front pour la Libération et la Reconstruction Nationale. Once the alliance had reached its objective, it was dissolved and each group continued to exist on its own. See International Crisis Group, see note 110, 10.
emerged regularly and the situation was aggravated by the violent assaults of the Chimères opposing the rebels. At the same time Haitians started to flee to the United States, where they were immediately sent back to their country due to a restrictive U.S.-migration policy.

In the course of the conflict both sides insisted stubbornly on the following positions, finally leading to the aggravation of the situation: on the one hand the rebels demanded Aristides resignation. On the other hand Aristide insisted on the legitimacy of his presidency. Nevertheless he vaguely offered new elections by the end of 2004. Negotiations between the rebel groups and the government of Aristide were facilitated by the international community, especially by France and the U.S.

With regard to the international involvement in this crisis, it is noteworthy that the OAS had – as in the course of the conflict in the first half of the 1990s – taken a leading role when the crisis arose in May 2000. Only when the situation aggravated and peaceful means such as good offices and technical assistance had failed, other actors, especially the U.S. and France, took over the leading position. The U.S. again lobbied for the resolution of the conflict due to the exodus of Haitians fleeing to the U.S. In addition, France played a far more active role at the side of the U.S. than it played at the beginning of the 1990s. Secretary-General Kofi Annan reacted by appointing the diplomat Reginald Dumas from Trinidad and Tobago as his Special Representative for Haiti in order to observe the situation in that country.

Finally, on 29 February 2004 Aristide renounced the Presidency and fled the country because he was not able to control the situation. Before leaving, he submitted a letter to the U.S. American embassy through which he explained that he would resign in order to avoid a bloodbath in Haiti. After he had left the country in a U.S. chartered plane to the Central African Republic, he claimed that he had become the “victim of a modern kidnapping.” His position was backed by the Caribbean

149 International Crisis Group, see note 110, 9.
150 This evolvement has probably two causes: first, the decreased interest of the U.S. in the Latin American region due to its heightened engagement in the Middle East. Second, the reluctance of France to a U.S. intervention into Iraq in 2003. In this context the Haitian case provided a good opportunity to prove Frances’ loyalty to the last superpower.
152 Erikson, see note 142, 87.
Community (CARICOM), which presumed that President Aristide had been overthrown by the U.S. and France.  

When Aristide resigned, Alexandre Boniface, President of the Supreme Court, became the Interim President of the country, a procedure pursuant to article 149 of the Haitian Constitution. The interim government composed of technocrats and not politicians committed itself to work for the organization and implementation of national, democratic elections in order to establish a new and fully legitimized government. In comparison with the coup in 1991, it can be stated that this time Haitians acted according to the Constitution and formally resolved the conflict in a legal way.  

Although the first steps were taken on a formal level, violence persisted throughout the country. Reacting immediately to the ouster of Aristide, the Security Council had convened a special session and had authorized – as in 1994 – a multinational force, succeeded by an UN peace-keeping mission.  

With regard to its issue, form, structure, and actors, the re-emerged conflict had changed in comparison to the beginning of the 1990s. First, its issue, exercise of national power, remained. It only differed in terms of its shaping. This time the legitimacy of the de facto government of Aristide was at stake. Second, the actors of the conflict changed gradually. While in the beginning of the 1990s Aristide was opposed merely by the traditional military and economic elite, now former followers of his own turned against him, because he had not fulfilled their expectations. In the eyes of many, Aristide’s government constituted just one more corrupt regime in Haitian history. Moreover, the conflict was penetrated by criminal groups. Third, while the form of the conflict changed from a – in the Haitian context “conventional” form of conflict – military coup to widespread rebel insurrections, its structure remained consistent with traditional conflict structures because it was a conflict amongst the elites on access to political power. Indeed, Aristide did not originate from the traditional mulatto elite of Haiti, but from the rather poor, rural majority of Haitian society. Although, his origins differ, he adapted his behavior to that of the traditional Haitian elite.

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153 Ibid., 88.
154 Erikson, see note 142, para. 9.
155 See note 151, para. 19 and para. 20.
156 See under III. 3. d.
157 Fatton, see note 106, 204.
Furthermore, he had mobilized new forces and therewith introduced new destabilizing factors into the Haitian conflict.

Finally it can be stated that the Haitian conflict is deeply rooted in the schism between the Haitian state and nation. In reference to the state, it was not capable to implement security reforms, which could have prevented a military coup or the following rebel insurgencies. With regard to the latter, this was aggravated by the fact that rebel groups took over police functions and therefore enjoyed partly popular support. With regard to human security the Haitian state could not evolve an output capacity which would have improved the socio-economic situation for its population. Here the root cause of the Haitian conflict lies. Since the access to power determines the access to resources, the conflict will not cease as long as power is not legitimately re-distributed and thereby resources made accessible for the whole population. Democracy is assumed to provide respective legitimate procedures to re-distribute power and resources in a peaceful manner. In the Haitian case, indeed, democratic elections took place. But they did not lead to a sustainable re-distribution of power due to the lack of implemented, functioning institutions and the lack of a democratic political culture. Therefore, democratic elections alone did not solve the repeated outbreak of the conflict. Against this background the state-building and democracy efforts undertaken by UN peace-keeping missions to resolve the Haitian conflict are questionable.

3. On the Ground: UN Peace-Keeping Approaches in Haiti

All over the world in no country have as many UN peace-keeping missions been stationed as in Haiti. Altogether since 1993 five missions were deployed:

(a) United Nations Mission in Haiti (September 1993-June 1996 – UNMIH),
(b) United Nations Support Mission in Haiti (July 1996-June 1997 – UNSMIH),
(c) United Nations Transition Mission in Haiti (August 1997-November 1997 – UNTMIH),
(d) United Nations Civilian Police Mission in Haiti (December 1997-March 2000 – MIPONUH),

In the following, special attention will be drawn to UNMIH and MINUSTAH because of their significance with regard to military interventions in the context of democratic state failing. On the one hand both missions have been undertaken in direct reaction to a clear rupture with democratic order in Haiti. On the other hand their mandates addressed the support of democratic institutions. In order to complete the picture of peace-keeping in Haiti and to build a bridge between the two highlighted missions, the remaining three missions will be examined very briefly. Additionally, MICIVIH will be examined due to its interference with the implementation of UNMIH.

a. UNMIH (1993-1996): A Narrow View on an Ample Problem

The United Nations Mission in Haiti (UNMIH) was established in September 1993 for the purpose of assisting the implementation of the Governors Island Agreement.\(^\text{158}\) The latter was agreed – after almost one week of negotiations – between Aristide, parliamentary representatives, and the de facto government of General Cédras on 3 July 1993. It comprised the facilitation of a political dialogue under the auspices of the United Nations and the OAS, the appointment of a new Commander-in-Chief by Aristide and, in turn, the early retirement of General Cédras. President Aristide was to return on 30 October 1993. Furthermore it requested the presence of the United Nations in Haiti in order to support the modernization of the army and the establishment of a police force. Subsequently another document, the New York Pact, was signed on 14 July 1993, which provided for a six month truce to guarantee a smooth and peaceful transition and invited Aristide to appoint a new Prime Minister.\(^\text{159}\) When the new Prime Minister, Robert Malval, was then assigned and approved by parliament, the two month


old UN oil and arms embargo was suspended on 25 August 1993. On 8 September 1993 an advance team, led by the UN/OAS Special Representative Dante Caputo, traveled to Haiti. It concluded that a deep polarization between the conflicting parties and the violation of human rights persisted.

*aa. Deployment*

Although promising at the beginning, the deployment of UNMIH turned out to be difficult. Amid tensions, provoked by the scheduled return of Aristide, the human rights situation deteriorated significantly. UNMIH was finally dispatched on 11 October 1993, but when it was about to land on the island, its disembarkation was prevented by organized civilian armed groups – supported and instructed by the *de facto* military regime. These incidents, obviously obstructive to the implementation of the Governors Island Agreement, were additionally aggravated by further human rights abuses against supporters of Aristide and the dismissive posture of the army against UNMIH. In consequence the Security Council, reacted immediately with the re-imposition of its oil and arms embargo.

In the period from October 1993 to September 1994 disruptions between the conflicting parties were further deepened and accordingly the climate of repression increased in Haiti, when the bulk of MICIVIH staff was withdrawn and the impossibility to deploy UNMIH became evident. Diplomatic efforts by the UN and OAS continued and the “Group of the Friends of the Secretary General for Haiti” fostered fur-

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160 S/RES/861 (1993) of 27 August 1993. The oil and arms embargo was imposed by the Security Council upon request of the OAS (OAS Doc. CP/RES/594 of 10 November 1992). The OAS had previously imposed a regional trade embargo which had remained ineffective (OAS Doc. MRE/RES/2/91 of 8 October 1991). After the imposition of the embargo in August 1993, the UN undertook, alongside the U.S., the lead position in the Haitian crisis.


162 Ibid., para. 22.


164 Malone, see note 3, 91-92.

ther political dialogue.\textsuperscript{166} Despite these initiatives the conflict remained unsolved. The mandate entrusted to UNMIH could not be implemented, but still the Security Council prolonged the mandate.\textsuperscript{167} Since no further advancements were made, it intensified the economic sanctions, reaffirming that:

“[…]
the goal of the international community remains the restoration of democracy in Haiti and the prompt return of the legitimately elected President, Jean-Bertrand Aristide, under the framework of the Governors Island Agreement.”\textsuperscript{168}

It also demanded the creation of the proper environment for the deployment of UNMIH.\textsuperscript{169} Given that these conditions were not established, the use of alternative means was first hesitantly discussed.\textsuperscript{170} Once more the Security Council, supporting a request of the Ministers of Foreign Affairs of the OAS, highlighted the need to rapidly dispatch UNMIH as soon as conditions would permit. Therefore the UNMIH mandate was extended for one month until 31 July 1994.

When all attempts to support the solution of the conflict ended in an impasse and when the internal pressure grew on U.S. President Clinton due to the increasing flows of Haitian refugees into the U.S. and due to parliamentary pressure groups condemning Clinton’s restrictive migration policy,\textsuperscript{171} the U.S. campaigned for the use of military means in order to restore democracy in Haiti. Aristide, in his letter to the Security Council on 31 July 1994 stated:

“[…]
take prompt and decisive actions, under the authority of the United Nations, to allow for [the Governors Island Agreement] full implementation.”\textsuperscript{172}

\begin{thebibliography}{17}
\bibitem{166} The “Group of Friends” was initiated by France and Venezuela in 1992. It comprises Canada, France, United States and Venezuela from the outset, Argentina since 1994 and Chile since 1996.
\bibitem{169} Ibid.
\bibitem{171} Clinton defined the Haitian refugees as “economic” and not “political” refugees. Therefore no asylum could be granted to them and all refugees – estimated 38,000 from 1991 to 1994 – were sent back to Haiti. Compare Morley/ McGillion, see note 135, 364-366.
\end{thebibliography}
On 31 July 1994, the Security Council adopted its Resolution 940. By the terms of this resolution, the Council acting under Chapter VII of the Charter, authorized Member States to form a multinational force under unified command and control, to use all necessary means to facilitate the departure of the military leadership, the prompt return of the President and the restoration of the legitimate government authorities. In Haiti the de facto government of Joinissant, previously appointed by the military, proclaimed the emergency status over Haiti. At the end of August 1994 Venezuela, supported by the “Group of Friends”, tried to arbitrate in the dispute once more. Since this remained ineffective, Secretary-General Boutros Boutros-Ghali declared that all attempts had failed.173 While a military intervention was prepared, the United States took a further unilateral, diplomatic initiative by sending a mission, headed by former U.S. President Jimmy Carter to Haiti. On 18 September 1994 the Carter Mission, composed of Jimmy Carter, U.S. General Colin Powell and U.S. Senator Sam Nunn, attempted to negotiate an agreement which called upon Haitian military to cooperate with U.S. military and for Cédras to retire and leave the country peacefully, no later than 15 October 1994.174 Hence, on 19 September 1994 the lead elements of the multinational force (MNF) landed without opposition on the island.175 One month later, on 12 October 1994, General Cédras and his followers resigned from power and went into exile to Panama.176 Finally, on 15 October 1994 President Aristide returned triumphantly to his country and assumed power.177 In a short-term perspective the MNF had completed its mandate and successfully restored democracy in Haiti. The weeks following the arrival of the MNF were marked by further improvements and politically motivated violence as well as human rights abuses declined.

**bb. Mandate**

With Resolution 940 the Security Council had reinforced and extended UNMIH’s mandate. It decided that the MNF would terminate its mission and UNMIH would assume the full range of its functions de-

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173 Kumar, see note 123, 26.
174 Sella, see note 124, 247.
175 Malone, see note 3, 110.
176 Stotzky, see note 118, 40-41.
177 In consequence of Aristide’s return economic sanctions were lifted, S/RES/944 (1994) of 29 September 1994, para. 4.
scribed when a secure and stable environment had been established and
UNMIH had adequate force capability and structure.\textsuperscript{178} According to
Resolution 940 UNMIH should assist the democratic Government of
Haiti to: sustain the secure and stable environment; professionalize the
Haitian armed forces and create a separate police force and establish an
environment conducive to the organization of free and fair elections.\textsuperscript{179}
While the MNF had to create a stable and secure environment UNMIH
should support the consolidation of the democratic order later on.

\textit{cc. Composition and Implementation}

With regard to its implementation UNMIH advance teams were de-
ployed on the ground in order to observe the stabilization efforts of the
MNF and coordinate the foreseen transition from the MNF to UN-
MIH in the months from September 1994 to January 1995.\textsuperscript{180} UNMIH
took over from the MNF on 31 March 1995. Nearly two years after its
establishment, UNMIH started its work with a maximum of 6,000
troops and 900 civilian police officers (CIVPOL). The latter was armed
and disposed of arrest authority – a novelty in peace-keeping.\textsuperscript{181}
CIVPOL next to its police functions unexpectedly helped to provide
security.\textsuperscript{182} Additionally, 460 civilian, international and local staff were
employed. It worked under the oversight of the newly appointed Spe-
cial Representative of the Secretaries General of the UN and OAS, who
also oversaw the activities of MICIVIH – a form of close cooperation
between the UN and a regional organization which constituted an in-
novation in UN peace-keeping missions. Once deployed on the
ground, the mandate of UNMIH was extended twice, until its final
withdrawal on 30 June 1996. At this time its contingent had been
greatly decreased to 1,200 troops and 300 police personnel.\textsuperscript{184}

\textsuperscript{178} Ibid., para. 8.
\textsuperscript{179} Ibid., paras 9 and para. 10.
\textsuperscript{180} S/RES/944 (1994) of 29 September 1994, para. 1. In January 1995 its man-
\textsuperscript{181} See for its functions in detail, A. Dobbin et al., \textit{America's Role in Nation-
Building: From Germany to Iraq}, 2003, 76.
\textsuperscript{182} As to the unforeseen duties see, Background information on UNMIH, UN
Depts/dpko/dpko/co_mission/unmihbackg2.html>.
Immediately after its arrival UNMIH undertook successfully various security measures such as carrying out patrols and escort of humanitarian relief convoys in order to sustain “the secure and stable environment”.\textsuperscript{185} It faced major challenges only once with regard to the Haitian security situation. In November 1995 social tensions increased and led to the killing of two deputies. UNMIH reacted with the deployment of Quick Reaction Forces and re-established control.\textsuperscript{186}

dd. Humanitarian Aid

One of UNMIH’s major tasks was to make humanitarian assistance available. Thereby it provided assistance in areas such as power supply, security of food supplies, engineering support and nutrition management.\textsuperscript{187} In conjunction with these duties an innovative approach was developed: for the first time a UN peace-keeping mission integrated the work of UNDP.\textsuperscript{188} The Secretary-General of the United Nations appointed C. Ossa as his Deputy Special Representative and concurrently UNDP Resident Representative. This was the first time that the United Nations had linked a peace-keeping mission to development activities in this manner. The linkage was intended to promote closer cooperation between all concerned and to facilitate the transition from UNMIH to continuing peace-building activities by the United Nations in Haiti.

ee. State-Building and Democracy Promotion

Throughout its implementation UNMIH’s mandate, as outlined in Security Council Resolution 940, underwent a shift from a combination of military and police functions to primarily police functions in order to assist an effective state-building. This evolution was determined by the disintegration of the police forces from the FADH and the following dissolution of the military. Against this background UNMIH supported the establishment of a 5,000-strong Haitian National Police (HNP).\textsuperscript{189} CIVPOL mainly monitored and guided this process, most

\begin{flushleft}
\textsuperscript{185} See note 40, para. 9 (a).
\textsuperscript{186} Ibid., 17.
\textsuperscript{187} Ibid., 15.
\textsuperscript{189} Kumar/ Cousens, see note 188, 5.
\end{flushleft}
notably by offering a trainee program.\textsuperscript{190} With reference to the concept of UNMIH’s efforts to support the establishment of HNP, it was embedded in an exceptional, comprehensive understanding of peace-keeping, as noted by the Security Council: “[The Security Council] reaffirms the importance of a fully functioning, national police force of adequate size and structure to the consolidation of democracy and revitalization of Haiti’s system of justice.”\textsuperscript{191}

Thereby, peace-keeping was closely linked to the establishment of a solid democratic system, including a secure environment and a functioning justice system. Nevertheless, although police officers were trained, it was not sufficient that police officers knew how to arrest somebody, while at the same time an effective court system was not available.\textsuperscript{192} Furthermore the size of HNP was too small with regard to a Haitian population of more than 7 million. Rural areas and slums in Port-au-Prince – the main source of violence – were partly not covered by police forces and consequently lapsed into self-justice.\textsuperscript{193} Insufficient numbers of HNP were mainly determined by difficulties in recruiting adequate personnel and by a lack of resources. Finally one major problem of the Haitian conflict was left open: former militias were neither disarmed nor reintegrated into society. UNMIH missed to respond to this problem due to its narrow approach, only focusing policing issues. Apart from that UNMIH paid special attention to the planning of a smooth and orderly transfer to the government of Haiti of its responsibilities and functions. The Security Council had stressed the importance of a fully functioning national police force for the consolidation of democracy in Haiti.\textsuperscript{194} In accordance with its mandate UNMIH provided a twofold assistance to the local and legislative as well as to the Presidential elections in June and December 1995. In cooperation with the OAS and MICIVIH it provided successfully logistic and financial assistance as well as technical assistance to the CEP.\textsuperscript{195}

\textsuperscript{190} Mendelsson-Forman, see note 109, 20-21.
\textsuperscript{192} Mendelsson-Forman, see note 109, 21.
\textsuperscript{193} Kumar/ Cousens, see note 188, 6 and 7.
\textsuperscript{195} See note 182, 15.
ff. Fulfillment of Mandate

After 15 months (dated from the 31 of March) on the ground, UNMIH left Haiti in June 1996, its comprehensive mandate only partly fulfilled. Although it was effective in providing humanitarian aid and electoral assistance, it did not achieve its primary goal of establishing a functioning police force. Due to a lack of man-power, equipment and knowledge, the HNP was not able to protect Haitian society on its own. Nevertheless UNMIH adopted various innovations – amongst them the integration of UNDP.

b. UNSMIH, UNTMIH, and MIPONUH (1996-2000): A Drop in the Ocean

The security situation in Haiti remained unchanged after the completion of UNMIH. With regard to HNP’s incapacity to fulfill its main functions, the UN Secretary-General had already recommended continuing engagement up to June 1996.196 Although the need for assistance was obvious, the permanent Security Council members’ willingness to extend UNMIH’s mandate or to establish another mission decreased. This was aggravated by the reluctant position of China which did not agree to an extension of the mission due to Haiti’s relations with Taiwan.197 Nevertheless up to the beginning of 2000 three more missions followed UNMIH, the United Nations Support Mission in Haiti (UNSMIH), the United Nations Transition Mission in Haiti (UNTMIH) and the United Nations Civilian Police Mission in Haiti (MIPONUH). Owing to their similarity, the missions will be described altogether briefly, followed by an assessment of the special issues of each mission.198

UNSMIH, UNTMIH and MIPONUH were all requested by the Haitian President, René Préval, in order to support the establishment and training of the HNP.199 Only UNSMIH’s mandate was broadened in order to support the coordination of the UN system’s efforts to

197 Malone, see note 3, 134 and 137-138.
“promote institution-building, national reconciliation and economic rehabilitation.”

In the case of the other two missions, the mandates were reduced to police activities due to the decreasing disposition of Member States to stay strongly engaged in the Haitian case and to the conviction that coordination functions should be undertaken by other UN agencies. Instead of enlarging the mission’s mandates Member States opted for using the specialized agencies in order to provide further international assistance. In consequence the size of all missions was successively reduced.

At the same time the UN Security Council continued to stress that only a functioning police force would lead to democratic consolidation. Compared to UNMIH, the Security Council went even further by stating:

“[…] the importance of a professional, self-sustaining, fully functioning national police force of adequate size and structure, able to conduct the full spectrum of police functions, to the consolidation of democracy and revitalization of Haiti’s system of justice.”

In the case of MIPONUH this affirmation was further strengthened by encouraging Haiti “to pursue its plans in these respects.” Unlike the previous missions, MIPONUH had no military component. Its mandate was to continue the work of the United Nations to support the Haitian national police and to contribute to its professionalism. France, initially reluctant to this solution due to its possible effect on UN peace-keeping in Africa, insisted on an exception clause in Resolution 1141: “[…] all special arrangements accorded to MIPONUH will not constitute precedents for other operations of the same nature that include civilian police personnel.”

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201 S/RES/1141 (1997) of 28 November 1997, para. 3. For a short description of the new concepts see the introduction of this article.
203 See note 200 para. 1 (emphasis added).
204 See note 201, para. 1.
205 Malone, see note 3, 145-147.
206 See note 201, para. 4.
Once ended, MIPONUH was substituted by a civilian support mission, MICAH (International Civilian Support Mission in Haiti), which worked during a one year period.\textsuperscript{207} It was then fully deployed and ready to work when the mandate expired.

One could state that UNSMIH, UNTMIH and MIPONUH concentrated on genuine state-building measures by supporting the establishment, training and monitoring of HNP. Alike UNMIH they did not apply a comprehensive approach in respect of the establishment of a police force, what lead to partially ineffective implementation of their mandates. Furthermore the success of all three missions was restricted due to their successively reduced contingents. To sum up, the peace-keeping missions’ narrow focus on police reform was rather to the disadvantage of democratization in Haiti than to its advantage.\textsuperscript{208} Furthermore it hardly complemented the strong efforts to promote economic growth and rule of law made by other UN agencies, especially UNDP.


In the environment of UN peace-keeping missions in Haiti, the International Civilian Mission in Haiti (MICIVIH\textsuperscript{209}) reveals an exception. It will be very shortly discussed, primarily with regard to its significance for the UN decision-making process in order to intervene coercively in Haiti. It requires further attention because it was unique in being a joint mission between the UN and a regional organization, namely the OAS.\textsuperscript{210}

MICIVIH’s was established in December 1993. The joint UN/OAS mission was given the mandate to monitor and report on the Haitian human rights situation during the negotiation process between the military junta and Aristide.\textsuperscript{211} After the latter’s return MICIVIH’s mandate, indeed, still focused on human rights, but it was further broadened to

\textsuperscript{208} Hippel, see note 198, 117-126.
\textsuperscript{209} Acronym accordant to its French naming Mission Internationale Civile en Haiti.
\textsuperscript{211} Granderson, see note 210, 386.
human rights education, support to police and prison reform as well as strengthening democracy, namely through electoral observation.\footnote{The terms of trade on which MICIVIH’s mandate was based, were not officially published by the United Nations. Martin provides the full text of the terms of reference in the annex of his article. See note 134, 113 et seq.}

With reference to its implementation MICIVIH rapidly took office in various regions of the country. It was also distinguished by a special, comprehensive training program for its personnel, and its effective reports on the human rights situation. Since MICIVIH was not directly involved in negotiations between the conflicting parties, it was able to act in a relatively neutral way. Consequently, the mission could establish widespread relations with various sectors of Haitian society, especially civil society and local actors. Generally, given its broad mandate, MICIVIH was poorly assigned in terms of human power and material equipment.\footnote{Granderson, see note 210, 386-287.}

With regard to MICIVIH’s fulfillment of its mandate, human rights education programs were first delayed because of a lack of expertise within the mission. Step by step they were effectively enhanced throughout MICIVIH’s duration on the ground, reaching many Haitians. Electoral observation was granted in 1995, but was characterized by incertitude with regard to determining MICIVIH’s role in the electoral process. Police and prison reform was slowly addressed, partly inhibited by the unclear repartition of labor and competences between MICIVIH and UN peace-keeping missions.\footnote{Martin, see note 134, 713.} This illustrates a general problem during the implementation process, which was marked by continuous discussions on MICIVIH’s role on the ground.

Although cooperation between MICIVIH, OAS and the UN Special Representative was repeatedly underscored, it was inadequate on the operational level. MICIVIH complained that it would report to the Special Representative instead of the UN Secretary-General. Indeed, MICIVIH’s direct influence at UN level was minimized, but nonetheless its effective reporting practice had influenced UN Security Council’s decision making.\footnote{Ibid., 735.} Finally, MICIVIH’s knowledge of the Haitian situation, especially referring to its work on the local level could have complemented and improved the peace-keeping missions work on the
ground, if communication between MICIVIH and peace-keeping missions would have been closer.\textsuperscript{216}

Twice during its mission, MICIVIH was evacuated. The first time in December 1993 which is to be interpreted as the UN’s response to the hindrance of UNMIH’s deployment by the military junta. Second, MICIVIH staff were expelled by the military when tensions during the negotiation process increased. Both occasions influenced the UN Security Council decision-making process and lead successively to intensifying coercive measures.

To sum up, no other mission ever spent more time in Haiti than MICIVIH. During its work in Haiti it contributed significantly to human rights education. Furthermore it was able to evolve valuable relations with Haitian organizations, especially on the local level, which unfortunately have not been used any further in order to deepen UN activities. The same applies to the successful, inter-cultural trainee course to train MICIVIH personnel. Although it could not fulfill its entire mandate due to material restrictions and to uncertainty about its role amongst donor agencies at the beginning of its mandate, MICIVIH may be considered as a successful mission in the domain of human rights.

d. MINUSTAH (since 2004): A Comprehensive Venture

MINUSTAH – the UN Stabilization Mission in Haiti – constitutes the international reaction to the ousting of President Aristide on 29 February 2004. In its Resolution 1529 of 29 February 2004 the Security Council stated that: “[…] the situation in Haiti constitutes a threat to international peace and security, and to stability in the Caribbean especially through the potential outflow of people to other States in the subregion.”\textsuperscript{217}

Thereby, Resolution 1529 may be considered as a continuation of Resolution 940\textsuperscript{218} by making special emphasis on the type of threat which would endanger international peace, especially in the Caribbean. In contrast to Resolution 940 of 1994, which just mentioned the desperate plight of Haitian refugees. This time explicit reference is made to the threat to international peace and security, and to the Caribbean region in particular, through “the potential outflow of people to other States in

\textsuperscript{216} Kumar/ Cousens, see note 188, 5.
\textsuperscript{218} For an interpretation of Resolution 940 see under II. 2. c.
the subregion.” This must be seen against the background of previous disputes between the neighboring Dominican Republic on Haitian refugees which had illegally entered Dominican territory.\footnote{Peral, see note 93, 4-5.} In addition, this definition of threat to international peace and security also reflects United States interests, which are based on the fear of an exodus of Haitian refugees to the United States.\footnote{Ibid., 4.}

\textit{aa. Deployment}

The UN Security Council acting under Chapter VII authorized the immediate deployment of a Multinational Interim Force (MIF), and declared its readiness to establish a follow-on United Nations stabilization force to support continuation of a peaceful and constitutional political process and the maintenance of a secure and stable environment.\footnote{See note 217, paras 2 and 3.} Consequently, the US-led MIF was immediately deployed in order to contribute: “to a secure and stable environment in the Haitian capital and elsewhere in the country … in order to support the constitutional political process under way in Haiti.”\footnote{Ibid., para. 2 (a).}

Despite MIF’s presence, destruction of businesses, killings and other acts of violence continued. MIF took several weeks to deploy throughout the country and to intervene decisively to stabilize the situation.\footnote{International Crisis Group, see note 110, 11.} When MINUSTAH took over the command from MIF on 1 June 2004, parts of the country were still under control of rebel groups, which took over state functions. Furthermore violence in the Aristide supporting slum areas in Port-au-Prince increased.\footnote{Interim Report of the Secretary-General on the United Nations Stabilization Mission in Haiti, Doc. S/2004/698 of 30 August 2004, paras 1 and 13.} MINUSTAH faced major challenges in terms of the security situation and the political process. Additionally, a flood, which caused the death of 2,000 people, aggravated the situation.\footnote{Report of the Secretary-General on the United Nations Stabilization Mission in Haiti, Doc. S/2004/908 of 18 November 2004, paras 34 and 35.} Against this background MINUSTAH’s deployment was too slow. In consequence, in its initial phase, MINUSTAH lacked sufficient manpower.
**bb. Mandate**

In order to define MINUSTAH’s mandate according to the needs on the ground, Secretary-General Annan dispatched an assessment mission, which worked under the auspices of Annan’s Special Adviser on Haiti.\(^{226}\) On the basis of the mission’s recommendations the Security Council adopted a comprehensive and detailed mandate for a peace-keeping mission.\(^{227}\) Although its content has not been substantially changed throughout the peace-keeping process, different emphases were made, at different points of time, according to primary needs on the ground. In general, three main areas for MINUSTAH activities were stressed in the mandate: (a) to ensure a secure and stable environment,\(^{228}\) comprising inter alia support to secure the environment needed for the continuation of the constitutional and political process, assistance to reform the HNP, the establishment of a disarmament, demobilization and reintegration (DDR) program and assistance to restore and maintain the rule of law; (b) the political process,\(^{229}\) encompassing the support of the Transitional Government in order to foster democratic governance, institutional development, decentralization and to organize as well as carry out national elections; (c) human rights,\(^{230}\) comprehending monitoring and reporting on the human rights situation as well as the support to guarantee human rights.

While security issues dominated the agenda in the first half year of MINUSTAH’s work, the support of the political process, primarily elections, became more important throughout the process.\(^{231}\) Enhancing elections accorded to the Consensus on the Political Transition Pact, which various Haitian actors – *inter alia* the Interim Government, political groups and civil society organizations, except the *Fanmi Lavalas*, which refused the pact – had agreed on 4 April 2004.\(^{232}\) Furthermore, MINUSTAH’s mandate was successively adapted to the *Haitian In-


\(^{228}\) Ibid., para. 7 (I).

\(^{229}\) Ibid., para. 7 (II).

\(^{230}\) Ibid., para. 7 (III).


\(^{232}\) See note 226, para. 4.
**In reference to state-building,** the mandate focuses again on the establishment of a functioning police force, but this time emphasizing the need of a so called democratic policing. In addition, “the restoration and maintenance of the rule of law” by institutional strengthening of the correction system was also enhanced.234

Democracy and the need to support it, were addressed differently throughout the mandating process. In its Resolution 1542 the Security Council scarcely referred to the democratic process in Haiti. It is mentioned only once:

“[…] to support the constitutional and political process under way in Haiti, including through good offices, and foster principles and democratic governance and institutional development.”235

Although the fulfillment of this mandate would have required activities beyond electoral assistance, between 2005 and February 2006 further Security Council resolutions concentrated explicitly on the need to support elections.236 Referring to the wording of Resolutions 1542 and later 1608, elections are not explicitly related to a democratic order, but indirectly to the continuation of the “constitutional process.” In contrast, the post-electoral Security Council Resolution 1658 marks a shift concerning MINUSTAH’s mandate, now referring explicitly to democracy promotion:

“Stressing that the consolidation of Haitian democratic institutions will be crucial for achieving stability and development, and that MINUSTAH and the international community should continue to assist in building the capacity of national and local authorities and institutions.”237

In general, this paragraph reflects the assumption that democracy might be one precondition for peace and stability. Whether this is true for the Haitian case depends indeed on the will of the Haitian polit-
cians, recently elected in February 2006. But with regard to MI
NUSTAH, its post-electoral activities must be adjusted if effective sup-
port of Haitian authorities in order to consolidate democratic institu-
tions will be granted. In addition, Resolution 1658 also states that rule
of law and human rights are vital components of democratic socie-
ties. Former Security Council mandating practice in the case of Haiti
relates rule of law and human rights merely in respect to policing tasks,
that is state-building. In turn, in its constitutive mandate of resolution
1542 the Security Council highlights the need for “democratic policing
standards.” In consequence, with resolution 1658, the Security
Council bridges the conceptual gap between state building and democ-
racy promotion; rule of law and human rights are supposed to be a re-
sult of successful policing on the one hand and preconditions for de-
mocracy on the other.

Moreover, further aspects stand out in the Security Council resolu-
tions referring to peace-keeping in Haiti: first, the Security Council
adapted a broad concept of peace. Bridging the gap between poverty
and conflict, it assumes that poverty is a root cause of conflict in
Haiti. Consequently its peace-keeping approach has changed, at least
rhetorically.

On the operative level, cooperation and coordination with other
donor agencies, especially of the UN, was increased because of their
complementary relevance in the fight against poverty. This is also
backed by the assignment of a Special Representative of the Secretary-
General. Additionally, the inclusion of the Special Representative, ap-
pointed by the Secretary-General, in a Security Council resolution can
be interpreted as validation of this post, already initiated in the first
Haitian conflict. Further the UNDP Resident Representative was as-
signed Deputy Special Representative of the Secretary-General to the
Mission. This composition gives rise to the assumption that MI
NUSTAH and UNDP exercised job-sharing, according to their com-
plementary objectives on the ground.

238 Ibid.
239 See note 227, para. 7 I (b).
241 See note 227. Additionally, a Core Group of all relevant actors and an ad
hoc group of the ECOSOC were established in order to improve the coor-
dination of external actors in Haiti. See note 225, para. 47.
The Security Council asserts its above-mentioned long-term perspective by completing each extension of MINUSTAH with the following: “with the intention to renew for further periods.”243 In its initial phase, between 2004 and February 2006, MINUSTAH was extended for one year terms. This extension practice turned more restrictive in February 2006.244 Whether this can be interpreted as a decreasing willingness of Security Council members to stay engaged in Haiti depends on the further evolvement of MINUSTAH.

cc. Composition and Implementation

With regard to its composition, MINUSTAH constitutes a novelty as the mission is led and mainly composed of Latin American states.245 The Latin American reluctance to interventionism, has been slowly softened throughout the 1990s.246 Moreover, with regard to international power politics, Brazil, Argentina and Chile might have attempted to compensate for their dismissive posture against the United States’ intervention in Iraq in 2003.247 Also, the Brazilian commitment can be interpreted in the scope of its engagement in UN-reform, especially in its campaigning for a permanent seat for Brazil in the Security Council,248 as engagement in UN peace-keeping missions was one criterion to measure the ability of candidates for potential additional permanent seats during the attempted reform process in 2005. MINUSTAH’s composition shall not exceed a maximum of 6,700 military troops and 1,622 civilian components.249 Only for the election period 2005 to 2006, was the size of the mission temporarily augmented to 1,897 police officers and 7,500 military troops.250 Additionally, 1,160 international civilian and local staff supports the work of MINUSTAH on the ground.

245 Peral, see note 93, 2.
246 See under II. 2. b.
249 See note 227, para. 4.
In its initial phase MINUSTAH focused on security and humanitarian issues. It pursued a reactive rather than proactive approach, which was provoked by the limited commitment of UN Member States and led to security problems. MINUSTAH’s deployment was too slow. In consequence, in its initial phase, MINUSTAH lacked sufficient manpower as well as equipment.\textsuperscript{251} This was further aggravated by the slow disbursement of funds by donors.\textsuperscript{252} Full deployment took place only after violent campaigns of street gangs against the Interim Government and the presence of MINUSTAH which led to the killing of Aristide opponents and police officers in September 2004.\textsuperscript{253} Initially, MINUSTAH followed a defensive approach. It acted hesitantly and failed to improve the security situation in the countryside as well as in the slums of Port-au-Prince. Only in 2005 MINUSTAH changed its tactics in order to secure slum areas for scheduled elections.\textsuperscript{254} In consequence MINUSTAH was accused and suspected of siding with Aristide opponents. These criticism deepened, when further accusations emerged that MINUSTAH had killed civilians during its attacks in slum areas. Consequently MINUSTAH’s general acceptance amongst Haitians decreased.

At the same time efforts to disarm rebel groups, former military and gangs, proved to be difficult. Although an effective DDR program was continuously discussed, its launching was delayed due to the discord amongst decision-makers, especially the Transitional Government, which did not fully agree on an effective program and changed its views repeatedly.\textsuperscript{255} In consequence, estimated 300,000 weapons circulate illegally in Haiti and still remain being a major problem.\textsuperscript{256}
State-building measures were focused on policing issues. MINUSTAH cooperated mainly with the HNP in order to recruit police officers and address vetting. Furthermore certification trainings were offered. Although advancements to reform the HNP were made, the police forces still constitute one part of the problem. On the one hand the police system is pervaded by criminals – also linked with drug trafficking – and former military members, likely to oppose democratization. On the other hand, police officers lack adequate education in terms of their capacity, role in society and human rights issues.

Democracy promotion measures were above all undertaken in the field of elections. Besides securing the environment for parliamentary, presidential and local elections, MINUSTAH – in close cooperation with the OAS – also assisted the CEP to plan, organize and hold elections. Thereby two major challenges were faced. On the one hand major organizational problems emerged due to the lack of permanent state structures for the preparation of elections. For instance, the CEP lacked capacity, voter registration moved very slowly and the insufficient installation of polling stations throughout the country and in the slum areas of Port-au-Prince threatened the access of all citizens to elections. On the other hand, political polarization increased because Aristide supporters refused elections and demanded Aristide’s return from exile. Also the registration process was boycotted and further slowed down. Consequently elections were delayed several times. Finally, on 7 February 2006, free and fair elections took place in Haiti.

In the aftermath of the elections, with a new elected government, headed by President René Préval, MINUSTAH is now redefining its future tasks.

ee. Fulfillment of the Mandate

To sum up, during its first two years on the ground MINUSTAH has only partly fulfilled its mandate. Initially the stabilization of the Haitian security situation was delayed due to its defensive and reactive ap-

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257 Ibid., paras 29-34.
259 International Crisis Group, see note 251, 6.
proach, which was intensified through the slow deployment of troops. Once it adapted a more robust approach, the security situation, especially in the slum areas of Port-au-Prince, improved, but did not completely stabilize. Although the organization of elections was marked by major problems, MINUSTAH’s efforts to support the electoral process, in close cooperation with the OAS, finally helped to make the holding of free and fair elections possible. In turn, the support to establish a functioning police force was unsuccessful due to HNP’s composition, partly pervaded by criminal subjects, and its incapacity to deal adequately with the situation. As mentioned also disarmament of former militias and criminals remains a major task for MINUSTAH. Moreover, the human rights issue was limited to the observation of the human rights situation and lacked measures to enhance the rule of law. In general, throughout MINUSTAH’s implementation, cooperation with the Transitional Government turned out to be difficult. Furthermore, accusations that MINUSTAH had sided with Aristide opponents and killed civilians, led to only a partial acceptance of MINUSTAH within the Haitian population.

e. Lessons Learned: UNMIH and MINUSTAH in Comparative Perspective

Already at a first glance the genesis from UNMIH to MINUSTAH gives evidence of the initially outlined evolution of UN peace-keeping during the past decade. Actually, MINUSTAH had adopted the lessons learned from four previous peace-keeping missions in Haiti by generally applying a broader concept of peace and especially, by adapting it to the Haitian context. While UNMIH pursued a narrow, policing-focused approach MINUSTAH now applies a multidisciplinary approach. Taking a comparative perspective will show how this evolution can be explained.

aa. Deployment

Both missions, UNMIH as well as MINUSTAH had difficulties with regard to their punctual deployment, though, for differing reasons. In the case of UNMIH external factors, that is the obstruction of the military junta, hindered its deployment. Consequently, a fast restoration of democracy was obstructed. MINUSTAH’s deployment – like MI-PONUH at the end of the 1990s – was delayed due to internal organizational factors. The low commitment of UN Member States to be ready to deploy troops for the mission hindered the effective dispatch
on the ground. In consequence, the only partly deployed mission was not capable of facing emerging security issues on the ground.

*bb. Mandate and Design*

Obviously, the formulation of MINUSTAH’s mandate is much more detailed and comprehensive than that of UNMIH. This is determined mainly by two factors.

First, the circumstances of the missions’ establishment played a crucial role. Indeed, both missions were undertaken in reaction to the rupture with the democratic order in Haiti. But UNMIH was established before the conflict was finally settled. UNMIH’s deployment was first preluded by negotiation efforts and economic sanctions, which altogether led to a strong involvement and commitment of the international community to support successfully the solution of the Haitian conflict. Whereas, in the case of MINUSTAH its establishment took place in the context of a lowered international interest. It was further established after a temporary conflict solution, that is the ousting of President Aristide and the following Haitian response to it in accordance with the Constitution. It was also voluntarily requested by the Interim Government of Haiti. These points of intervention and circumstances resulted in two different definitions of conflict resolution, which, in turn, determined the mission’s design in the case of UNMIH. Here the resolution of the conflict the “restoration of democracy”, that is Aristide’s return to factual power, was the task. Thereby a purposeful and punctual perspective was taken. Once Aristide’s power was restored, the conflict was presumed to be solved for the time being, and an actor-focused state-building design was implemented, which primarily lacked the sustainable prevention of a renewed outbreak of the conflict. In contrast, MINUSTAH, was established in accordance with the constitutional Interim Government, following a temporary conflict resolution. It should *inter alia* support the constitutional process in Haiti. This enabled mission drafters to adopt a process-oriented and comprehensive design, arranged with the Interim Government.

Further, on the one hand MINUSTAH’s relatively detailed mandate and design is owed, *inter alia*, to the results of the primarily unsuccessful UN peace-keeping story in Haiti. Repeated failure of peace-keeping missions urged the re-designing of such efforts in Haiti. Against this background MINUSTAH had become the last resort to make UN peace-keeping in Haiti a success story. On the other hand, the design of MINUSTAH results from a general evolution of a broad concept of
peace, which widened the objectives of UN peace-keeping and also includes strategies of peace-building.

cc. Form

Both missions show a rather conventional form. Generally, following the majority of UN peace-keeping missions, UNMIH and MINUSTAH had a two-step approach. A multinational force was deployed in order to secure and stable the environment. Successively, the force was substituted by UNMIH/MINUSTAH.

dd. Composition and Implementation

MINUSTAH is the first mission to be under the command of a Latin American force commander, namely Brazil. This reflects the lowering of the traditionally high threshold to interventionism in the Americas. Latin American states now seem more willing to take responsibility for security tasks in their region. This fact could increase the acceptance of UN peace-keeping in the region further. But this development also shows the reduced interest of the U.S. in the Americas, triggered by an increasing interest in other world regions, especially the Middle East.

Furthermore, UNMIH and MINUSTAH do not differ considerably with regard to the size of their military component, which shall/did not exceed a maximum of 6,000, and 6,700 troops, respectively. In contrast, the civilian component increased. This increase of civilian staff reflects the adoption of a more comprehensive peace-building approach, which requires the knowledge and capacity of civilian experts.

In reference to their implementation UNMIH and MINUSTAH faced a common organizational problem, namely problems in connection with their late deployment. Moreover MINUSTAH met further challenges during its first implementation period from 2004-2006. It was, on the one hand, confronted with a difficult cooperation with the Interim Government. On the other hand, its acceptance amongst the Haitian population was at stake when it started its robust security campaign in the Port-au-Prince slums. In consequence, the implementation of planned and crucial policies such as the DDR program were held up.

ee. State-Building

State-building meant merely narrow policing measures throughout the 1990s. UNMIH and its succeeding missions ignored the structures and
root causes of the Haitian conflict and instead focused its symptoms. Whereas it was obvious that the Haitian state could not grant physical security to its citizens due to a lack of a functioning police force, UNMIH limited its activities to reinforce the HNP. In doing so it failed to address major challenges, interlinked with the security issue, such as the integration of former militias, which evolved to an armed group and were responsible for the renewed outbreak of the conflict in 2004.

In contrast, MINUSTAH now follows a more comprehensive and political state-building approach, which addresses issues of physical and human security. With regard to policing it makes use of a more systemic design by applying “democratic policing standards”. One of the main tasks is the vetting of police officers in order to prevent the engagement of non-loyal officers within the HNP. Additionally, disarmament and integration of the former military and other armed groups is focused and shall be implemented through a wide-ranging DDR program. On the political level MINUSTAH also tends to foster a national dialogue amongst all relevant parties. Thereby an agreement on the role of the military in Haitian society shall be envisioned, because besides being a major security problem, the military is still provided for in the Haitian constitution.

ff. Democracy Promotion

While an evolution of state-building during the last decade is obvious, democracy promotion has hardly changed in the scope of UN peace-keeping. UNMIH’s mandate accentuated the restoration of democracy, whereas MINUSTAH’s mandate focus does not primarily refer to democracy, but to the support of the “constitutional process”, both missions’ efforts to promote democracy show no major differences on an operational level.

UNMIH’s as well as MINUSTAH’s mandate emphasize the holding of elections. They both were based on the assumption that elections led to the consolidation of democracy. Since a relation between consolidated democracies and peace is assumed, elections were perceived as a significant precondition to solve the Haitian crisis. Consequently, electoral assistance was presumed to be an adequate instrument. Although elections should not be underestimated, they are only the first – formal

260 Here, only activities of peace-keeping measures are taken into account. Whereas, it must be stated meanwhile UNDP has undertaken various efforts in order to promote democracy in Haiti.
– step to be taken on the road to democracy. In the case of Haiti it became clear, that elections did not solve the Haitian crisis in a sustainable manner. Further measures, addressing the root causes of the Haitian conflict, which lie in the dual structure of the Haitian society, must be addressed if democratization in order to build peace, is to be achieved.

In this spirit UNMIH had clearly failed to support democratic consolidation in Haiti, despite its major objective to restore democracy. MINUSTAH, in turn, is still on the ground. Its success – assuming that UN Member States maintain their commitment – now depends on its capacity to assess the Haitian post-electoral situation of 2006 in order to evolve adequate strategies and measures for peace-building through democracy promotion.

Finally, an evolution with regard to democracy on the conceptional level has been made since UNMIH and its succeeding missions. UNMIH based its work on a narrow concept of democracy which primarily comprised that of a functioning police which is a prerequisite of democratic order. Whereas, the concept of democracy underlying MINUSTAH’s mandate primarily is a means and not the objective of UN peace-keeping, as it was in the 1990s. In the former spirit it is presumed to be the precondition for stability and development and is closely interlinked with rule of law and the guarantee of human rights.\(^{261}\) This is also institutionally reflected in MINUSTAH’s organization: MINUSTAH disposes of a unit to monitor and support human rights. In contrast, UNMIH had no such entity, but cooperated with MICIVIH, instead. As already stated, in consequence of these conceptual and organizational evolutions a more comprehensive peace-keeping approach emerges. Although this is to be welcomed, it must be critically stated that a global, wide-ranging approach alone does not solve any conflict. If a comprehensive approach shall be successful, its single components – human rights, democracy, rule of law, peace and development – must be systematically and transparently related to each other in order to establish a complementary approach.

**gg. Cooperation**

Since UNMIH’s and its successor’s missions one more aspect has gained crucial relevance in UN peace-keeping, marching in step with the evolution of a more integrative and multidisciplinary approach, where institutionalized cooperation with other authorities became more

\(^{261}\) See under III. 3. d. in this article.
relevant. First, MINUSTAH – alike UNMIH – integrated UNDP into its mission. But this integration was formal at best. De facto cooperation between both UN entities has been limited due to their overlapping mandates. Second, the HIICF (Haitian International Interim Cooperation Framework) set a framework for organized cooperation between MINUSTAH, the Haitian Government and other donors.\(^{262}\)

Third, further enhancements were made through the creation of a Core Group and several groups linked to ECOSOC for better coordination between development partners, including financial organizations.\(^{263}\) Whether these cooperation structures will finally merge into a complementary donor strategy in Haiti, which in the long-run enables Haitians to sustain their society without external support, will depend on the further developments made by the new Government of President Préval who assumed office in May 2006.

**IV. Conclusions**

More than ten years after the first UN peace-keeping mission in Haiti, peace-building in this country is still in its infancy. Since 1991 the deep-rooted conflict has endured. Five UN peace-keeping missions could not reverse this. Recently, in February 2006, democratic elections promised another start to resolve the Haitian conflict sustainably. If the international community wants to effectively support this new process, it must think over its peace-building strategies. MINUSTAH, which was established in 2004, had already made a start on this.

Coming back to the initial interest of this article, it must be first stated that the Haitian case of 1993 does not constitute a precedent for a right to democracy in international law. No such universal right to democracy exists, although, democracy is anchored in regional international law like that of the EU or the OAS. In particular the Inter-American Democratic Charter constitutes an exception. Pursuant to its article 1 peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it. The international community increased its commitment to democracy on a political level, e.g. through electoral assistance or the creation of the already mentioned United Nations Democracy Fund.

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\(^{262}\) See note 113.

With regard to the rupture with democracy as a threat to peace, it must be assumed that the effects for the democratic order in Haiti in 1991 constituted a threat to peace, above all international peace. The combination of an outflow of Haitian refugees to neighboring countries and the sensitiveness of American states to the rupture with democracy – as democracy is perceived as a precondition for peace within the region –, were defined as threats to peace and therefore, built a legal precondition for the use of force pursuant to Article 39 of the UN Charter. On the empirical level, the comparative examination of UN peacekeeping in Haiti brought to light that the UN developed over time a comprehensive and political approach to keep and build peace in Haiti, which was more and more sensitive to the specific characteristics of the Haitian context.

With regard to the appropriateness of UN peace-keeping missions the UN, indeed, made use of state-building and democracy promotion as peace-building instruments in Haiti. But they were inadequate, as on the one hand they were to some extent inadequate instruments to solve the Haitian conflict and on the other inadequate use was made of them. Consequently, state-building’s and democracy promotion’s effectiveness in terms of a positive contribution to resolve the Haitian conflict were limited. They failed to address the root causes of the Haitian conflict as well as, partly, its symptoms in terms of enabling the Haitian authorities to guarantee physical security.

State-building was narrowly focused as the establishment of a functioning police force during the 1990s. By pursuing an apolitical policing-focused approach, UN peace-keeping missions missed the chance to take a systemic view of the Haitian conflict. Consequently, major challenges like the integration of ex-militias into society were not addressed. Instead, ex-militias evolved to be a new destabilizing factor in Haiti and contributed strongly to the further outbreak of the Haitian conflict in 2004.

If state-building is to be an adequate measure to support peacebuilding in Haiti, it must first develop an integrative approach to support the necessary security reform. MINUSTAH’s “democratic policing” strategy might be the beginning of that. Secondly, even more important, is that state-building must address the dual, deep rooted structure of the Haitian society which divides the urban elite with access to resources from the marginalized rural population, excluded from state revenues. Only if the output capacity of the state, that is its socio-economic performance, can be improved and equitably distributed, can peace be built.
Democracy promotion in the scope of UN peace-keeping missions in Haiti was mainly an equivalent to electoral assistance. But, since “an election by itself can seldom, if ever, resolve a conflict about which people feel strongly enough to resort to bloodshed,”

electoral assistance had a very limited effect in terms of peace-building. Nevertheless, with regard to democracy promotion MINUSATH continues to focus on electoral assistance.

Furthermore, it was – although partly successful in the short-run – too punctual and did not enable Haitian authorities and institutions to hold elections without the support of the international community.

Since democracy is built between elections, and not on election day, UN peace-keeping missions, mutually with other international actors, must take further measures to promote democracy. For instance, it is necessary to support the implementation of the Constitution of 1987, that is the establishment and strengthening of crucial institutions on the national and, especially on the local level as well as to build the capacity of the population and political elite in order to create a democratic political culture. In this respect MINUSTAH has already endorsed successful activities on the local level. But if these shall be sustainable, cooperation between UNDP and MINUSTAH will be essential due to the limited duration of MINUSTAH on the ground.

Moreover, with regard to state-building and democracy, UN peace-keeping lacks a common understanding of state and democracy. Only if all actors on the ground, above all the national authorities and respective populations are aware of what democracy and state should be like not only in Haiti, could an adapted state-building and democracy promotion be an adequate means to build peace. Therefore, the UN should foster a national dialogue between the political elite, civil society and

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265 Besides electoral assistance local authorities and institutions shall be supported, particularly, on the local level. Altogether the support of democratic governance plays a subordinate role in the current formulation of MINUSTAH’s mandate. Instead the Secretary-General identifies two main areas for its work. First, support of institutions of rule of law and state administration. Second, ensuring a secure and stable environment as well as police and justice/prisons system support; cf. Report of the Secretary-General on the United Nations Stabilization Mission in Haiti, Doc. S/2006/592 of 28 July 2006, paras 44 and 45 and 77-80. The Security Council recently extended MINUSTAH’s mandate until the 15 February 2007, S/RES/1702 (2006) of 15 August 2006.
the donor community in order to define common visions for the political future of Haiti, and like cases.

Finally, the international community has now been engaged for more than a decade in Haitian conflict resolution – but without continuous and sustainable success. However, for these efforts to be eventually brought to a successful end, a long-term effort of the international community in the Caribbean country is clearly needed. Since UN peace-keeping missions in Haiti had a short-term perspective, other UN mechanisms should be given a try. In that respect, the recently established UN Peace-building Commission should take the Haitian case into account. This would constitute an important symbolic gesture to confirm the international community’s commitment to Haiti and to prevent the Haitian case from again sinking into oblivion, as has happened many times before.
Organisation and Jurisdiction of the Newly Established Afghan Courts – The Compliance of the Formal System of Justice with the Bonn Agreement

Ramin Moschtaghi *

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* I would in this respect especially like to thank my friends and colleagues Ms. Ulrike Deutsch and Ms. Andrea Ernst, who with their inspiration and critique helped to make this article possible.
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I. Introduction

On 26 January 2004, the new Afghan Constitution was promulgated by Hamid Karzai, the President of the Transitional Administration of Afghanistan. One year later it was followed by the enactment of the Law of Organisation and Jurisdiction of Courts of the Islamic Republic of Afghanistan (LOJC) and the Juvenile Law. With the enactment of these regulations Afghanistan has given itself a new and complex structure of courts. Both laws were passed by resolution of the High Council of Ministers and enacted by presidential decree in accordance with

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1 The article is based on the experiences gained while working in the Afghanistan Project of the Max Planck Institute for Comparative Public Law and International Law. The project aims to support the reconstruction efforts of the Afghan Judiciary and Administration (for further information see: <http://www.mpil.de/ww/en/pub/research/details/know_transfer/afghanistan_project.cfm>). In the course of the project in 2004, a manual in respect to the basic fair trial principles in Afghan law was compiled, which has successfully been used to train Afghan legal practitioners. Because of the success of the project, in the second half of 2005 a second edition for further workshops has been elaborated including newly enacted Afghan laws. Having in mind the difficulties to understand the complexity of the structure of Afghan courts and the fact that scientific material in English or other European languages is rare and Dari literature is mostly lost in the turmoil of regime changes and the civil war, I gladly took the opportunity to write this article to shed some light on the Afghan judiciary.

2 Decree No. 103 published in the Official Gazette No. 818.

3 To reduce the risk of confusion, I will maintain the official Dari terminology for these laws, speaking of laws (qanun) even though these are not laws in the formal sense of article 94 para.1 of the Afghan Constitution (AC) but governmental legislative decrees (farman e taqmi). The authority to pass these regulations lies for the interim period with the government in accordance with article 159 Afghan Constitution.

article 159 No. 2 of the Constitution.\textsuperscript{5} They will stay in force until abrogated by Parliament, as provided by article 161 of the Constitution. Since the first parliament after the fall of the Taliban regime was inaugurated only on 19 December 2005 and is still debating its final procedural order,\textsuperscript{6} it is not very likely that it will abrogate these laws in the near future, especially considering the complete lack of legislation in many other important areas.

In order to assess the new structure of courts it will be necessary to outline the basic lines of development in the history of the judiciary of modern Afghanistan (see under II.). In this regard, the article will mostly focus on the reforms and the development of the judiciary until the crucial year of Daoud Khan’s coup d’état in 1973. The sometimes contradictory changes of various “revolutionary” governments during the following years accompanied by turmoil and civil unrest seem to be based on different ideological perceptions rather than on a promotion of civil rights and the rule of law. Accordingly, the Bonn Agreement\textsuperscript{7} expressly re-established the Constitution of 1964 as a basis for the legal framework of Afghanistan.\textsuperscript{8} In Part III. of the article, the present structure of courts and their organisation will be elaborated, thereby giving for the first time a comprehensive analysis of the new laws. Parts IV. and V. will assess the compliance of the outlined system with the Bonn Agreement and point out remaining deficits.\textsuperscript{9}

As a preliminary remark, I would like to clarify that the focus of this article will be only the reforms and modernisation of the official judicial system. The immense problems involving the informal administration of justice by village or tribal councils (jirgas, shuras), which are unauthorised courts according to arts 116, 120 of the Afghan Constitution, will be left aside.

\textsuperscript{5} According to this provision the government is authorised to pass regulations concerning the structure and competencies of the courts during the interim period.

\textsuperscript{6} The time of the elaboration of this article was May 2006.

\textsuperscript{7} Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, also named Bonn Agreement after the location of its signature, Doc. S/2001/1154 of 5 December 2001.

\textsuperscript{8} See article II. 1. of the Bonn Agreement.

\textsuperscript{9} Furthermore, after this survey of the legal perimeters of the Afghan judiciary, the article of Mrs. Mandana Knust in this Volume, assesses the case of Abdul Rahman, an Afghan Apostate. His case sheds light on the implementation of the laws by the Afghan judiciary.
II. Historical Overview: The Organisation and Jurisdiction of Courts in Afghanistan

1. The Beginnings of a Modern Nation State

For more than a century after Ahmad Shah Durani was proclaimed Amir in 1747, which is usually seen as the beginning of the Afghan Kingdom, the judiciary remained in the firm grip of the ulama, the community of the religious scholars, or to be precise the qadis and muftis. The ulama strongly supported the central government, which in return bestowed large allowances and privileges upon them and thereby increased their power and influence. The ulama were basically free to administrate justice in accordance with their interpretation of Islamic principles. In order to establish a monopoly of power in the hands of the state authorities the most prominent aim of modernisation and legal reform has been and still is to diminish the influence of religious leaders in the judiciary. This aim has only relatively recently been supplemented by the notion to reduce the power of the executive and to grant judicial independence. Legal reforms aimed at judicial independence have been adopted only in the short period of the Afghan democratic experiment in the sixties and early seventies of the last century while already the central authorities at the end of the 19th century took the first steps to reduce the power of the ulama in the judiciary.

Amir Abdur Rahman (reign 1880-1901), was the first to undertake steps of modernisation in this regard. He strongly relied on Islam to legitimise and stabilise his centralised rule. Therefore, he introduced a new doctrine of sovereignty, in which the Islamic concept of divine sanction played a role similar to that of the European absolute notion of divine sovereignty. He claimed that in contrast to his predecessors, who had derived their power from decisions made in formal traditional gatherings by tribal chieftains, his rule was based on divine sanctions. According to this doctrine, he was the leader of the Muslim society, the deputy of god for his subjects. Nevertheless, he perceived the uncontrolled power of religious leaders, which was characteristic of the rather

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12 See also Kamali, see note 11, 14 et seq.
13 Ewans, see note 10, 101.
informal system of adjudication by the ulema as a threat to his own power. Determined to enforce the control of the state on the religious leaders, he transformed the qadis, who were responsible for the administration of Islamic justice, from purely religious authorities financed by fees and donations to state bureaucrats. In order to achieve this aim he took over the waqf, the religious trusts, thereby destroying the economic base of the qadis. In order to achieve the title of qadi and to be appointed to one of the shari’a courts, candidates had to pass a state-controlled examination which tested their religious knowledge and thereby determined the amount of their salaries. Once appointed, qadis were forbidden to engage in “worldly vocations or the teachings of sciences”. In return, they were no longer dependent on fees and donations, but were paid a salary by the central authority. Furthermore, Abdur Rahman installed a system of shari’a courts which operated by procedures laid down by the state in a manual for judges, the Asas ul Quzat. The duties and obligations that accompanied the transformation of a qadi into a state bureaucrat are portrayed in detail in this manual. The reforms of Abdur Rahman, although they formalised the administration of justice and thereby increased the power of the central authorities over the judiciary, did not touch the character of the judiciary as a stronghold of the religious establishment. Religious knowledge was still indispensable for becoming a judge in an Afghan court.

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14 He accused them of behaving like kings ruling with “tyranny and unbearable cruelty”, cited according to Ewans, see note 10, 101.
15 Ewans, see note 10, 101.
16 Ewans, see note 10, 101.
18 Kamali, see note 11, 7; Rubin, see note 11, 50; Ghani, see note 17, 273; Ewans, see note 10, 14 et seq.
19 Ghani, see note 17, 354.
20 E.g. the Asas ul Quzat required every qadi to send a monthly report of all proceedings of his court to the qadi of the city in which the governor resided, and the latter was to collect the transactions of the whole province and send them, on a monthly basis, to the chief-qadi in the capital. The chief-qadi then had to go over all the accounts and to determine the correctness of the judgements. The standard was the shari’a, with priority given to the precedents of Abu Hanafi. If a qadi could not find a rule for a case, he was obliged to ask the chief-qadi in writing, who extracted it from the authoritative sources or acquired an order from the Amir, cf. Ghani, see note 17, 354.11.
Under his successor, Amir Habibullah (reign 1901-1919), this system remained unthreatened. In fact, Habibullah adopted a rather lenient attitude towards the religious leaders, who regained much of their influence and in return supported his reign willingly.21

2. The Reforms under Amanullah Khan

However, the coexistence of the central authorities and the religious establishment became seriously shaken under the rule of Amanullah Khan (reign 1919-1929). His rule was characterised by major changes, the most important of which was the formal independence of Afghanistan from the United Kingdom after the end of the rather short third Anglo-Afghan War (Treaty of Rawalpindi of 8 August 1919). Having formally established an independent state, Amanullah tried to transform the tribal society of Afghanistan into a real nation state as an example to the Islamic world. The reforms by Amanullah were certainly by far the most ambitious and radical reforms Afghanistan had seen so far. They included the introduction of female education,22 the abolition of child marriage and restrictions on polygamy. Furthermore, he tried to radically change and modernise the economy of Afghanistan.23 He also introduced ambitious reforms in the legal sector. Following the example of western countries, he tried to introduce a complete legal basis for the state in order to implement a rule of law, an idea formerly unknown in Afghanistan. In 1923, he gave Afghanistan its first Constitution changing it into a constitutional monarchy.24 The judicial reforms of Amanullah, often called the Nizamnama reforms, were partly inspired by the Turkish Tanzimat reforms of the late 19th century.25 Amanullah introduced a new system of state courts and a penal code. Article 21 of the Constitution stated that in courts of justice all cases had to be decided in accordance with shari’a law and the general crimi-
nal and civil law. This new penal code was not an adoption of western style legal texts, but mostly codified Islamic law. Nevertheless, since the ulama were no longer allowed to extract their own interpretation from the religious texts, but had to follow the compulsory interpretation of the law, this codification significantly reduced their influence and undermined the position of the religious leadership at the tribal and village level.

a. The System of Ordinary Courts

With regard to the organisation of the ordinary courts, arts 50-57 of the Constitution of 1923 in conjunction with arts 213-226 of the Nizamnama of Basic Organisation of 1923 introduced a new system of courts of general jurisdiction. The former two-tiered system of the shari’a courts was transferred into a three-tiered system and the existing shari’a courts were renamed. The courts of general jurisdiction were referred to as Primary Courts (Mahkama-e ebteda’iye), Appeal Courts (mahkama-e moraafi’a) and the High Cassation Board in Kabul (hay’at-e ‘ali-e tamiz).

An innovation of the reforms of Amanullah was the introduction of Courts of Reconciliation (mahkama-e eslahiya). Civil cases had to be presented to these courts before they could be presented to a Primary Court. Only if the reconciliation failed it was possible to refer the case to the courts of first instance. According to Kamali, law provided that the Courts of Reconciliation had to be established in all provinces, which was achieved by establishing them only in the provincial cen-

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26 It has to be remarked that the reference to the shari’a was not meant like in Islamic constitutions of today as an exaltation of Islamic law but as a temporary solution for the corpus of statutory law was still embryonic.

27 For details of Islamic criminal law, see A. El Baradie, Gottes-Recht und Menschen-Recht, 1983.

28 Ewans, see note 10, 129; this explains why the codification of punishments by Amanullah was a highly controversial issue in the Loya Jirga of 1924, where the reforms of Amanullah were discussed and partially amended. Whereas under the Constitution of Amanullah no one could be punished except as provided in the general or military criminal code, the Loya Jirga reintroduced the possibility of punishment according to the rules of shari’a and other laws which were codified in accordance with the rules of shari’a.

29 Kamali, see note 11, 212.


31 Kamali, see note 11, 212.
If this was the case, it was a rather impractical regulation, since parties had to travel over long distances into the provincial centres before they were able to refer their cases to the Primary Courts, which were much more conveniently situated. The Courts of Reconciliation were supposed to attempt to reach an agreement by the parties; their decisions were to be based entirely on the agreement itself and hence not subject to appeal. The Reconciliation Courts were competent in civil and commercial cases only, criminal cases fell in the jurisdiction of the ordinary courts.

The judges in these courts were to be appointed by the monarch on proposal of the Provincial Governors and recommendation by the Minister of Justice. A most interesting and important fact was that these judges would be selected among respectable persons known for their trustworthiness. Remarkably, it was not a legal prerequisite for judges to have a religious education. Since the Reconciliation Courts were only supposed to reach agreements between the parties, they did not have to apply shari'a law. As a consequence for the first time it was not necessary to be part of the religious establishment in order to be appointed as a judge.

The Reconciliation Courts lasted only until the mid-1930s. Their jurisdiction in relation to commercial matters was then transferred to the newly established Commercial Courts, and the authority in civil cases was transferred back to the ordinary courts.

Kamali, see note 11, 215.

Unfortunately, it was impossible to obtain a copy of the text of the Nizamname of Basic Organisation of 1923.

Kamali, see note 11, 215.

Article 211 Nizamname of Basic Organisation 1923, cited after Kamali, see note 11, 215.

Kamali, see note 11, 215.

However, a formal mediatory element as in the Reconciliation Courts is highly recommendable for the judicial system of Afghanistan bearing in mind the relatively high level of formality to be observed in the ordinary courts, as well as the high rate of illiteracy and the lack of qualified lawyers. Moreover, the century-old Afghan tradition of Jirgas or Shuras, i.e. gatherings of villagers or tribesmen designed to reach solutions for conflicts based on an agreement by both parties illustrates that the idea of mediation is deeply rooted in the Afghan society. For details see W. Steul, Paschtunwali - Ein Ehrenkodex und seine rechtliche Relevanz, 1981. These courts could serve as an inspiration for future judicial reforms.
Review by higher courts against decisions of the Primary Courts was only given if certain prerequisites were met.\textsuperscript{38} In criminal cases, death sentences were to be automatically referred to all three instances and had to be approved by the monarch; sentences of the Primary Courts with regard to felonies were also referred to a higher court as a rule.\textsuperscript{39} Furthermore, the defendant could appeal against sentences involving corporal punishment or damaging his reputation. According to Kamali, the Primary Courts consisted of different chambers for civil, criminal and commercial disputes.\textsuperscript{40} However, since the Primary Courts were equipped with only one qadi and two muftis, it is not very likely that they all consisted of different chambers. It is much more probable that only the Urban Primary Courts in provincial centres had special chambers, as is provided today by arts 41 and 46 of the LOJC (2005) with regard to the Urban Primary Courts situated in provincial centres.

The Courts of Appeal were to be established in each provincial capital and were composed of one qadi, four muftis and two clerks. There were chambers for civil, criminal and commercial disputes.\textsuperscript{31} In Kabul, the High Board of Cassation was established which served as court of final appeal for entire Afghanistan.\textsuperscript{42} While the Appeal and Primary Courts were authorised to review the facts of the case, the Cassation Board was solely authorised to act on appeal of law and thus confined to examine the compliance of the lower courts with the shari’a and the statutory laws. The Cassation Board could either confirm or reverse the decisions of the lower courts, but it did not have the authority to decide the case itself. The judges of the Cassation Board as well as those of the lower courts were to be appointed by the monarch, whereas the assisting judges could be appointed by the Minister of Justice or, in the case of Primary Courts, by the Provincial Governors.\textsuperscript{43} Beside the ordinary system of courts, several courts of specialised experience were competent for the adjudication of special cases.

\textsuperscript{38} In civil cases, the Primary Courts were competent to issue final decisions up to a certain pecuniary value, which was slightly higher for Urban Primary Courts in provincial centres. For details see Kamali, see note 11, 212.

\textsuperscript{39} Kamali, see note 11, 212.

\textsuperscript{40} Kamali, see note 11, 213.

\textsuperscript{41} Kamali, see note 11, 213.

\textsuperscript{42} Kamali, see note 11, 213; the Board of Cassation sat in a combined session with the Kabul Court of Appeal. If a decision of the latter one was appealed the acting judges were excluded from the session of the Board.

\textsuperscript{43} Kamali, see note 11, 213.
b. Courts of Specialised Experience

aa. Commercial Courts

Since religious minorities, especially Hindus and Jews, played a major role in the commercial life of Afghanistan, the demand for jurisdiction outside the shari’a courts was very high. Therefore in the late 19th century a board of commerce named Panchat was established in Kabul. The president of this board was elected by the Kabul merchants and often Hindus were elected as its presidents. The board adjudicated trade disputes on the basis of commercial customs, contracts and documentary evidence.

The religious establishment has been very critical of the Panchat. In the course of the Loya Jirga of 1924 the ulema succeeded in putting forward a notion which restored the commercial jurisdiction to the shari’a courts and consequently abolished the Panchat. In turn a special chamber was created within the courts of general competence for commercial cases.

bb. Other Courts of Specialised Experience

Other courts of specialised experience were the Civil Servants Courts, the High Court for the Trial of Ministers and the Military Courts.

The Civil Servants Courts consisted of the State Council and the Provincial Consultative Council, which were both composed half of elected and half of appointed members and whose primary function was advisory. The State Council had to advise the government in legis-

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44 Kamali, see note 11, 220.
45 In this Loya Jirga the reforms of Amanullah were discussed controversially. The gathering was convened by Amanullah after it became clear that the traditional tribal and religious elites were strongly antagonised by Amanullah’s reforms. For details see Poullada, note 23.
46 In 1931, a Commercial Disputes Tribunal (faysala-e monaazi’at-e tidjarat) was set up in Kabul, which was followed several years later by tribunals in Qandahar and Mazar-e Sharif. The authority for appeals lay with the Chamber of Commerce in Kabul; final appeals were to be considered by the Counsel of the Ministry of Commerce. Later on in 1949, a three-tiered court structure was established with a Court of Commercial Appeal (mahkama-e moraafi’a-e tidjarat) and a Cassation Court of Commerce (mahkama-e tamiz-e tidjarat), both situated in Kabul, Kamali, see note 11, 220.
ative matters and had to prepare draft legislation, while the Provincial Council’s duty was to consider provincial administrative affairs under the supervision of the provincial governors. Moreover, the Councils were competent to adjudicate all criminal charges brought against government officials in the capital or the provinces respectively. The State Council additionally served as a Court of Appeal and Cassation. It is remarkable that these courts were empowered to adjudicate charges brought against judges and judicial employees including qadis and muf-tis, since they were regarded as regular civil servants.

The High Court for the Trial of Ministers (diwan-e 'ali) was an ad hoc tribunal, whose only duty was to investigate and adjudicate charges of misconduct brought against ministers. The judges of these courts of specialised experience did not have to be elected from the religious establishment, since the relevant provisions were not part of the shari'a. Thus, the introduction of these courts undermined the influence of the ulema in the judiciary. Moreover, Amanullah established a public administration academy in Kabul (Dar al- bukkam) in the 1920s to train administrative and judicial personnel. Although this academy could have served as a base for a developing secular legal elite, it was much too small and its training programme too brief to supply the required personnel for the reforms of Amanullah.

Even though the reforms of Amanullah were very ambitious, the promotion of judicial independence was not on their agenda. Although the Constitution of 1923 stated that “in Afghanistan all courts of justice are independent and immune from all forms of interference”, it is doubtful whether this proclamation led to a greater freedom of the courts. The judiciary was still a part of the executive branch, which is illustrated by the fact that the Civil Servant Courts had the authority to sentence judges. It was not until the Constitution of 1964 was introduced that the first steps in the direction of judicial independence were taken.

47 Kamali, see note 11, 216 et seq.
48 Kamali, see note 11, 216 et seq.
49 For details Kamali, see note 11, 217 et seq.
50 Kamali, see note 11, 212 et seq.
51 The fact that the judiciary was still firmly in the hands of the overwhelmingly conservative religious establishment certainly did not serve as a strong motivation for any plans in this direction.
52 Kamali, see note 11, 208; R. Grote, “Separation of Powers in the New Afghan Constitution”, ZasRV 64 (2004), 897 et seq.; Chishti, see note 30, 33.
With regard to the laws applicable by the courts, the Constitution of 1923 surely was the most liberal one Afghanistan ever had. For example, it did not confine judicial practice to a particular school of Islam. Article 21 provided that “In the courts of justice all disputes and cases will be decided in accordance with the principles of shari’a and of general civil and criminal laws.” Accordingly, the judges were enabled to consult different schools of shari’a for the most appropriate and even for the most modern solution whereas in other Afghan Constitutions judges have been restricted to an application of the Hanafi school of law.

Since several of the reforms of Amanullah, especially those which undermined the power of the religious establishment, aroused much protest from the ulama, Amanullah lost most of his Islamic legitimacy in the eyes of the people. Furthermore, his economic reforms curbed the interests of the tribal chiefs and therefore antagonised them. Amanullah was overthrown by a rebellion led by Habibullah.

3. Reaction and Slow Modernisation (1931-1964)

During his rebellion Habibullah relied mostly on the support of the religious leaders. After he was declared king (1929) he returned the responsibility for the administration of justice and education to them. However, the short episode of Habibullah’s quite anarchic rule ended already in the same year when Nader Shah (reign 1929-1933), a former general of the Anglo-Afghan war and member of the royal family con-

53 Kamali, see note 11, 30.
54 Kamali, see note 11, 30.
55 E.g. in the present Constitution of 2004, article 130.
56 In this atmosphere an attempt of his government to curb smuggling and toll collection in some border regions led to a rebellion of a northern Tajik tribe. An incident, which under normal circumstances would have been a routine confrontation, gained religious backing from many of the ulama. In the course of this rebellion the army failed to support Amanullah effectively. Kabul was taken and the leader of the northern rebellion Habibullah, was declared king. Amanullah had to flee in exile to Italy where he died in 1960, cf. Rubin, see note 11, 57; Ewans, see note 10, 129 et seq.; Poullada, see note 23, 1 et seq.
57 Ewans, see note 10, 136.
quered Kabul, and took the throne. As a reaction to the anarchy following the downfall of Amanullah in 1929, the 1931 Constitution enacted by Nader Shah emphasised the unity of Afghanistan and the supreme powers and competencies of the monarchy. Nader Shah, who at least in theory, shared the goal of modernisation with Amanullah, was much more cautious and went to some length to appease the religious establishment. He abrogated most of the controversial *Nizam-nama* legislation and confirmed the enforcement of religious laws via religious courts as reintroduced by Habibullah. Arts 87, 88 of the Constitution of 1931 stated that general lawsuits had to be filed under *shari’a* law and that these suits had to be dealt with in accordance with the principles of the *Hanafi* jurisprudence, while a recourse to statutory law was not mentioned.

As already elaborated, Amanullah’s attempt to build up a legal elite beside the religious establishment failed. Therefore until the early 1940s, when the Faculties of Law and Political Science and the Faculty of *Shari’a* at the University of Kabul were established, a certificate of religious schools (*madrasas*) remained the sole educational credential for entry to the judiciary. Even after their establishment, the Law of Civil Procedure of 1957, for example, provided as a prerequisite for judicial appointment that a *qadi* had “to be fully knowledgeable in *figh*, (i.e. religious law), especially in *Hanafi figh* and to be able to apply the authoritative rules thereof in settling the disputes before him” (article 4). Additionally, the “*qadi* had to have full information of the state laws, especially those concerning judicial affairs”. Notwithstanding the existence of two law faculties in Kabul, a legal certificate issued by them was not demanded as a requirement for appointment as a *qadi*. Article 2 of the same law is also telling in this respect, describing the *qadi* as “the ruler of *shari’a* who is appointed by the sovereign or his regent, and who settles the disputes before him in accordance to the provisions of *shari’a*”. This shows that for the decades following the downfall of Amanullah the influence of the religious establishment on the judiciary

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58 Ewans, see note 10, 136 et seq.
60 Ewans, see note 10, 139.
62 Quoted according to Kamali, see note 11, 229.
remained intact, with the sole exception of the courts of specialised experience.

After the assassination of Nader Shah in 1933, his son Mohammad Zahir Shah (reign 1933-1973) followed him to the throne. In the following decades the various uncles and cousins of Zahir Shah, who served as prime ministers, dominated the politics of Afghanistan. The most prominent of them was Daoud Khan, later the first president of the Republic of Afghanistan (Presidency 1973-1978).

Daoud served as prime minister from 1953 until 1963. While on the one hand, Daoud’s term as prime minister was characterised by many successful modernisations, these modernisations were accompanied on the other hand by a curtailment of civil rights and freedoms and by an increased concentration of power in the hands of the central government. While the intelligentsia was antagonised by the first, the latter upset the traditional tribal elites. After having also alienated the royal family by his tendency to reach basic decisions without their consent, Daoud had to resign. The resulting power vacuum provided a unique opportunity for these three forces (i.e. intelligentsia, traditional tribal elite and royal family) to join and reach a broadly based compromise for the sharing of power.

4. The Liberal Period of Afghanistan and the Constitution of 1964

The result of this compromise was the Constitution of 1964. Contrary to the aims of the Constitution of 1931, its main objective was a separation and coordination of the different branches of power.

This constitution is remarkable in many aspects. It was a product of ample negotiations and compromises between the various factions. Therefore the judicial modernisations were less ambitious but much more realistic than the reforms of the 1920s and also more systematic and consistent. The widespread acceptance of the 1964 constitution is underlined by the fact that the Bonn Agreement chose this constitution as

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63 Magnus, see note 59, 54 et seq.
64 For details see Magnus, see note 59, 54; Ewans, see note 10, 165.
65 Magnus, see note 59, 54.
as the legal framework of the transitional order. Moreover the constitution of 2004 is in wide parts inspired by the constitution of 1964.

a. The Separation of Powers and First Attempts to an Independent Judiciary

Arts 97 and 98 of the constitution established the judiciary as an independent organ of the state. Article 98 was an important provision declaring the judiciary to be the sole organ competent to adjudicate in legal disputes, including those in which the state was a party. It was prohibited for any law to exclude a case from the jurisdiction of the judiciary. As an institutional guarantee of an independent judiciary, article 107 established the Supreme Court (Stera Mahkama) as the organ heading the judiciary of Afghanistan, which besides its judicial authority was also the highest administrative organ of the judiciary. The Supreme Court was responsible for the regulation of the organisation and functioning of the courts including the recommendation of candidates for judicial appointment to the king, as well as their promotion, transfer and recommendation for retirement. The Supreme Court furthermore was responsible to hear cases of judges suspected of having committed offences. Moreover, the Supreme Court was competent to appoint, promote, dismiss and retire the civil servants and administrative employees of the judiciary. The Chief Justice (qazi-ol’qozat) was also responsible for the preparation of the budget of the judiciary, which was administered by the Supreme Court (article 107). Finally, the Supreme Court was competent to propose laws concerning judicial matters to the Parliament (article 70).

The nine judges of the Supreme Court including the Chief Justice were to be appointed by the king according to article 105. Under the same provision, the king was allowed to review the appointment of the judges after a period of ten years. Apart from that, removal of the judges was only allowed in case one third of the members of the Lower House demanded the impeachment of one or several members of the Supreme Court due to a charge of a crime stemming from the performance of their duties. To be successful, the impeachment had to be approved by a two-thirds majority of its members (article 106).

Supreme Court judges were prohibited from becoming ministers, government officials or members of the legislative after their term of of-

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66 Article II 1. of the Bonn Agreement.
67 Article 107 of the 1964 Constitution.
fice (article 105). In return they enjoyed the financial benefits of their term of office until the end of life as long as they had not been removed from office in an impeachment procedure.

Additionally, article 90 of the Law of Organisation and Jurisdiction of Courts (1967)\(^{68}\) provided that if a judge should join a political party or be nominated for membership in parliament or even the municipal council, he should resign from his office.

b. Criteria for Judicial Appointment

aa. Supreme Court Judges

Supreme Court judges had to be at least 35 years old (40 for the Chief Justice), they had to be eligible for election to the national assembly (shura)\(^{69}\) and had to have “sufficient knowledge of jurisprudence, the national objectives and the laws and legal system of Afghanistan” (article 105). Therefore a formal decree of an institution of higher education was not necessary to qualify as Supreme Court judge. Thus this could imply that persons with an exclusively religious education could qualify as judges. However, according to Afghan legal experts article 105 has been interpreted as requiring familiarity with both Islamic and non-Islamic sources of law.\(^{70}\) For example in the late 1960s, only two of the judges of the Supreme Court were religious dignitaries, both of them with long-standing judicial experience, the other ones were all graduates from Kabul university with postgraduate training in the West.\(^{71}\)

bb. Regular Judges

With regard to the regular judges, the criteria for appointment were stated in article 75 of the LOJC (1967). According to No.4 of that article, candidates must have a degree similar to a Bachelor of Arts of the Faculty of Law and Political Science or the Faculty of Shari’a or a licence from an official religious college (madrasa) run by the state. Until

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68 Decree No. 588-2189 of 1967 published in the Official Gazette No. 89.
69 This included according to article 46 being Afghan National for at least ten years, not being punished by a court with the deprivation of the political rights after the promulgation of the constitution and not being illiterate.
71 Kamali, see note 11, 208.
the late 1960s judges were almost exclusively drawn either from the graduates of the Faculty of Shari’a in Kabul, from the nine state-run religious high schools or from private religious studies in mosques.\(^{72}\) The latter appointments were obviously not in compliance with the legal prerequisites. This shows that an Islamic education was still the best guarantee for the entrance to the judiciary. However, article 102 of the Constitution of 1964, in contrast to its predecessor of 1931, explicitly reduced the application of shari’a law and required the courts to settle disputes by applying the Constitution and the laws of the state.\(^{73}\) Thus, judges had to be familiar with Western legal practices besides having knowledge of Islamic law. Hence, the judiciary started to diversify its sources of recruitment and to attract more people who had undergone higher education. Additionally, a one-year judicial training programme was initiated in 1968. Senior judges, administrators and law professors were employed to strengthen the credentials of the candidates. Prospective judges with an Islamic education received a survey of Western legal principles and prevailing Afghan statutes while those with a secular education received Islamic Shari’a studies.\(^{74}\) Admission quotas were established requiring a certain percentage of candidates to have a degree from the Faculty of Law.\(^{75}\) The aims of this policy have widely been achieved, which is illustrated by the fact that while in 1968 about 80 per cent of the judges were religious dignitaries with no formal education, only four years later their contingent had dwindled to 53 per cent.\(^{76}\)

c. The Structure of Courts according to the Constitution of 1964 and the Law of the Structure and Organisation of Courts

The LOJC (1967) with the guidelines of the Constitution introduced a basically three-tiered system. The Primary Courts (arts 56-62) as courts of first instance had general jurisdiction in cases of criminal and civil law with the exception of cases falling under the special authorities of the Provincial Courts (arts 43-55). The Provincial Courts were partly courts of first instance in cases related to crimes of government officials stemming from the performance of their office, press offences, smuggling and other offences as promulgated by law. They were also compe-

\(^{72}\) Weinbaum, see note 61, 47.
\(^{73}\) Article 102 of the Constitution of 1964.
\(^{74}\) Weinbaum, see note 61, 44; Kamali, see note 11, 207.
\(^{75}\) Weinbaum, see note 61, 47.
\(^{76}\) Kamali, see note 11, 231.
tent in cases of tax claims and in cases of challenges of parliamentary elections and municipal or provincial council elections. Beside the Provincial Courts also had appellate jurisdiction concerning the judgements of the Primary Courts (article 36).

The President of the Provincial Court had the authority to establish a Chamber for Commercial Cases (article 47). If necessary, he had to appoint a judge for the adjudication of juvenile cases until a Juvenile Court was established (article 48).

The High Central Court of Appeal (arts 35-42) was situated in Kabul and was competent to review the factual and legal circumstances of first instance decisions of the Provincial Courts in cases of appeal, including cases of commercial and labour law. Later on this court was abrogated and its duties were transferred to a Central Public Security and Commercial Appeal Court.77

The Supreme Court (arts 5-17) was the highest organ of the judiciary empowered with administrative powers over the judiciary as well as with certain judicial authorities (article 13), most notably the decision whether laws were inconsistent with the constitution as well as the decision on the interpretation of the application of laws. Within the Supreme Court, a Court of Cassation was established (arts 18-34). The Court of Cassation was competent to review all verdicts of the Provincial Courts which were appealed on points of law (article 28). The Court of Cassation had to review the conformity of the decision with the law as well as with the principles of the shari‘a (article 30). The lower courts were enabled to follow the precedents of the Court of Cassation (article 24).

Apart from the power of the King to appoint Supreme Court judges without the legislature playing a part in the nomination, the Constitution of 1964 provided the basic principles allowing for the development of an independent judiciary; surely, the legal prerequisites had never been better. However, in the brief period between 1964 and 1973, the courts were just beginning to form an independent entity and did not present real challenges to the executive or legislative authorities. In the only case that might have tested the power of the judiciary involving a

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77 Decree No. 1380-415 of 1968 published in the Official Gazette No. 117.
dispute between the legislature and the executive about the budgetary authority, the King intervened and resolved the dispute.\textsuperscript{78}

All in all, the Afghan legal system in the 1960s and 70s seems to have developed very slowly but steadily in the direction of a modern independent and self-confident judiciary with judges becoming more educated and better qualified to handle statutory laws. From this time on, a legal elite was beginning to emerge, substituting the religious establishment in administering law. This developing elite was decimated in the years of regime change and civil unrest.\textsuperscript{79} The overwhelming majority of the members of this developing elite was either killed or imprisoned by the opposing factions or left the country. While the composition of the judiciary remained still largely intact during the presidency of President Daoud, it is unclear according to which prerequisites and criteria judges have been employed and appointed later on. It has been personally reported to the author by top ranking officials of the present Ministry of Justice that, for example, military service was regarded sufficient for at least judicial advancement if not even appointment to the judiciary during the communist rule. Likewise it seems that over the years of civil war and even after the fall of the Taliban in 2001, judges were appointed who lacked the legal prerequisites and had only very basic and solely religious education.\textsuperscript{80}

5. The Period of Revolution and Civil Turmoil 1973-2001

a. The Presidency of Daoud 1973-1978

With the proclamation of the Republic of Afghanistan by President Daoud following his \textit{coup d’état} in 1973, the Supreme Court was abol-

\textsuperscript{78} J.A. Thier, “Re-establishing the Judicial System in Afghanistan,” CDDRL Working Papers No. 19 (2004), Stanford Institute for International Studies, 1 et seq.

\textsuperscript{79} Currently 7 per cent of the active judges have been appointed during the reign of Zaher Shah. Livingston Armytage, Judicial Training Assessment and Strategy [Afghanistan], Centre for Judicial Studies, 2006.

\textsuperscript{80} Around 20.5 per cent of the active judges have only primary, secondary or high school education. Armytage, see note 79; see also Thier, see note 78; United States Institute for Peace, Establishing the Rule of Law in Afghanistan, Special Report 117, 7 et seq., 2004, \<http://www.usip.org/pubs/specialreports/sr117.html\>.
ished and the authorities of the Supreme Court were transferred to the Committee of Public Justice of the Ministry of Justice, whose title was changed to High Council of the Judiciary. The authority of the Chief Justice was transferred to the Minister of Justice. The structure of the other courts remained intact according to the 1967 Statute. The experience of the following years led to the re-introduction of a Supreme Court in the newly enacted Constitution from 27 February 1977. The Supreme Court was once again attributed with its former competencies (arts 101, 112). Nevertheless, even in the text of this constitution the decline of the independence of the judiciary is visible. Article 76 introduces the judiciary as an organ of the state without even mentioning its independence. The President of the Republic appointed the judges of the Supreme Court as well as the Chief Justice (article 107), and interaction with other state organs was not provided. Furthermore, article 104 para. 4 gave the President of the Republic the possibility to review the appointment of the judges after a period of five years instead of the ten years established in the Constitution of 1964.

b. The Communist Regime

Before the Supreme Court was re-established, the government of President Daoud was overthrown in yet another coup d'état by communist forces. According to the proclamation of the Revolutionary Military Council of the Democratic Republic of Afghanistan, the Constitution of 1977 was repealed and all affairs of the country had to be regulated by decrees and administrative regulations by the Revolutionary Council of the Democratic Republic of Afghanistan. The Revolutionary Council declared all previous laws and regulations with the exception of the Constitution of 1977 should remain in force as long as they were in compliance with the aims of the Democratic Republic of Afghanistan.

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82 Published in the Official Gazette No. 360.
83 With regard to the lack of independence of the judiciary see also R. Bachardoust, Afghanistan Droit constitutionnel, histoire, régime politiques et relations diplomatiques depuis 1747, 2002, 146.
84 For details Ewans, see note 10, 176 et seq.
and were not revoked by the Revolutionary Council.\textsuperscript{86} Article 2 of the same decree transferred the authorities of the Supreme Court to a Supreme Judicial Council which was headed by the Minister of Justice and accountable to the Revolutionary Council, while the authorities of the Chief Justice were once again transferred to the Minister of Justice.\textsuperscript{87} The duties of the Supreme Judicial Council were vaguely described as the defence of the laws of the Democratic Republic of Afghanistan and of the well being of the people, the verification of the desires of the revolution as well as the basic outline of policy and revolutionary duties as sanctioned by the Revolutionary Council. Furthermore, article 7 introduced a Revolutionary Court of the armed forces having indeterminate competency for crimes against the revolution or the profit of the people, public goods or the internal or external security of the Democratic Republic of Afghanistan. This system of revolutionary courts was changed and renamed several times in the years of the communist regime until their abolition in 1990.\textsuperscript{88} Since these courts were a peculiarity of the communist era and had no influence on the present system of courts, they are not examined in detail at this stage.\textsuperscript{89}

The communist constitution of 1980\textsuperscript{90} once again reintroduced the Supreme Court as the highest organ of the judiciary.\textsuperscript{91} It had the authority and duty to control the judiciary and to supervise its methods and its unity. Article 56 promulgated the independence of the judges. Curiously enough, however, article 55 provided that the Supreme Court had to report to the Revolutionary Council on a regular basis. All the judges of regular courts as well as the Supreme Court were to be appointed by the cabinet of the President of the Revolutionary Council; candidates were usually proposed by the Supreme Court.\textsuperscript{92} Article 54 established special tribunals for cases which had to be defined by law.

\textsuperscript{86} Decree No. 3 of the Revolutionary Council of the Democratic Republic of Afghanistan of 28 May 1978 published in the Official Gazette No. 398, article 1.
\textsuperscript{87} Article 6 of Decree No. 3.
\textsuperscript{88} See M.H. Saboory, “The Progress of Constitutionalism in Afghanistan”, in: N. Yassari (ed.), \textit{The Shari'a in the Constitutions of Afghanistan, Iran and Egypt-Implications for Private Law}, 2005, 12 et seq.; for a detailed report about this period see Zhobal, see note 81, 19 et seq.
\textsuperscript{89} For details see Zhobal, see note 81.
\textsuperscript{90} Constitution of 21 April 1980 published in the Official Gazette No. 450.
\textsuperscript{91} Arts 54-58; quoted after Zhobal, see note 81, 32.
\textsuperscript{92} Zhobal, see note 81, 32.
As a part of the attempts of the regime to raise popular support, a new constitution was enacted in 1987\textsuperscript{93} which introduced only few changes in the structure of the courts. Article 107 declared the judiciary to be an independent organ of the state and article 109 confirmed the Supreme Court as the highest judicial organ responsible for supervising the activities of the courts and ensuring the uniform application of law. According to article 110, the Chief Justice as well as the members of the Supreme Court were appointed by the President for a period of six years.

c. The Internal War of the Mudj Abedin

With the revision of the Constitution in 1990 removing the last vestiges of communism, additional changes were introduced. Article 110 provided that the Chief Justice was accountable to the President and had to report to him. Furthermore in 1990, a new Law on the Organisation and Jurisdiction of Courts was introduced.\textsuperscript{94} However, since the Taliban later abolished all laws and regulations promulgated by the communist regime and reintroduced the system of laws that had been in practice under the reign of Zahir Shah,\textsuperscript{95} this rather short-lived law shall not be analysed in detail.

The following years were mainly years of civil war between the various factions of mudj Abedin warriors. In 1992 a new constitution for the Islamic Republic of Afghanistan was drafted. However, it was never promulgated, which clearly indicates the inability to reach agreements between the different factions. Stability was not reached until the Taliban movement conquered Kabul at the end of September 1996 and established their radical Islamic system throughout most of the country.\textsuperscript{96}

\begin{footnotesize}
\begin{enumerate}
\item Constitution of 30 November 1987 published in the Official Gazette No. 660.
\item Decree No. 63 of the Council of Ministers 1990 Published in the Official Gazette No. 739.
\item Ewans, see note 10, 267.
\item For details see Ewans, see note 10, 261 et seq.
\end{enumerate}
\end{footnotesize}
6. The Way from the Bonn Agreement to the Constitution of 2004

After the terrorist attacks on the World Trade centre the United States led a multilateral military campaign against the Taliban regime causing its downfall.\(^97\)\(^98\) In order to achieve a provisional basis for restructuring the country the “Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions”, also called the Bonn Agreement was signed in 2001.\(^99\) The agreement has proved relatively successful, although the Taliban as one of the warring parties have remained absent.\(^100\) The Bonn Agreement envisaged three phases of transition, the third and final one ended on 19 December 2005 with the inauguration of the elected Parliament. The Bonn Agreement established the Constitution of 1964 along with the existing laws as a legal framework to the extent that they were not inconsistent with the agreement or the international obligations of Afghanistan and the Constitution.\(^101\) In accordance with the provisions of this agreement, a Constitutional Commission was appointed by the Transitional Administration to assist a Constitutional Loya Jirga\(^102\) in adopting a new constitution.\(^103\) After public consultations in the summer of 2003, the Constitutional Commission submitted the draft Con-

\(^97\) For details see A.H. Guhr/ E. Afsah, “Afghanistan: Building a State to Keep the Peace”, Max Planck UNYB 9 (2005), 373 et seq. (406).


\(^99\) See note 7.

\(^100\) For the history and the details leading to the Agreement cf. Guhr/ Afsar, see note 97.

\(^101\) Article II. 1. of the Agreement.

\(^102\) The Pashtu term Loya Jirga (grand assembly/council) is defined in the Constitution of 2004 in article 110 as the highest manifestation of the will of the Afghan people, being composed out of the members of the National Assembly and the Chairmen of the Provincial and District Councils. Traditionally a Loya Jirga was an assembly of delegates of the different Afghan tribes convening on a national level, to reach important decisions for the country as a whole.

\(^103\) Article I. 6. of the Bonn Agreement.
stitution to the transitional government in late September 2003. Finally, the Constitutional Loya Jirga accepted the draft with minor amendments on 4 of January 2004 and the Constitution was proclaimed on 26 January 2004.

The Bonn Agreement stipulated in respect of the judiciary, under III. 2): “The judicial power of Afghanistan shall be independent and shall be vested in a Supreme Court of Afghanistan, and such other courts as may be established by the Interim Administration. The Interim Administration shall establish, with the assistance of the United Nations, a Judicial Commission to rebuild the domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan Legal Traditions”.

Before dealing with the questions of conformity it will be necessary to outline the present court structure established according to the agreement.

III. The Present Structure of Courts

Article 116 of the Constitution and article 2 para. 1 of LOJC (2005) establish the judiciary as an independent organ of the state, being composed of the Supreme Court (Stera Mahkama), the Courts of Appeal (Mobakem e Estinaf) and the Primary Courts (Mobakem e Ebtedaje).

1. Primary Courts

Article 40 para. 1 of the LOJC (2005) establishes the following courts of first instance in the circuit of the Courts of Appeal:

- Urban Primary Courts
- Juvenile Courts
- Commercial Courts
- District Primary Courts
- Primary Courts for Personal Status

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105 Decree No. 103 published in the Official Gazette No. 818.
Generally the District Primary Courts or the Urban Primary Courts respectively are competent to handle cases unless it is promulgated otherwise by law. Unfortunately, the formulation of the respective legal provision is somewhat unclear.

a. General Competencies

Article 48 LOJC (2005) promulgates the general competencies of the District Primary Courts for the adjudication of all cases of regular criminality as well as cases of private law. The wording of this article seems quite unambiguous both in Persian as well as in the English translation thereby excluding the Urban Primary Courts from the cases of regular criminality. However, according to the information received by Afghan lawyers, general jurisdiction concerning this cases is also given to the Urban Primary Courts. The question whether the District Primary Courts or the Urban Primary Courts are competent is to be decided solely by referring to the principles of local competency elaborated in the respective procedural laws. Hence, it seems that the terms jaza’-e adi used in article 48 LOJC when referring to the competence of the District Primary Courts and jaza’-e omumi used in article 44 para. 1 LOJC in regard to the competence of the Chamber of Criminal Law of the Urban Primary Court are meant as synonym. Quite opposite to most of the existing English translations, which tend to translate the second term as public criminality. Additional support for this result is provided by the fact that in a certain district there is either an Urban Primary Court or a District Primary Court but never the two of them. While the District Primary Courts regularly are composed of three judges without a distinction into subdivisions, the Urban Primary Courts are situated in provincial centres and are composed of five chambers:

- The Chamber of Criminal Law
- The Chamber of Private Law
- The Chamber of Public Rights
- The Chamber of Public Security
- The Chamber of Traffic Violations

107 Article 47 LOJC (2005).
The chambers are composed of a president and a maximum of four judicial members.

**b. Exclusive Competencies**

Article 46 LOJC (2005) establishes exclusive competencies for commercial cases, criminal cases concerning crimes against public security and public rights cases. Commercial Courts have to be established in each provincial capital (article 45 LOJC (2005)). If, as yet, there is no commercial court in one of the capitals, the Chamber of Private Law has jurisdiction in the case.\(^{109}\) As an Afghan peculiarity, the procedure of the commercial court is written in an extra law and differs from the ordinary private procedural law, a fact probably due to the pancham jurisdiction mentioned above,\(^{110}\) which was different from the shari’a jurisdiction of the ordinary courts.

The exclusive competence to adjudicate crimes against public security cases lies with the Chamber of Public Security.\(^{111}\) The Chamber of Public Rights on the other hand has the competence to review cases concerning public rights.\(^{112}\) Furthermore, there are other exclusive competences with regard to cases of juvenile criminality\(^{113}\) and cases of public criminal law.\(^{114}\) Juvenile Courts have to be established in all provincial capitals (article 26 of the Juvenile Code and article 44 LOJC (2005)). It is an important and interesting feature of the Juvenile Courts that according to article 26 para. 3 of the Juvenile Code, in addition to the usual qualifications, juvenile judges must have a special disposition for interaction with minors, a special theoretical training and experience in affairs related to the trial of juveniles.

In case of necessity, the Supreme Court has the authority to establish further chambers within the Urban Primary Courts as well as

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\(^{109}\) Article 45 para. 2 LOJC (2005).

\(^{110}\) See under II. 2. b. aa.

\(^{111}\) Article 42 para. 4 LOJC (2005), see below.

\(^{112}\) Article 42 para. 3 LOJC, the slightly unclear meaning of the term public rights (*hoquq e ami*) will be elaborated under IV. 2. b.

\(^{113}\) Article 26 para. 1 of the Juvenile Code.

\(^{114}\) The meaning of the term in Dari terminology is unclear, referring to Iranian legal terminology, public crimes means crimes against objects protected in the interest of the community, e.g. destruction of public goods, M.J. Jafari-Langrudi, *Terminologie e hoquq* (Legal Terminology), 2004, 191.
within the District Primary Courts after approval by the President of the Republic (article 50, paras 1, 2).

2. Courts of Appeal

Article 31 para. 1 LOJC (2005) asks for the establishment of Courts of Appeal in each of the provinces of the country. These courts are composed of the following chambers (article 32 para. 1):

- Chamber of Criminal Law
- Chamber of Public Security
- Chamber of Private Law and Personal Status
- Chamber of Public Rights
- Commercial Chamber
- Juvenile Chamber

The number of judicial members of each chamber may not exceed six persons (article 32 para. 2 LOJC 2005). The Chamber of Criminal Law (article 32 para. 3 LOJC 2005) also has to review traffic cases. In accordance with article 32 para. 3 LOJC (2005), the Supreme Court can, if necessary, establish further chambers in the framework of the Court of Appeal after endorsement by the President of the Republic.

According to article 35 LOJC (2005) in connection with article 6 of the same law, the decisions and verdicts of the Court of Appeal are binding with regard to the factual circumstances of a case.

The Court of Appeal itself has to review all factual and legal aspects of the lawsuit anew and has the competence to correct, overrule, amend, approve or nullify sentences of the lower courts.\(^{115}\) The prerequisites under which an appeal can be filed are regulated in the respective procedural laws (for problematic restrictions see below).\(^{116}\)

\(^{115}\) Article 33 LOJC (2005).

\(^{116}\) See under IV. 3. a.
3. The Supreme Court

a. Structure

The Supreme Court is the highest judicial organ and heads the judiciary (article 116 para. 3 of the Constitution, article 16 LOJC 2005). This has to be understood literally: the Supreme Court is not only the highest Court of Afghanistan, but also has administrative competencies comprising the competence to administer and manage the affairs of the whole judiciary, a task that is fulfilled by the Ministries of Justice in most European countries. In this regard the Constitution of 1964 has obviously served as the model.

The Supreme Court is composed of nine judges as members of the court, one of whom is appointed Chief Justice (article 117 para. 1 of the Constitution). After a differentiated regulation for the first term of office, the President of the Republic will appoint them for a term of ten years with the approval of the Lower House (Wolesy Jirga). Prerequisites for their appointment are stipulated by article 118 of the Constitution. Of special interest are the prerequisites concerning the legal education. Here the constitution stipulates that candidates must have attained higher education in law or in Islamic jurisprudence, and shall have sufficient expertise and experience in the judicial system of Afghanistan. Hence, the appointment of judges having only religious legal education is explicitly allowed, whereas the Constitution of 1964 asked for “sufficient knowledge of jurisprudence, […] and the laws […] in

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117 Article 117 para. 2 of the Constitution: Three members are appointed for a period of four years, three members for seven years and three members for ten years. Later appointments will be for a period of ten years.

118 Article 118 of the Constitution:

“A member of the Supreme Court shall have the following qualifications:
-- The age of the Head of the Supreme Court and its members should not be lower than forty at the time of appointment.
-- Shall be a citizen of Afghanistan.
-- Shall have a higher education in law or in Islamic jurisprudence, and shall have sufficient expertise and experience in the judicial system of Afghanistan.
-- Shall have high ethical standards and a reputation of good deeds.
-- Shall not have been convicted of crimes against humanity, crimes, and sentenced of deprivation of his civil rights by a court.
-- Shall not be a member of any political party during the term of official duty.”
Afghanistan”, which has been understood as requiring experience in both Islamic and secular law. One may argue that the requisite of competence and experience in the Afghan legal system will serve as a regulator since the Afghan system, despite its numerous roots in Islamic law, also has strong components of secularly rooted laws. One can therefore argue that competence and experience in the legal system asks for more than an education purely based on religious law.

Article 117 para. 3 of the Constitution prohibits a second appointment of Supreme Court judges. Article 126 of the Constitution provides that former members of the Supreme Court enjoy financial benefits for the rest of their lives after finishing their term of office if they do not occupy administrative or political positions afterwards and have not been impeached.

Article 127 para. 1 of the Constitution regulates the procedure of impeachment of Supreme Court judges. To achieve an impeachment, at least one-third of the delegates of the Lower House (Wolesi Jirga) have to demand a trial of a member of the Supreme Court due to a misde-meanour committed during the performance of his duty or due to a felony. Furthermore, the Lower House has to approve this request by a majority of two-thirds of all of its members in order to dismiss the accused from his office and refer the case to a special court, to be established by a special law.[121]

Article 118 No. 6 of the Constitution prohibits Supreme Court judges from being members of political parties during their term of office.[122] This provision serves as an additional requisite to ensure the independence of the judges from undue political influences.[123] It is a precautionary measure that is not particular to Afghanistan but is also used in a couple of other countries, e.g. in Hungary,[124] to shield judges from political influence and to support the perception of the judiciary, in the eyes of the citizens, as an impartial organ of the state.

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119 Article 105 No. 3 Constitution of 1964.
120 See note 70.
121 This law still remains to be elaborated by the new parliament.
122 This prohibition is extended to regular judges by the provision of article 15 LOJC (2005).
123 Article 118 No. 6 of the Constitution.
124 Article 32 lit. a para. 5 Hungarian Constitution of 1949 prohibits judges of the Constitutional Court to be a member of political parties.
b. Adjudicative Competencies

The duties and authorities of the Supreme Court are extensive. First there are judicial competencies directly related to the administration of justice. These are summarised in article 24 LOJC (2005) encompassing:

- The review of the conformity of laws, legislative decrees and international treaties with the Constitution and their interpretation on request of the government or courts.\(^{125}\)

Reading this provision together with article 3 of the Constitution, stating that no law can be contrary to the beliefs and provisions of the sacred religion of Islam, the court also has the power to strike down laws and provisions on the basis that they are contrary to the provisions of the Islam.\(^{127}\)

- The proposal of legislation concerning the regulation of affairs of the judiciary to the National Assembly via the government;
- The reopening of final judgments based on newly emerged evidence upon request of the General Attorney or the parties according to the provisions of the respective law;
- The settlement of disputes between different courts with regard to competences on the request of the General Attorney or the parties;
- The competence to review the grounds of decisions in cases of extradition of criminals, both Afghan citizens and foreigners, to a foreign state and to promulgate the final decision;
- The Supreme Court is furthermore obliged to guarantee the uniformity of the judicial practice;
- Decisions on criminal and disciplinary violations of judges;
- To reply to legal questions of lower courts.

The Supreme Court generally takes care of these duties in plenary sessions. Ordinary sessions are convened every 15 days. Extraordinary sessions can be summoned upon the request of the Chief Justice, a pro-

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125 This refers to decrees by the executive in accordance with article 159 of the Constitution for the interim period before the inauguration of the first parliament on 19 December 2003.

126 This authority is also stated in the constitution see article 121.

127 See also Thier, see note 78, 9; Grote, see note 52, 912; M. Lau, “The Independence of Judges under Islamic Law, International Law and the new Afghan Constitution”, ZaöRV 64 (2004), 917 et seq. (925); R. Schmidt, “Wie viel Altes im Neuen?”, IP 61 (2006), 104 et seq. (106).
posal by the General Attorney or a request of a third of the members of the Supreme Court. Concerning its duty to guarantee the uniformity of judicial practice in its function as cassation court, decisions are not made in plenary sessions but by chambers of the Court.

Article 26 para. 1 LOJC (2005) states that if a chamber of the Supreme Court determines that the decision of a lower court contradicts the law, or is mistaken in its implementation or interpretation, the chamber of the Supreme Court will overrule the decision and will deliver the case to a lower court in order to get a new decision. The Supreme Court is equipped with four chambers, which were introduced by article 18 para. 1 of the LOJC (2005):

- The Chamber of Criminal Law
- The Chamber of Public Security
- The Chamber of Civil Law and Public Rights and
- The Chamber of Commercial Law.

Each of the chambers is headed by one of the members of the Supreme Court. The head of the chamber leads all activities of the chamber including its sessions. He is also responsible for the unification of the judicial practice of his chamber as well as for reporting to the Supreme Court Plenum. The exact shape of the chambers is not written down explicitly in the LOJC 2005. However, article 6 LOJC (2005) stipulates that in case of an appeal on points of law to the Supreme Court, at least two members of the Supreme Court have to take part in the trial. Moreover, article 20 LOJC (2005) declares that the Supreme Court has judicial advisors whose number shall not exceed 36. It seems to be the practice of the Supreme Court to have between eight

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129 Article 18 para. 2 LOJC (2005).
130 In this regard the replaced LOJC dated 1967 (see note 68) should have been used as an example, with its detailed regulations about the different chambers in article 19.
131 According to article 21 LOJC (2005) candidates are appointed from among the judges having competence, quality, knowledge and at least ten years of judicial experience.
132 These judicial advisors have to analyse and review cases under consideration and prepare a report to the court so that a decision can be reached (article 22 LOJC (2005)).
133 According to interviews with the Supreme Court conducted by my friend and colleague Mr. Pouya Esmailzadeh, whom I would like to thank warmly.
and ten advisors per chamber, which results in a size of at least ten judges per chamber.

As a result of the importance of the appeal on points of law for the unification of the law, article 26 para. 1 LOJC (2005) also stipulates that the chambers of the Supreme Court can overrule decisions in case of violations of law even if this violation was not denounced in the plea. Article 28 LOJC (2005) declares decisions of higher courts on appealed cases binding for the lower courts.

With regard to the competencies of the Supreme Court, the question arises if the Supreme Court is a constitutional court. A constitutional court is characterised by its ability to control all three branches of state power with regard to their compliance with the constitution. The Supreme Court has the power to review the conformity of laws with the constitution and with the principles and demands of Islam and thus controls the legislative power. Moreover, the Supreme Court controls the judiciary via its function as a court of cassation. However, a judicial control of the executive is still not existing, since an effective procedural administration law ensuring the control of the executive has yet to be implemented. Hence, as long as this prerequisite is not fulfilled, the Supreme Court of Afghanistan cannot be referred to as a constitutional court.

Another issue of concern is that the authority of the Supreme Court to control legislation as well as legislative decrees is designed in a very restrictive way. As the right to request a review of the conformity with the constitution is only conferred to the government and the lower courts, all political forces which do not support the government are denied access to constitutional review of the legislation. Even the French Constitution, which in comparison with other constitutions aims at strengthening the position of the executive at the expense of the powers of parliament, grants the right to initiate proceedings before the Constitutional Council to the Presidents of both Houses of Parliament and to a quorum of members of parliament. Therefore, it is questionable if the system of constitutional review will prove successful in Afghanistan. There is also no possibility for ordinary citizens to file in-

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134 The competence for the distribution of the judicial advisors to the different chambers lies with the Chief Justice (article 21 LOJC (2005)).
136 Article 121 of the Constitution, article 24 No. 1 LOJC (2005).
138 See also Grote, see note 52, 911.
individual complaints alleging that their fundamental rights have been violated.

c. Administrative Competencies

The administrative duties and authorities of the Supreme Court are elaborated in article 29 para. 1 LOJC (2005) encompassing:

- Devising the budget of the judiciary in consultation with the government;
- Heading and supervising the administrative activities of the other courts;
- Introduction of provisions and proposals to regulate the judicial and administrative affairs of courts;
- Reviewing results of scientific studies concerning the judicial affairs and the adoption of measures to solve problems of the courts and to unify their proceedings;
- Proposing candidates as judges and judicial advisors to the President of the Republic in accordance with the provisions of the LOJC;
- Proposing the appointment, transfer, promotion, extension of contracts and retirement of judges to the President in accordance with the provisions of this law;
- Proposing the establishment of courts and of administrative offices for the registration of documents, including their judicial and administrative competencies to the President of the Republic;
- Allocation of the budget of the judiciary;
- Ensuring the necessary facilities for the functioning of the courts;
- Conducting the inception course for the future judges and regulating the affairs related to the course;
- Adoption of the necessary measures to improve the level of education and experience of the judges;
- Supervision of the activities of administrative employees of the judiciary;
- Elaboration of annual statistics and reports of the activities of all courts of the judiciary;
- Other duties and authorities which have been assigned by this or other laws to the Supreme Court.
The Supreme Court performs these duties via the Public Administrative Department of the Judiciary. This organ is introduced by article 23 para. 1 LOJC (2005) to improve the regulation of administrative as well as judicial affairs and is headed by an Administrative Director, who is appointed by the President of the Republic upon the proposal of the Chief Justice. Article 30 LOJC (2005) regulates the duties and authorities of the Chief Justice. They encompass inter alia the general leadership of the judicial and administrative activities of the Supreme Court. He is furthermore authorised to preside over the sessions of the Supreme Court as well as its tribunals, to supervise the enforcement of final judgements, to issue orders resulting from the review of cases of crimes or judicial or administrative transgression of judges. Finally, he may propose the amnesty or reduction of a punishment of a judge to the President of the Republic.

4. Prerequisites for a Judicial Appointment

Article 58 LOJC (2005) establishes as criteria for the judicial appointment of the regular judges that candidates have to be Afghan nationals, that they are at least 25 years old and are free of a final conviction by a court due to the commitment of a felony or an intentional misdemeanour. Furthermore, they must hold at least Bachelor of Arts from the Faculty of Law and Political Science or the Faculty of Shari’a, a degree of an official state-run religious school (madrasa) or an equivalent to these and they must have successfully completed the inception course of the judiciary. Candidates fulfilling these prerequisites can be appointed judges by the President of the Republic on proposal of the Chief Justice. Candidates holding only a degree from one of the official state-run religious schools or its equivalent can be appointed for the first three years as a member of a primary court, a condition which seems to serve as a kind of apprenticeship. Finally, article 58 para. 3 LOJC (2005) gives the Supreme Court the authority to implement additional criteria if the number of applications exceeds the number of vacancies.

A point of critique in this regard certainly is the possibility to appoint candidates holding a degree of the Faculty of Shari’a and even those just holding a degree from official religious schools or their equivalent. Furthermore, it seems questionable which prerequisites will

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139 Article 29 para. 2 LOJC (2005).
be accepted as being equivalent to a degree from official religious schools, especially with regard to the present shortage of judges, which may induce the authorities to be very lax on this point. Graduates from the religious schools tend to have a very poor knowledge of the actual law because they are mainly taught to memorise verses of the Koran and are normally not proficient with the use of legal text or even the principles of shari’a.¹⁴⁰

For the future it would be highly advisable to realise existing plans to merge the Faculty of Law and Political Science and the Faculty of Shari’a.¹⁴¹ Such a reform would streamline the universities in accordance with the structure of the modern Afghan system of law, which has merged the traditions of shari’a with the laws enacted by the state. A degree from this faculty should be the only acceptable educational degree for a judicial career.

Concerning the actual practice of nomination it has been widely criticised by researchers that judicial appointments are made on the basis of personal or political connections without regard to the legal prerequisites.¹⁴²

IV. Conformity of the Organisation and Jurisdiction of Courts with the Bonn Agreement

As already elaborated, after the fall of the Taliban regime the Bonn Agreement mapped out the transition process leading to a new constitution and a permanent order. Concerning the judiciary, the Bonn Agreement stipulates in section III. 2): “The judicial power of Afghanistan shall be independent and shall be vested in a Supreme Court of Afghanistan, and such other courts as may be established by the Interim Administration. The Interim Administration shall establish, with the assistance of the United Nations, a Judicial Commission to rebuild the domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan Legal Traditions”.

¹⁴⁰ Weinbaum, see note 61, 44.
¹⁴² United States Institute for Peace, see note 80; Feinstein International Famine Center, see note 141, 208 et seq.
This part will examine the compliance of the justice system with the prerequisites of independence, rule of law, international standards and Afghan legal traditions. The question of compliance with Islamic principles will be left unanswered, since their exact content is heavily contested.

1. Independence

The idea of independence of the judiciary as required by the Bonn Agreement is a well-established legal doctrine. It has been embraced by numerous national constitutions and laws and has been recognized by various international treaties and legal instruments, starting with the Universal Declaration of Human Rights in 1948. The principle is further promulgated by article 14 para. 1 ICCPR and article 37 of the Convention on the Rights of the Child. Afghanistan is party to both of these international human rights instruments. Moreover, the major regional human rights conventions also promote judicial independence. Additionally it is enshrined in international humanitarian law and in the statutes of international courts.

143 Adopted and proclaimed by A/RES/217 A (III) of 10 December 1948. Stating in article 10: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

144 Article 14 para. 1 “[…] In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

145 Article 37 “States Parties shall ensure that[…]
   d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.”


147 See e.g. European Convention on Human Rights, article 6; American Convention on Human Rights, article 8; African Charter on Human and Peoples Rights, article 7.
In order to concretise the meaning of judicial independence and allow for a monitoring of its implementation the United Nations General Assembly endorsed the Basic Principles on the Independence of the Judiciary.\textsuperscript{150} Although as a General Assembly resolution these principles are not binding for the states,\textsuperscript{151} they nevertheless provide good benchmarks for an assessment of the implementation of judicial independence. In addition to the UN Principles, several non-governmental organisations have created further comprehensive standards.\textsuperscript{152}

The independence of the judiciary is derived from the most enduring components of justice, namely impartiality.\textsuperscript{153} Independence refers to the autonomy of a judge or a bench in the application of the law to the facts when adjudicating cases. It can be more specifically described

\textsuperscript{148} See e.g. article 3 of the Geneva Conventions; Additional Protocol I article 75 para. 4; Additional Protocol II article 6 para. 2.
\textsuperscript{150} Basic Principles on the Independence of the Judiciary adopted by consensus on the seventh UN Congress on the Prevention of Crime and the Treatment of Offenders in Milan, 6 September 1985 and endorsed by the General Assembly with A/RES/40/32 of 29 November 1985 para. 5. The General Assembly later specifically welcomed the principles and invited governments to respect them and to take them into account within the framework of their national legislation and practice, A/RES/40/146 of 13 December 1985, para. 2.
as encompassing two different sub-aspects. First, institutional independence, which refers directly to the principle of the separation of powers, thus prohibiting undue influence by other state organs on the judiciary as a whole and second, individual independence. While institutional independence primarily prohibits intrusions by the executive but also to a lesser extent by the legislative branch of the state, individual independence focuses on the individual judges and means the independence from external and internal forces by the respective person. Undue internal influence may be exercised by other members of the judiciary, especially superiors. To ensure impartial decisions the individual judge has to be free from any interference and pressure when reaching his decisions and be subject only to law.

a. Institutional Independence

As already pointed out the institutional independence of the judiciary derives from the principle of separation of powers. As the UN Special Rapporteur on the Independence of Judges and Lawyers has pointed out in one of his reports: “[...] the principle of the separation of powers [...] is the bedrock upon which the requirements of judicial independence and impartiality are founded.” The separation of powers asks for the guaranteed autonomy of each of the public powers, their mutual independence and the guarantee of a confinement of each of the powers to its respective role. Hence, the judiciary should have jurisdiction over all issues of a judicial nature and should have exclusive authority to decide whether an issue submitted for decision is within its competence as defined by law.

154 W. Bondy, *Separation of Governmental Powers*, 1896, 12 et seq.; International Commission of Jurists, see note 152, 20; Doehring, see note 135, 161 et seq.
157 International Commission of Jurists, see note 152, 23.
159 Bondy, see note 154, 12 et seq.; Doehring, see note 135, 161 et seq.
160 Cf. principle 3 of the UN Basic Principles on the Independence of the Judiciary, see note 150.
Another critical point in regard to the separation of powers and the institutional independence is the formation of the judiciary, i.e. the appointment of judges. A comparison of the different legal systems, reveals several ways to appoint the judiciary. There is no agreement in international law as to the method of appointment. Different models are in place such as appointment by the government, appointment by the government with consent of the parliament or by a judicial service commission, co-option, or election by the people or by parliament. Moreover, different methods of appointment are used for different instances within the judiciary. Each system has its advantages as well as disadvantages. What is important within any system is that the elected or appointed judge enjoys independence from the nominating body. To secure the independence and impartiality of the judiciary, the appointment procedure needs to adhere to transparent and strict selection criteria.

**aa. Competences of the Judiciary**

Articles 120 and 122 of the Afghan Constitution meet the requirements for an institutional independence of the judiciary in providing that the competence to adjudicate lawsuits lies solely with the judiciary and that no law under any circumstances may exclude certain cases or a field of law from the competencies of the judiciary.

An additional positive aspect with regard to the institutional independence of the judiciary is the fact that the Supreme Court itself is responsible for the elaboration of the budget of the judiciary as well as its distribution.

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161  E.g. an election by the people could motivate judges to reach popular decisions or to support popular opinions, while an appointment or election by one of the other state powers has the disadvantage of a personal dependence on the appointing/electing authority. In regard of these disadvantages an interaction between the other public powers in the appointment of the judiciary seems preferable. Moreover, it is also desirable to have a cooperation or at least consultation of the judiciary in the appointment or election of judges, most prominently to ensure the professional qualifications of the candidates. Cf. International Commission of Jurists, see note 152; Doebring, see note 135, 161.

162  International Commission of Jurists, see note 152, 41.

163  Article 29 para. 1 No. 1 LOJC (2005).

164  Article 29 para. 1 No. 8 LOJC (2005).
Concerning the formation of the Afghan judiciary, one must distinguish between Supreme Court judges and regular judges, since they are appointed in different ways.

aaa. The Appointment of Supreme Court Judges

The Afghan Constitution stipulates a shared responsibility of the Parliament and the President of the Republic\textsuperscript{165} for the appointment of the judges of the Supreme Court. The President appoints the Supreme Court judges with the approval of the Lower House of Parliament (\textit{Wolesi Jirga}). Such an interaction generally seems to be a proper guarantee to ensure the independence of the Supreme Court and its judges. Questionable is the lack of a possibility for an opposition to veto nominations.\textsuperscript{166} The provisional\textsuperscript{167} Rules of Procedure\textsuperscript{168} do not provide such a possibility. According to rules 72 and 73 the approval of the nominees by a simple majority of the delegates is necessary. A possibility for some kind of filibustering is not given.\textsuperscript{169} Without a minority veto, the danger is that an executive supported by the majority in parliament might nominate only candidates from its own party, resulting in a politically one-sided or biased judiciary.\textsuperscript{170} Even though for the time being such a possibility seems unrealistic due to the fractioned parlia-

\begin{footnotes}
\item[165] Article 117 of the Constitution.
\item[166] For example, in the United States the possibility of the minority to veto appointments is secured by procedural regulations enabling the minority to effectively prevent the appointment of an unacceptable candidate. The so-called filibustering, i.e. unlimited speech by a senator effectively prevents the voting on a candidate. This possibility is given since the standing rules of the senate place no general time limit on debate. See also D.S. Rutkus, \textit{Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate, CRS Report for Congress}, 2005, 30 et seq.; for details about the U.S. System see H.J. Abraham, \textit{The Judiciary}, 1996.
\item[167] The Afghan Parliament was inaugurated only in December 2005; it is still unclear how the final rules of procedure will be elaborated.
\item[168] National Assembly of Afghanistan, Rules of Procedure of the \textit{Wolesi Jirga} (Lower House) adopted on 3 January 2006 for three month; unfortunately an official publication of the document is not known to the author.
\item[169] See rules 43-53 of the Provisional Rules of Procedure.
\item[170] Cf. Doehring, see note 135, 162.
\end{footnotes}
ment, it is nevertheless recommendable to adopt appropriate safeguards in the final rules of procedure.

bbb. The Appointment of Regular Judges

Regular judges are appointed on proposal of the Supreme Court and with approval of the President of the Republic. The Public Administrative Department of the Supreme Court executes this authority for the Supreme Court. This regulation grants the judiciary an extensive contribution in the appointment of judges and constitutes a rather unique regulation. For comparison, in Germany federal judges are chosen by a special election committee made up of members of the legislative and executive branches and are appointed by the President of the Republic, while the judiciary only has a right to be consulted. Even the Italian system, which shares similarities with the Afghan system by giving the judiciary a very prominent part in the appointment of judges, is more restrictive in this regard. There the Superior Council of the Judiciary is responsible for the appointment of judges. However, a third of the members of the Italian Superior Council of the Judiciary including the vice-president are elected by parliament, whereas in Afghanistan the Supreme Court alone, without any participation by

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171 Article 132 of the Constitution; arts 60, 58, 29 para. 1 No. 5 LOJC (2005).
172 Article 29 para. 2 LOJC (2005).
174 Article 60 of the Basic Law of the Federal Republic of Germany.
175 §§ 55 et seq. German Judiciary Act (Deutsches Richtergesetz).
177 Article 105 of the Italian Constitution of 1948.
178 Article 104 paras 4, 5 of the Italian Constitution of 1948; see also Cappelletti/ Merryman/ Perillo, see note 176; Mariuzzo, see note 176, 163.
other public powers, is responsible for the choice and proposal of candidates to the President of the Republic.

By granting such extensive participation of the judiciary this regulation establishes a good prerequisite to ensure the institutional independence of the judiciary. A point of concern is the missing participation of the parliament in the appointment procedure. Whereas the lack of democratic legitimation can be compensated by the participation of the directly elected President, the participation of the parliament nevertheless could improve the transparency of the process and thereby improve the population’s perception of an independent judiciary.

b. Individual Independence of the Judges

As pointed out, independence of the judiciary not only requires institutional, but also individual independence of the judges. Both concepts are associated and interwoven. Individual independence requires that the judges be free not only from external but also from internal pressure and influence from within the judiciary itself. The conditions of judicial service are of great importance in this regard, i.e. the security of tenure, including the question of removal from office. Judges should only be removed for serious misconduct or disciplinary or criminal offences that render them unable to perform their functions. Judges should not be removed from office for bona fide errors or for disagreeing with a particular interpretation of the law. They need not necessarily be appointed for a lifetime or be unimpeachable, but they must be appointed or elected at least for several years.

Another aspect is the question of discipline and sanctions. The freedom from instructions or pressure while administering a case is of rele-

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179 Generally speaking, it is preferable for judges to be elected or appointed by a body independent from the executive and the legislature, cf. International Commission of Jurists, see note 152, 45.

180 For concerns raised in regard to the present procedures see at the end of III. 4.


182 Cf. International Commission of Jurists, see note 152, 57; cf. also e.g. Doc. CCPR/CO/75/VNM of 5 August 2002, para. 10.

183 Nowak, see note 156, 320; Morse, see note 153, 733; International Commission of Jurists, see note 152, 51; cf. Principles 11,12 and 18 of the UN Basic Principles, see note 150.
vance in this respect. Judges must not be subject to directives or in some other manner dependent while adjudicating, they should be free from binding orders in relation to their specific judicial activities and they should not be disciplined for a particular interpretation of the law in good faith.

Concerning individual independence a further point of importance is the question of the personal security of the judges as well as that of adequate salaries.

**aa. Tenure**

The Afghan legal system provides different regulations for the tenure of the judges of the Supreme Court and the regular judges, as well as for their removal.

**aaa. Conditions of Tenure for Judges of the Supreme Court**

After an special regulation for the first appointment, members of the Supreme Court including the Chief Justice are appointed for a term of office of ten years; the Constitution prohibiting a second appointment. Generally speaking, a lifetime appointment as established for the federal judges in the United States or an appointment until the age of retirement as practiced in Germany, except for judges of the Federal Constitutional Court, is the most effective way to ensure judi-

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184 Nowak, see note 156, 320.
186 See note 117.
187 Article 117 of the Constitution.
188 Article I Sec. 2 Constitution of the United States of America.
189 §§ 10, 21 German Judiciary Act.
cial independence.\footnote{Cf. Nowak, see note 156, 320; International Commission of Jurists, see note 152, 51.} However, a limited term of office does not necessarily imply a lesser degree of independence.\footnote{For example the Judges of the Federal Constitutional Court of Germany are appointed for a period of twelve years excluding a second term of office, and the history of this court shows a well-developed independence in relation to the other state powers. § 4 Federal Constitutional Court Act.}

It has to be taken into account that many powers and authorities are concentrated in the Afghan Supreme Court. As mentioned the Supreme Court is \textit{inter alia} competent for the interpretation and the review of the conformity of laws, legislative decrees and international treaties with the Constitution,\footnote{Article 121 of the Constitution and article 25 para. 1 LOJC (2005).} responsible for the administration of the affairs of the judiciary\footnote{Article 30 LOJC (2005).} and for the proposal of legislation to the parliament concerning the regulation of judicial matters.\footnote{Article 25 para. 2 LOJC (2005).} By the latter competence, the Supreme Court even takes part in the shaping of the legal system of the state, a task that belongs to the duties of the legislature, according to a strict interpretation of the doctrine of separation of powers. Considering this accumulation of competencies and powers, it seems in fact advisable to limit the term of office of the judges, in order to ensure the balance between the public powers. Beside that, the independence of the Supreme Court judges is increased by the regulation that former members of the Supreme Court receive financial benefits from their former office for the rest of their lives, under the precondition that they do no take another governmental or political post.\footnote{Article 126 of the Constitution.}

Summing up, the regulations concerning the tenure of Supreme Court judges comply with the prerequisite of an independent judiciary as recommended by the Bonn Agreement. Nevertheless it should be mentioned that until the formation of the first Supreme Court after the transitional period by the approval of the newly elected parliament, it seems very likely that the President will deem himself competent to make changes to the provisional Supreme Court based on his provisional competencies in article 159 paras 2 and 4 of the Constitution, enabling him to remove and appoint members of the Supreme Court including the Chief Justice almost at whim. However, this transitional
period will soon end with the approval of the Lower House of the candidates proposed by the President of the Republic.\footnote{At the time of the elaboration of the article (June 2006), the Lower House was still debating about their approval of the nominees.}

\textbf{bb. Conditions of Tenure of Regular Judges}

Unfortunately, the period of office is not explicitly regulated by law. Neither the LOJC (2005) nor the Labour Law and the Law of Civil Servants, which can be used supplementary in case issues are not regulated by the LOJC\footnote{Article 65 para. 1 LOJC (2005).} contain explicit provisions regulating the tenure of judges explicitly. According to information by both the Department of Research of the Supreme Court as well as its Department of Human Resources, the prevailing perception within the Supreme Court is that since the law does not mention any limit for the tenure except for Supreme Court Judges, the tenure of judges lasts until the retirement age. The conditions for retirement are regulated in article 62 para. 1 LOJC (2005), which states that retirement is mandatory at the end of 40 years of active service, upon reaching the age of 65 – a regulation which can be seen as an indication of a (working) lifetime appointment – as well as under other conditions defined by law. One of these conditions is regulated in article 133 of the Constitution. Under that provision, a judge may be dismissed by the President of the Republic on the suggestion of the Supreme Court in case the judge has been accused of a felony and the Supreme Court finds the accusation well-founded.

The tenure of the regular judges is regulated satisfyingly to support the independence of the judiciary.

\textit{bb. Sanctions and Freedom from Undue Instructions}

Disciplinary sanctions are regulated in article 68 LOJC (2005). As stipulated in this norm, sanctions can be invoked in accordance with special regulations which have to be approved by the Supreme Court. These disciplinary regulations have not been passed yet, which leaves considerable insecurity with regard to their future content. To avoid uncertainties and to improve transparency it would have been preferable to adopt a clear system of sanctions in the LOJC itself. In this regard, the old law of 1967 was preferable since it contained respective provisions.
A point closely linked to the system of sanctions and directions is the freedom of decision of the judges, i.e. the freedom from binding orders in relation to the specific judicial activities of the judges. This point is regulated by article 14 of the LOJC (2005), stating that courts are independent while deciding on a case and are subordinated to the law while issuing a decision. However, critical in this regard will be the future practice of the judicial administration, since the difference between undue interference with the adjudication of justice and necessary disciplinary sanctions and measures can be very hard to discern. Various participants of training courses for the judiciary have informed the author and his colleagues that they were frequently ordered by superiors via phone calls to decide cases in a certain way. This is a clear breach of Afghan law and international standards and an infringement of the independence of the judiciary. These cases raise great concern about the perception of judicial conduct within the judiciary itself. An incident exemplifying the attitude of many high-ranking judicial officials were the public statements of the head of the Department for the Supervision of the Judiciary, who openly stated his discontent during an ongoing trial and thereby tried to influence its outcome.

**cc. Security and Salary of Judges**

The duty to ensure security for judges and their offices lies with the Ministry of the Interior and other related authorities (article 73 para. 1 LOJC 2005). Practice will show whether the Ministry of the Interior will fulfill its responsibility in this respect. At least in Kabul, the police seem to be capable of handling the task. In the provinces, especially in the south-eastern part of Afghanistan in which elements of the former Taliban forces are still active, this is highly questionable. It would also have been preferable to clarify that the judge or the president of a tribunal has the power to maintain the orderliness of courtroom proceedings, including the power to hold disruptive persons in contempt of

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199 This took place during the trial against Assadullah Sarwari former head of the communist secret police on 25 March 2006.

200 See C. Ahlund, “Major Obstacles to Building the Rule of Law in a Post-conflict Environment”, *New England Law Review* 39 (2005), 39 et seq. (40); for a telling example although in the years 2002, 2003 see Thier, see note 78, 1 seq.; Feinstein International Famine Center, see note 141.
court and the explicit command over security personnel and the police in the courtroom.

Regarding the salary of the judges, article 155 of the Constitution and article 74 LOJC (2005) provide that Supreme Court judges as well as regular judges are entitled to an adequate salary. Although remuneration at present is not at all satisfactory, bearing in mind the prospect that Afghan justice institutions envisage an increase in salaries of 500 per cent in the next 12 years, as stated in the strategy paper “Justice for All” by the Afghan Ministry of Justice, an adequate remuneration will hopefully be achieved in the future.

Summing up, the Constitution and the new LOJC set down an acceptable legal basis on which to build an independent judiciary. There are still some deficits in the laws which the new parliament will hopefully undertake to correct once it has adapted to its tasks. Nonetheless, the main problems for an independent judiciary seem to be related to practical aspects like lack of security, still insufficient salaries, and a lack of awareness in the minds of superiors of the implications of judicial independence and its importance. Another immense problem is the insufficient level of legal education of the judiciary. According to a recent study, more than thirty percent of the active judges are without higher education and have only visited primary or secondary schools or religious high schools. The education of the judiciary will therefore be one of the most important tasks to ensure the correct and unbiased application of the law, a task which is unfeasible without a properly educated judiciary.

2. Rule of Law

The Bonn Agreement also asks for a judiciary in accordance with the rule of law. The concept of the rule of law is hard to describe exhaus-

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202 “[…] 16.1% are educated in non-university settings including Madrassas (religious high schools), and 20.5% are primary, secondary or high school educated. “, Armytage, see note 79.

203 Article II. 1. of the Agreement.
tively. There are numerous publications dealing with this topic, some authors even call the rule of law an opaque concept. In literature there are basically two main perceptions, a legal positivistic one sharing in varying degrees a formalistic understanding of the concept, and a substantive approach including, also in varying decrees, aspects of morality and natural law. Between these extreme views there are numerous particular conceptions seeing the rule of law as emphasising and advancing different goals. It would go much beyond the scope of this article to give an in-depth analysis of the discussion, hence it will be concentrated on the core meaning of the concept of the rule of law and its implications for the structure and competencies of the judiciary. A famous statement which is regularly cited as an example for the classical conception of the principle is part of the Constitution of Massachusetts, requiring “… a government of laws and not of men.” Read in context, this clause was a clear expression of the doctrine of separation of powers. While this doctrine is still seen as part of the rule of

206 Demonstrated drastically in the phrase “A non-democratic legal system, based on the denial of human rights […] may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened western democracies”, Raz, see note 205, 78.
207 Fletcher, see note 204, 11; M.J. Radin, Reconsidering the Rule of Law, 1989, 781 et seq.
208 For an overview of the discussion: R.A. Cass, The Rule of Law in America, 2001, 1 et seq. and Bellamy, see note 205, 2005, 3 et seq.
210 Constitution of Massachusetts 1780 pt.I article XXX: “In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men.”
law, the modern understanding of the overall concept is much broader. The modern usage is widely traced back to A.V. Dicey who defined the rule of law. In a nutshell, each intrusion in the rights of the citizens has to be based on law. Moreover, there has to be equality before the law with everybody including the government being subject to the law. This definition can be enriched with the definitions and guidelines that the International Commission of Jurists has worked out to concretise the implications of the rule of law:

- The judiciary has to be an independent organ of the state,
- A judicial review of the acts of the executive which directly and injuriously affect the rights of the individual has to be guaranteed and
- In case of legislation delegated to the executive or other agencies a judicial review by an institution independent of the executive has to be

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213 “We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary or discretionary powers of constraint” and “[…] we mean in the second place, when we speak about the rule of law […] not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals”, cf. A.V. Dicey/ E.C.S. Wade, Introduction to the Study of the Law of the Constitution, 1948, 202.
214 See also Venkatachaliah, see note 211, 323.
215 International Commission of Jurists, see note 211, 1 et seq.
217 International Commission of Jurists, see note 211, 12; Deninnger see note 216, 49.
guaranteed ensuring that the extent, purpose and procedure appropriate to delegate legislation has been observed.\textsuperscript{218}

The independency of the judiciary has already been assessed above.

\textbf{a. Equality Before the Law and General Subjection to the Law}

Article 22 of the Constitution states that every citizen of Afghanistan, no matter if male or female, is entitled to the same rights and duties. Any discrimination or the bestowal of privileges is prohibited. Article 14 states that the proceedings and verdicts of courts will be based on the principle of equality before the law and the courts. Read together with the provisions about the impeachment of state officials,\textsuperscript{219} these provisions implement equality before the law into the legal system of Afghanistan and also clarify that everybody is subject to law, including the President of the Republic. A question which could be raised in this respect is the question of justice and punishment for perpetrators of past human rights abuses and atrocities. This remains a task yet to be shou-dered.\textsuperscript{220} To end the culture of impunity will in the first instance be a political decision. It should be appreciated that there are at least no am-nesty laws or similar legal obstacles for a prosecution of these crimes which could contradict the principle of equality before the law.

\textbf{b. Judicial Review of Intrusions of Individual Rights by the Executive}

To promote the rule of law, acts of the executive which directly and injuriously affect the rights of the individual should be subject to a re-

view by courts.\textsuperscript{221}

Article 120 of the Afghan Constitution and article 3 LOJC (2005) declare that the competence of the courts includes the review of all claims filed by natural or legal persons, including the state, no matter if

\textsuperscript{218} International Commission of Jurists, see note 211, 12 et seq.

\textsuperscript{219} Article 69 of the Constitution in regard to the President of the Republic, article 78 in regard to the ministers, article 127 for the Chief Justice and the members of the Supreme Court.


\textsuperscript{221} Cf. International Commission of Jurists, see note 211, 12.
as a claimant or a defendant, in accordance with the provisions of law. Although these regulations promulgate the competency of the courts for the review of claims involving the state as a party, it is highly questionable which court and which chamber respectively is actually competent. It seems that the Chambers of Public Rights (divan e hoquq e am’e) of the Urban Primary Courts\footnote{Article 41 para. 1 No. 3 LOJC (2005).} at the first instance and the Chambers of Public Rights of the Appeal Courts,\footnote{Article 32 para. 1 No. 4 LOJC (2005).} the Chamber of Civil and Public Rights of the Supreme Court\footnote{Article 18 para. 1 No. 2 LOJC (2005).} at the appeal level are the competent bodies. Still the exact scope of the competencies of these chambers is somewhat opaque. Article 42 LOJC (2005) provides that the Chambers of Public Rights of the Urban Primary Courts are competent to review civil cases between natural and legal persons or between legal persons. The wording of this regulation raises doubts whether claims against the state are subject to the regulation or not, particularly since in contrast the wording of article 120 of the Constitution as well as article 3 of the LOJC (2005) expressly include the state as such into the notion of legal persons.\footnote{“The competence of the courts includes the review of all claims filed by natural or legal persons, including the state, no matter if as a claimant or a defendant, in accordance with the provisions of law.”} On the other hand, article 3 LOJC (2005), which regulates the scope of the competencies of the judiciary, explicitly encompasses claims against the state, therefore at least one of the bodies mentioned in the same law has to be competent to handle the respective cases. Most matching would be the Chambers of Public Rights, since first the term “public rights” has a connotation of claims involving the administration. Second, the replaced LOJC (1967) stipulated for the then Chambers of Public Rights (divan e hoquq e am’e)\footnote{Article 19 para. 3 LJOC (1967) for the Chambers of the Cassation Court, article 36 b) LJOC (1967) for the High Central Court of Appeal and article 44 c) LJOC (1967) for the Provincial Courts.} of the different courts the competency to adjudicate claims against the state. Another argument for this perception is that article 42 para. 3 LOJC (2005) uses the word qasie for case, which is normally used in respect of criminal cases instead of the term da’eva, which is used in article 42 para. 2 LOJC when referring to private disputes. Hence it seems likely that the function of the Chambers of Public Rights remained basically the same, namely to administer claims against
the state. This was also the perception of Afghan lawyers the author consulted.\textsuperscript{227}

Another provision regulating the competence of the Supreme Court for judicial review of executive acts is article 24 para. 5, 6 LOJC (2005) concerning the extradition of accused or convicted foreigners and Afghan nationals to other states.

However, all mentioned provisions just regulate competences with regard to judicial review, none of them regulates the right to file claims, let alone the prerequisites under which such a right can be realised. A provision granting citizens the rights to bring an individual complaint alleging that their fundamental rights have been infringed by state action is not mentioned, neither in the Constitution nor in the LOJC (2005)\textsuperscript{228} nor in other laws regulating activities of executive organs, for example in the new Police Law.\textsuperscript{229} This may serve as an explanation why the courts are still not fulfilling their competence of reviewing administrative acts.\textsuperscript{230} There is an urgent need to elaborate as soon as possible a law about the administrative court procedure including the right of complaint for every citizen.

It should be mentioned in this context though that article 58 of the Constitution establishes an Independent Human Rights Commission were everyone can file a complaint alleging that his or her human rights have been violated. The Commission can then refer the case to the courts, which are obliged to apply the constitution and may thus address human right breaches.\textsuperscript{231} However, this can only serve as an additional instrument of human rights protection and cannot substitute a judicial review by the courts. First the Human Rights Commission has no means of interfering itself with the acts of the executive, e.g., to order temporary measures,\textsuperscript{232} and second there is no obligation of the courts to review cases handed over by the Human Right Commission.

\textsuperscript{227} Perception of my friend and colleague Mr. Gholamhaidar Allama of the Afghan Independent Human Rights Commission on 27 March 2006.

\textsuperscript{228} See as well Grote, see note 52, 911.

\textsuperscript{229} Presidential Decree No. 75, Published in Official Gazette No. 862.

\textsuperscript{230} Information received in an interview with Dr. Kwan of the Afghan Independent Civil Service Commission on the 27 February 2006.

\textsuperscript{231} Grote, see note 52, 911.

\textsuperscript{232} The Independent Human Rights Commission is solely competent to investigate cases, pass materials to the competent authorities and follow up the respective proceedings without having legal means to enforce them (article 23, 21 No. 9 of the Law on the Structure, Duties and Authorities of the Af-
Hence, the prerequisite of the Bonn Agreement for the judiciary to comply with the rule of law demands the introduction of a law regulating administrative court proceedings which above all grants citizens the right to challenge executive acts infringing their rights.

c. Judicial Review of the Legislation Delegated to the Executive

To establish and strengthen the rule of law it is further advisable to introduce a judicial review to determine whether the executive has exceeded its delegated power of legislation.\(^{233}\)

Compared to other legal systems, the Afghan Constitution equips the government with quite extensive law-making powers, which can be used without an interaction of Parliament. This extensive authorization is in itself rather problematic with regard to the separation of powers and the rule of law.\(^{234}\) Article 76 of the Constitution grants the government the power to devise regulations to implement the basic lines of policy and to regulate its own duties, with the sole restriction that these regulations are not contrary to the text and the spirit of the law. Such an extensive authority should at least be softened by a strict judicial review.

According to article 121 of the Constitution and article 24 para. 1 LOJC (2005), the Supreme Court is competent to review the conformity of formal laws, legal decrees and international treaties with the constitution and its interpretation. However, these legal decrees (\textit{faramin e taqnini}) are a peculiarity of the Interim Legal System. They have the function of formal laws\(^ {235}\) and are not equivalent to the decrees (\textit{moqararat}) which the government may enact according to article 76 of the Constitution.\(^ {236}\) Therefore there is at least no direct possibility of judicial review of the legislative acts of the executive. Only an incidental review by the courts in the course of regular proceedings is possible as


\(^{233}\) C.I. International Commission of Jurists, see note 211, 15.

\(^{234}\) For this question see Grote, see note 52, 909.

\(^{235}\) See with regard to these legal decrees article 159 of the Constitution.

\(^{236}\) This perception also correlates with the legal terminology used in the Iranian legal system since regulations passed by the government are called decrees (\textit{moqararat}) too, while the term \textit{taqnin} is reserved for acts of the legislator, see M.J. Jafari-Langrudi, \textit{Terminolojie e hoquq} (Legal Terminology), 2004, 679.
courts are only bound by law and not by decrees of the executive (article 130 Constitution). Hence, they can decide not to apply unlawful decrees. However, this indirect control is not sufficient with regard to the rule of law.

It should also briefly be mentioned that the proceedings of the Supreme Court when reviewing the conformity of formal laws in accordance with article 121 of the Constitution and article 24 para. 1 LOJC (2005) has as well not been regulated by a law yet.

3. International Standards

The third prerequisite of the Bonn Agreement for the Afghan judiciary is its compatibility with international standards. This requirement seems to be a subsidiary clause beside the requisite of an independent judiciary and the rule of law. In addition to these two, international standards concerning the judiciary include the principles of fair trial. Article 14 para. 1 ICCPR guarantees a right to a “fair hearing”. This principle is at the centre of civil and criminal procedural guarantees and, with respect to criminal cases, it is further developed by a number of concrete rights in arts 14 and 15. However, the majority of the requirements necessary for a fair trial are less questions of the structure and jurisdiction of the courts than those of the respective procedural law. The relevant aspects in the former regard the right to appeal in criminal cases and the special prerequisites of juvenile trials.

a. Right to Appeal

Article 14 para. 5 ICCPR reads “Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.”

The right to appeal is aimed at ensuring at least two levels of judicial scrutiny of a case, the second of which must take place before a higher
tribunal. A confirmation of the judgement by the original trial judge does not satisfy the requirement of review by a higher tribunal. Revisions limited to questions of law would not satisfy the requirements; the case has to be reviewed with regard to legal and factual aspects of the conviction and sentence.

Article 31 LOJC (2005) entails the obligation to establish Appeal Courts in each provincial capital throughout Afghanistan. Article 33 LOJC (2005) provides Appeal Courts to review judgements of lower courts by reconsidering all factual and procedural aspects of the case.

The details of the appeal process have been regulated in the Interim Criminal Procedure Code for Courts and provide for an effective implementation of the right into the legal system. The only problematic regulation in this respect is article 53 LOJC (2005) restricting the right to appeal. While the first restriction, which limits the right to appeal to the lapse of a certain time, is unproblematic, the second limitation is questionable. Article 53 para. 5 LOJC (2005) excludes the appeal if the punishment is a fine not exceeding 50,000 Afghanis i.e. ca. 1000 USD.

It is questionable whether a limitation of the right to appeal other than the lapse of a time limit is in conformity with article 14 para. 5 ICCPR. The right to appeal is generally applicable to everyone convicted of any criminal offence, regardless of the seriousness and severity of the offence. The question whether petty offences may be exempted was seen as a question that may be regulated by internal law. However, for example the denial of judicial review for offences punishable by a prison term of up to one year was regarded as a violation of article 14 (5) ICCPR. The limitation of the right to appeal in Afghan law is well below that line. However, in a country like Afghanistan,

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239 Nowák, see note 156, 349.
240 Nowák, see note 156, 348.
241 Decree No. 115 published in the Official Gazette No. 820.
242 For a detailed description, see Guhr/ Moschtaghi/ Knust, see note 238; Defferrard, see note 238.
243 Guhr/ Moschtaghi/ Knust, see note 238.
244 Nowak, see note 156, 350.
245 The preparatory work leading to the codification of the right in the ICCPR contained in fact a restriction for petty offences. However, this exception was struck during the elaboration process and did not appear in the final text, Nowak, see note 156, 350 et seq.
246 Nowak, see note 156, 351.
which is suffering from widespread poverty, it is highly questionable to impose a barrier of 50,000 Afghanis as even the remuneration of well-paid jobs at western aid agencies usually does not exceed round about 300 USD per month. Therefore, the enactment of a different provision seems advisable to ensure compliance with article 14 para. 5 ICCPR.

b. Juvenile Trials

Article 14 para. 4 ICCPR obliges state parties to conduct criminal trial against juveniles in such a manner as will take account of their age and the desirability of promoting their rehabilitation. This is repeated and developed further in article 40 of the Convention on the Rights of the Child, ratified by Afghanistan. States are not expressly required to establish juvenile courts.247 Nevertheless, they must ensure that criminal trials against juveniles are conducted in a way different from those against adults and that due consideration is taken of the interest of promoting the rehabilitation of the juvenile.

Article 2 para. 1 of the Juvenile Code introduces rehabilitation and re-education of minors who are in conflict with the law as one of the objectives of the law. Article 26 of the law introduces special Juvenile Courts on the level of the Primary Courts. Furthermore article 26 para. 3 requires judges at Juvenile Courts to fulfil special criteria, i.e. to have special talents and professional training as well as experience in matters related to the trial of juveniles. Hence, the demands of a fair trial with regard to the structure of courts in juvenile trials are fulfilled.248

4. Afghan Legal Traditions

It now remains to assess the compliance of the structure of courts with Afghan legal traditions. Disregarding the communist era as well as the other extremist regimes, whose rather peculiar structures of courts were attractive only to their respective clientele, the present system of courts presents itself as an organic development of the Afghan legal system of the 60s and 70s. The generally three-tiered structure of courts was known in Afghanistan since the times of Amanullah, and one could very well argue that the principle was already established in the time of

247 Nowak, see note 156, 347.
248 Reaching the same conclusion in more detail Guhr/ Moschtaghi/ Knust, see note 238, 137.
Abdur Rahman in shape of the report obligation for the qadi. The system has been unified and simplified to reduce the overall number of different kind of appeal and cassation courts as a necessary modernisation. Also the Supreme Court, which due to its administrative functions rigorously separates the judiciary from the executive, was already established in the Constitution of 1964 as a guarantee of judicial independence. The speed and frequency with which revolutionary regimes have abolished the court shows the threat it has posed to an uncontrolled power of the executive. The possibilities of the Executive to influence the judiciary have been reduced compared to the Constitution of 1964, as the President of the Republic is no longer authorised like the former king to review the appointment of judges after a time of ten years, but is solely able to appoint new ones after the expiration of the term of office. Moreover, the tenure of office has been changed for the regular judges to a lifetime appointment, thus increasing judicial independence. Traditional proven means to reach unification of jurisprudence are still in use, as the formal questions of lower courts to the Supreme Court in regard of judicial matters (article 24 para. 9 LOJC (2005)) are a modern form of the presentation of questions to the chief-qadi already practised under the Asas ul Quzat of Amir Abdur Rahman.249

Modernisation of the system was and still is necessary – modernisation itself can be called a tradition of the Afghan system by now, especially when aiming at reducing the influence of the religious establishment and increasing the independence of the judiciary. In both aspects, there remains much to be done for the Afghan state in order to achieve the status of the 1960s and early 70s and even exceed it. Hence, the prerequisite of conformity with Afghan legal tradition is given, even though in some regards a little more courage in straining this prerequisite would have been preferable. However, another lesson drawn from the history of Afghanistan should be kept in mind as well, namely that drastic reforms always failed and that the great reform achievements were reached by compromises between traditionalist and progressive forces.

V. Conclusion

Above all, to establish the rule of law in the Afghan legal system a judicial review of the executive acts must be implemented as soon as possi-

249 See above under II. 1.
ble. Apart from the non-existent provisions concerning a right to review of administrative acts, the structure and competency of the Afghan courts is basically in compliance with the international requirements established by the Bonn Agreement. However, there are still some deficits in the laws and some points remain unclear like, the exact number of the members of the different chambers of the Supreme Court and clear regulations about the distribution of general competencies between the Urban and District Primary Courts. Thus there is a need for some improvements, which the new parliament will hopefully undertake once it has adapted to its tasks. The problematic aspects of the norms mentioned seem to be rather due to a lack of competence and experience on the side of the legal drafters than to intent. Hence, it seems to be advisable for the community of donors to increase the support of the respective departments of the government commissioned with the task of legal drafting without being overcome by the temptation to design laws themselves, which just have to be translated in order to be implemented.\textsuperscript{250} The laws of the 1960s and 70s reveal the skill of the drafters of legal texts before the era of civil turmoil and war and should be used when appropriate as suitable models for the present legal system.

Additional points of concern are the educational criteria for the appointment of the regular judges since necessary degrees vary greatly with regard to the level of legal education and the quality of teaching. Furthermore, they may be applied laxly due to the present lack of judges in Afghanistan. A uniform educational standard would be highly recommendable, leading to a uniform degree which should be the sole and only qualification for an entry into the judiciary. The level of education of judges has to be raised since this is an essential prerequisite for an independent judiciary. In addition, it would seem advisable to improve the transparency of the procedure for the appointment of the regular judges, preferably by the participation of parliament, by means of chosen delegates. Moreover, there are grave practical problems beside the still insufficient remuneration of most of the judges and lack of personal security in most parts of Afghanistan, most prominently the insufficient awareness in the minds of superiors of the meaning of judicial independence and its importance. The crucial task in the future will be to transfer the generally positive legal base provided for in the Constitution and the laws of Afghanistan into reality. Judicial independence

remains a mere written promise, invisible for the people, if the importance of this principle is not embedded firmly in the minds of the members of the judiciary and if the government lacks an effective monopoly of force to be able to prevent war lords or other power holders from interfering with the affairs of the judiciary.
The Case of an Afghan Apostate – The Right to a Fair Trial Between Islamic Law and Human Rights in the Afghan Constitution

Mandana Knust Rassekh Afshar *

I. Introduction
II. Factual Background of the Case of Abdul Rahman
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Glossary

I. Introduction

The constitutions of most Islamic countries – including that of the Islamic Republic of Afghanistan – contain clauses establishing Islam as the official state religion and requiring that all laws adopted by the state comply with Islamic beliefs and religious doctrine. At the same time,

* The article is based on a speech given before the Scientific Advisory Board of the Max Planck Institute for Comparative Public Law and International

these constitutions guarantee civil rights for all citizens. The Afghan Constitution\(^2\) even refers to the Universal Declaration of Human Rights and the Charter of the United Nations and compels the Afghan state to respect these rights and abide by the international conventions it has ratified.\(^3\)

The question of whether these two obligations are contradictory or complementary will be examined and methods of resolving such a potential conflict will be evaluated. I would like to shed some light on the Afghan legal system, in particular the Afghan Constitution, and describe how religious doctrine and the conflicts, which arise from the coexistence of these two obligations in the Afghan legal framework, can be said to influence due process.

The case of Abdul Rahman, an Afghan-born Muslim who converted to Christianity while he was working abroad and was later on accused of apostasy, was heavily reported worldwide and drew much public interest. The case clearly illustrates the conflict of different legal systems coexisting in legal pluralistic societies such as Afghanistan. A legal evaluation of the case will provide the necessary insight and elaborate the relationship between religious and judicial norms in the Afghan Constitution and their compliance with human rights standards.

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1. Countries with a majority Muslim population giving Islamic law a preferred position are *inter alia* Islamic Republic of Afghanistan, article 3 of the Afghan Constitution; Arab Republic of Egypt, article 2 of the Egyptian Constitution; Islamic Republic of Iran, arts 2-4 of the Iranian Constitution; Republic of Iraq, article 2 of the Iraqi Constitution; Islamic Republic of Pakistan, article 227 of the Pakistani Constitution; State of Qatar, article 1 of the Qatari Constitution; Kingdom of Saudi-Arabia, *inter alia* arts 1, 23 and 48 of the Saudi-Arabian Constitution; Republic of Yemen, article 3 of the Yemeni Constitution.


3. Article 7 of the Constitution.
II. Factual Background of the Case of Abdul Rahman

Abdul Rahman was accused of rejecting Islam and converting to Christianity 16 years ago when he was working for a Christian relief organisation in neighbouring Pakistan as a medical aid officer caring for Afghan refugees. When he returned to Afghanistan to settle a custody battle for his daughters, he was arrested after his family denounced him to the police, accusing him of becoming a Christian. In an interview with the Associated Press, the competent judge stated:

"We are not against any particular religion in the world. But in Afghanistan, this sort of thing is against the law. It is an attack on Islam... The prosecutor is asking for the death penalty".4

Nevertheless, Abdul Rahman avowed himself a Christian when questioned by the competent judge. High-ranking state officials and dignitaries called for his release, reminding Afghanistan of its duty under international human rights law to respect the freedom of religion. Afghanistan's judiciary was vexed by the external intervention, recalling that it was a sovereign and independent nation. Finally, the indictment was rejected on procedural grounds and Abdul Rahman was released. The questions raised by his prosecution, however, remain crucial. Is the Afghan legal and judicial system's ability to provide rule of law and protect human rights merely hindered by a lack of capacities, or is the source of all evil the Constitution and legal system itself?

First, the legal basis of the offence of apostasy in the Afghan legal system will be examined, and then the constitutionality of recourse to Islamic jurisprudence will be challenged.

III. Legal Basis of the Crime of Apostasy in the Afghan Context

There is much doubt as to the legal foundation of the prosecutor’s demand for the death penalty. This interpretation is borne out by an analysis of the applicable legal sources.

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1. The Afghan Penal Code

The Afghan Penal Code of 1976, in force today, does not deal with apostasy and therefore fails to set out an applicable penalty. Article 1 of the Afghan Penal Code, however, specifies that the Penal Code only deals with *ta’zir* crimes and sanctions, while crimes and sanctions of the *qisas* and *hudud* category shall be punished in accordance with the provisions of Islamic religious law, namely, *Hanafi* religious jurisprudence.

Islamic offences are divided into three categories and classified pursuant to punishment. *Ta’zir* crimes and sanctions are those crimes that are not qualified as *hudud* or *qisas* offences, or prescribed by Islamic law, but may be decided by a judge or codified by the state if deemed necessary, so long as Islamic principles and rules of procedure are respected. *Ta’zir* crimes and sanctions form part of the secular statutory laws of Afghanistan and are left to the discretion of the respective authorities. *Qisas* and *hudud* crimes and sanctions are determined by Islamic law, also referred to as the *shari’a*.

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5 Decree 910 published in the Official Gazette No. 347; for English translation see under <http://www.idli.org/AfghanLaws/Laws%201921_todate.htm>.
7 In Islamic jurisprudence, the principle of separation of powers is not followed. The Head of State as well as his appointed judges have the authority to administer justice. They have the power to set forth new crimes and sanctions at their own discretion; A. Baradie, *Gottes-Recht und Menschenrecht*, 1983, 156.
9 Cf. article 1 of the Afghan Penal Code.
10 A. Abd al-Aziz al-Alli, “Punishment in Islamic Criminal Law”, in: Bassiouni, see note 8, 227 et seq. (227).
2. Islamic Law

The question of whether apostasy is a crime under Islamic religious law punishable by the death penalty must therefore be answered before any examination of how such an interpretation may be implemented under the Afghan Constitution can take place.

The term ‘Islamic Law’ generally refers to the entire system of law (shari’a) and jurisprudence (fiqh). It is important however to distinguish between shari’a and fiqh, and the terms should not be used interchangeably. While the shari’a is both infallible and irrevocable, the concepts of fiqh may change according to the circumstances.

Literally, shari’a means “the path to be followed,” and is understood as guidance revealed. Its sources are the word of God as laid down in the Qur’an and the normative praxis of the Prophet Mohammad – the sunna. The interpretation of the shari’a is determined by Islamic legal scholars (faqih). This jurisprudence of the shari’a established by inferring from and applying shari’a is called fiqh, literally “understanding” or “intelligence”. Islamic legal scholars belong to different legal schools or jurisprudences (madhhab) predominant in different parts of the Islamic World. These legal schools are equally orthodox.

The Hanafi jurisprudence referred to in article 1 of the Afghan Penal Code is one of the Sunni legal schools predominant in Afghanistan. According to article 1 of the Afghan Penal Code, the crimes and sanctions...
tions of qisas and hudud must be interpreted and implemented in compliance with the Hanafi jurisprudence.

Qisas comprise manslaughter and bodily harm. These crimes constitute a violation of the rights of men and require retaliation pursuant to the talion (Native) principle.\(^\text{15}\) Although God explicitly provides for qisas crimes,\(^\text{16}\) the victim or his/her family may renounce their right to retributive punishment and negotiate compensation (diyat),\(^\text{17}\) which is encouraged in the Qur'an.\(^\text{18}\) This category of crimes is however not relevant to the case at hand.

The final category are the hudud crimes, which are considered to be crimes against God. They are prescribed and defined by Him and may not be modified by men.\(^\text{19}\) Hadd, the singular for hudud, literally means ‘limit’ or ‘restriction’. Hudud form the bounds of acceptable behaviour.\(^\text{20}\) Crimes classified under hudud are the most severe and carry harsh punishments.\(^\text{21}\) The procedural rules concerning the violation of hudud are characterized by their rigidity and stringent requirements of proof, which makes it sometimes almost impossible to prove a crime.\(^\text{22}\) Neither the evaluation of evidence nor the punishments leave room for discretion.\(^\text{23}\)

According to the prevailing opinion of all Islamic legal schools, adultery,\(^\text{24}\) false accusations of adultery directed at a chaste individual,\(^\text{25}\) theft,\(^\text{26}\) and armed robbery\(^\text{27}\) are without controversy hudud crimes.\(^\text{28}\)

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\(^{15}\) Cf. M.C. Bassiouni, “Quesas Crimes”, in: id., see note 8, 203 et seq.; Lippman/ McConville/ Yerushalmi, see note 6, 49-52.

\(^{16}\) Qur’an, Sura 2:178.

\(^{17}\) Tellenbach, see note 8, 931; Lippman/ McConville/ Yerushalmi, see note 6, 38 and 41.

\(^{18}\) Qur’an, Sura 3:159 as translated by Abdullah Yusufali; Cf. Bassiouni, see note 15, 203 et seq. (205).

\(^{19}\) Benmelha, see note 8, 212.

\(^{20}\) Lippman/ McConville/ Yerushalmi, see note 6, 38; Benmelha, see note 8, 212.

\(^{21}\) A. Aly Mansour, “Hudud Crimes”, in: Bassiouni, see note 8, 195 et seq. (196).

\(^{22}\) Baradie, see note 7, 99; Tellenbach, see note 8, 933.

\(^{23}\) Baradie, see note 7, 99.

\(^{24}\) Qur’an, Sura 2:208.

\(^{25}\) Qur’an, Sura 24:2.

\(^{26}\) Qur’an, Sura 5:38.

\(^{27}\) Qur’an, Sura 5:33.
Apostasy, the formal renunciation of one’s religion, is not defined as a crime in the Qur’an.29 The Qur’an only states:

“[…] And if any of you turn back from their faith and die in unbelief, their works will bear no fruit in this life and in the Hereafter; they will be companions of the Fire and will abide therein.”30

While there are consequences, they are not legal in nature. Moreover, this citation must be compared with another sura constituting that “there be no compulsion in religion.”31 This could be interpreted as a statement clearly in favour of religious freedom and the right to freely renounce Islam and convert to any other religion.32 Nevertheless, the predominant understanding is different. According to the prevailing opinion of Islamic scholars, this sura only refers to Non-Muslims who shall not be converted to Islam by compulsion but shall be enabled to freely worship. Born Muslims or a convert to Islam must submit entirely to Islam.33 The meaning of the word “Islam” is “submission or surrender to Allah’s will”.34 Matters, which have been decided by God and his Messenger, are excluded from the free disposal of the believer.35 Hence, it is concluded that a Muslim cannot freely choose to renounce Islam. Pursuant to this traditional understanding, apostasy is considered as one of the hudud crimes giving rise to the death penalty. It is the greatest sin a Muslim can commit against God and the Muslim community. It is high treason.36

Scholars see the legal basis of their interpretation in a hadith,37 which are the reported words and deeds of the Prophet Mohammad. They are an important tool for the determination of the Sunna referred to by all traditional legal schools. They are binding for the Muslim community under the prerequisite that they derive from a reliable

28 Baderin, see note 8, 79; Abd al-Aziz al-Alfi, see note 10.
29 J o r d a n , see note 14, 61.
30 Qur’an, Sura 2:217 as translated by Abdullah Yusufali.
31 Qur’an, Sura 2:256 as translated by Abdullah Yusufali.
32 Cf. Baderin, see note 8, 120.
33 Qur’an, Sura 2:208.
34 Lippman/ McConville/ Yerushalmi, see note 6, 24
35 Qur’an, Sura 33:36.
36 T. Kamali, “The Principle of Legality and its Application in Islamic Criminal Justice,” in: Bassioumi see note 8, 165 et seq.; Aly Mansour, see note 21, 197; Baradie, see note 7, 125.
37 “Whoever changes his religion, kill him”; see Kamali, see note 36, 166.
The Prophet Muhammad is said to have described the three cases in which Muslim blood may be legitimately shed: it is justified to kill an adulterer, a murderer, or an apostate abandoning his community. This hadith may of course be and is interpreted in various other ways. The predominant opinion is confronted with more moderate interpretations of the shari’a. Some legal scholars do not consider apostasy as a hadd crime. Others have a very restrictive interpretation of the elements of crime justifying a punishment so severe as the death penalty.

Grand Ayatollah Montazeri e.g., one of the highest-ranking authorities in Shi’a Islam today, has issued a fatwa on the question of apostasy, stating that an apostate, in terms of Islamic criminal law, is a born Muslim who has rejected the religion of Islam with the intent to harm Muslims and to fight against Islam. A hostile intent is thus required. A believer who renounces Islam after searching his soul without expressing any ill-will shall not fear prosecution. One of Montazeri’s students goes even further in claiming that the crime of apostasy, which goes back to the time of ancient religious wars, cannot be applicable today.

According to Hanafi jurisprudence, which is authoritative in Afghanistan and decisive for the case at hand, apostasy of a Muslim-born sane adult constitutes a hadd crime for which the prescribed sanction is the death penalty. It can be therefore concluded that the act of apostasy is a hadd crime under the prevailing Hanafi jurisprudence’s interpretation of Islamic criminal law. If the constituting elements of the crime can be proven, its sanction is the death penalty.

The next question to examine is whether this interpretation of Islamic law has to be considered in the legal system of Afghanistan and, if so, whether its consideration would be consistent with the Afghan Constitution.

38  Baradie, see note 7, 26.
39  Kamali, see note 36, 153.
40  For an overview on the arguments see Baderin, see note 8, 124–125.
41  A fatwa is a legal pronouncement in Islam, issued by a religious law specialist (mujtahid) on a specific issue. See Glossary at the end of the article.
43  Baradie, see note 7, 123 et seq.
IV. Constitutionality of Recourse to Hanafi Jurisprudence

1. Article 130 para. 2 of the Afghan Constitution

This interpretation of the Hanafi jurisprudence could be asserted before a court according to article 130 para. 2, which states:

“When there is no provision in the Constitution or other laws regarding the ruling of a pending case, the courts shall decide in accordance with the Hanafi jurisprudence and within the limits of this Constitution in a way to serve justice in the best possible manner.”

The scope of application and the interpretation of this article was discussed at length amongst the judges, prosecutors, police officers, defence counsel and law students at the Fair Trial Training of the Max Planck Institute for Comparative Public Law and International Law and the Institut International de Paris la Défense in Kabul. The participants had differing views on the possibilities of recourse to Hanafi jurisprudence and the limits determined by the Constitution. The different opinions will be presented and discussed below.

2. Constitutional Limits

According to the wording of article 130 para. 2 of the Constitution, a recourse to Hanafi jurisprudence is limited to ruling on cases which have been already taken to court. In criminal cases, an indictment for an offence constituting a crime under statute law is presupposed.

Under the Constitution or other statutory laws, apostasy is not recognized as a crime. Apostasy is a hadd crime under Hanafi jurisprudence (shari’ah). Pursuant to article 130 para. 2 of the Constitution, recourse to Hanafi jurisprudence must be within the limits of the Constitution.

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44 Unofficial translation of the author in compliance with the Dari version of the text.
a. Principle of Legality

One of the constitutional principles limiting state action is the principle of legality. State infringement of civil rights and freedoms always requires a legal basis. This principle is inferred from the principle of rule of law. It serves as a protection against abuses of power and arbitrariness of judges and ensures legal predictability and certainty. In the field of criminal law, where state sanctions constitute the deepest intrusions in respect of the fundamental rights of the citizens, the principle of legality must be observed throughout.

aa. Recourse to Hanafi Jurisprudence Excluded in Criminal Cases

The principle of nullum crimen, nulla poena sine lege is set out in article 27 of the Afghan Constitution. One could argue that the doctrines of Hanafi jurisprudence are not laws in terms of the Constitution. If the Islamic jurisprudence were to be understood as other laws in terms of article 130 para. 2 of the Constitution, it would be superfluous to point out their applicability for adjudicating cases.

The traditions of the Prophet Mohammad were not transformed in Afghan statutory law according to the constitutional law making process. Apostasy is not stipulated as a crime in any Afghan statute law. Recourse to the shari’a according to a Hanafi jurisprudential interpretation would violate the principle of legality of crime and sanction. According to this perception, convicting Abdul Rahman and handing down the death sentence for apostasy would be inconsistent with the principle of the rule of law. Such a sentence would have violated article 27 of the Constitution. Consequently, the subsidiary use of Hanafi jurisprudence in terms of article 130 para. 2 of the Constitution would be

46 Kamali, see note 36, 149; Tellenbach, see note 8, 930; cf. Baderin, see note 8, 112.
47 Article 27 of the Constitution reads: “No act is considered a crime, unless determined by a law adopted prior to the date the offence was committed. No person can be pursued, arrested or detained but in accordance with provisions of law. No person can be punished but in accordance with the decisions of an authorised court and in conformity with the laws adopted before the date of the offence.”
48 See arts 94-96 of the Constitution on the lawmaking process.
excluded in criminal cases. It is argued therefore that the scope of application of article 130 para. 2 of the Constitution is limited to civil cases.49

bb. Recourse to Hanafi Jurisprudence not limited per se

This perception is confronted with the wording of article 130 para. 2 of the Constitution mentioning the adjudication of cases. A restriction to civil cases is not obvious. Furthermore, this interpretation does not take into account the Afghan legal conception and the predominating legal pluralism in Afghanistan. Among believers, Islamic law and jurisprudence are, without any act of state legislation, considered binding laws.50 Hence, it is asserted that recourse to Hanafi jurisprudence does not violate the constitutional principle of legality. Moreover, it is stressed that the Constitution forbids any contradictions between laws and the belief and provisions of the sacred Islam.51 This constitutional conception would justify recourse to Hanafi jurisprudence regarding the punishment of behaviour contrary to the provisions of Islam. This view can be based on article 1 of the Afghan Penal Code, which refers to the applicability of Islamic criminal law in addition to the Penal Code.

b. Obligation to Observe International Law

As regards the recourse to Islamic jurisprudence, article 7 of the Constitution must also be considered. Article 7 stipulates that Afghanistan has an obligation to abide by the Charter of the United Nations, the treaties and conventions it has ratified, and the Universal Declaration of Human Rights. One of these international treaties is the International Covenant on Civil and Political Rights of 1966 (ICCPR).52 Afghanistan acceded to the ICCPR on 24 January 1983 without reservation.

Article 18 para. 2 of the ICCPR states:

“No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”

The threat and execution of the death sentence for apostasy amounts to a coercion, which would significantly impair the freedom of indi-

49 Tellenbach, see note 8, 932.
50 Kamali, see note 36, 151.
51 Article 3 of the Constitution.
individuals to have or to adopt a religion or belief of their choice under international law.

Article 2 of the Afghan Constitution guarantees the freedom for followers of religions other than Islam to exercise their faith and to perform their religion within the limits of the provisions of law. However, the freedom to freely adopt a religion of one’s choice is not protected under the Constitution.

Pursuant to article 18 para. 3 of the ICCPR:

“Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”

Any justification of such limitations of the freedom to adopt a religion of one’s choice therefore requires a prescription by law, which is the point at issue.

The constitutional obligation to abide by international law could lead to a restrictive interpretation and implementation of article 130 para. 2 of the Constitution, which would ensure compliance with Afghanistan’s commitment under international law to guarantee entirely the freedom of religion under article 18 of the ICCPR. In line with this perception, any interpretation and implementation of Islamic jurisprudence allowing a sentence for apostasy would be prohibited under article 7 of the Constitution. The conviction and execution of Abdul Rahman on the basis of Islamic jurisprudence would violate the limits of the Constitution and thus be inconsistent with article 130 para. 2 of the Constitution.

c. Obligation to Observe the Beliefs and Provisions of Islam

Restricting the scope of application of article 130 para. 2 of the Constitution through the principles of legality, and the obligation to respect universal human rights standards could conflict with the requirement of article 3 of the Constitution.

53 See also article 18 of the Universal Declaration of Human Rights of 10 December 1948, A/RES/217A (III) of 10 December 1948: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”
Article 3 states that:

“In Afghanistan no law can be contrary to the beliefs and the provisions of the sacred religion of Islam”.

As a legal concept, this article is vague.\textsuperscript{54} It is unclear to which provisions of Islam article 3 refers. Does it refer to the indisputable principles of Islam as the Iraqi Constitution does,\textsuperscript{55} or does it require compliance with all provisions of the shari’a?

Examining Afghanistan’s constitutional history, we find provisions such as the cited arts 3 and 130 para. 2 in every Afghan Constitution since the very first Constitution of 1923.\textsuperscript{56} The self-commitment to observe the United Nations Charter and respect international (human rights) treaties is a novelty in Afghan constitutional history, promulgated for the first time in this new Constitution of 2004. Moreover, this Constitution binds the Afghan state to protect human rights and human dignity so as to achieve democracy.\textsuperscript{57} These provisions render the Afghan Constitution as one of the most modern and unique among Islamic states.\textsuperscript{58} This can be considered as proof of the desire of the fathers and mothers of this Constitution to more effectively promote the protection of human rights after the fall of the Taliban regime.\textsuperscript{59}

Taking that desire into account, the constitutionality of a criminal conviction of Abdul Rahman becomes dubious at best.

\footnotesize{\begin{itemize}
\item \textsuperscript{54} Mahmoudi, see note 14, 870.
\item \textsuperscript{55} Article 2 (b) Iraqi Constitution states that “no law can be passed that contradicts the undisputed rules of Islam”, cf. <http://en.wikipedia.org/wiki/Proposed_Iraqi_constitution>.
\item \textsuperscript{56} On the constitutional history of Afghanistan see e.g. S. Arjomand, “Constitutional Developments in Afghanistan: A comparative and historical perspective”, Drake Law Review 53 (2004/2005), 943 et seq.
\item \textsuperscript{57} Article 6 of the Afghan Constitution reads: “The state is obliged to create a prosperous and progressive society based on social justice, protection of human dignity, protection of human rights, realization of democracy, and to ensure national unity and equality among all ethnic groups and tribes and to provide for balanced development in all areas of the country.” Mahmoudi, see note 14, 873.
\item \textsuperscript{58} Mahmoudi, see note 14; H.J. Vergau, “Manifest der Hoffnung. Über die neue Verfassung Afghanistans”, VRÜ 37 (2004), 465 et seq. (488) who states that, radical-conservative interpretations of the Constitution would violate its spirit.
\end{itemize}}
V. Conclusion

To conclude, I would like to point out that I consider bringing charges for an offence not based on Afghan statute law unconstitutional. Such indictments betray the principle of legality of crime and sanction set forth by article 27 of the Constitution, and therefore equally violate the principle of the rule of law as well as the fundamental rights of the accused. The accused finds his rights to a fair trial infringed. The infringement is not covered by article 130 para. 2 of the Constitution. In my view, the scope of application of article 130 para. 2 is limited to pending civil cases. Afghanistan could bypass this problem by adopting the shari’a as statute law and following the example of the Islamic Republic of Iran. This would ensure compliance with article 27 of the Constitution. However, the violation of Afghanistan’s obligations under international law would linger.

Afghanistan can only do justice to its constitutional self-commitments by promoting a more moderate interpretation of Islamic law and jurisprudence. The Iranian Grandayatollah Montazeri is one advocate of such moderate Islamic interpretations. According to his understanding, the crime of apostasy is only committed when acting with hostile intent and contentious deeds against Islam and the society of Muslims and was restricted by Prophet Mohammad to these conditions⁶⁰.

Afghanistan is struggling to enter into modernity as it remains bound to conservative and sometimes conflicting interpretations of religious and traditional laws and values. During the constitutional process, compromises had to be made on both sides, conservatives and reformers.⁶¹ The Afghan Constitution thus leaves the door open for both possibilities. One can only hope that Afghanistan chooses the path of the rule of law, democracy and the protection of human rights without losing its religious identity.

⁶¹ On the struggles and compromises regarding the preference of Islamic Law on the one side and human right obligations under international law on the other see Vergau, see note 59, 471 et seq.
## Glossary

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
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<tbody>
<tr>
<td>Diyat</td>
<td>Blood money, compensation for murder or injuries under Islamic law</td>
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<tr>
<td>Faqih</td>
<td>Islamic jurist</td>
</tr>
<tr>
<td>Fatwa</td>
<td>Legal or religious opinion by a qualified Islamic law specialist (mujtahid)</td>
</tr>
<tr>
<td>Fiqh</td>
<td>Understanding; Islamic jurisprudence and methodology for the interpretation of shari’a</td>
</tr>
<tr>
<td>Hadd (sg.)/Hudud (pl.)</td>
<td>Limit(s); fixed punishment for certain crimes under Islamic law</td>
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<tr>
<td>Hadith</td>
<td>Saying; traditions of the Prophet Muhammad</td>
</tr>
<tr>
<td>Madhhab</td>
<td>School of Islamic jurisprudence</td>
</tr>
<tr>
<td>Mujtahid</td>
<td>Islamic legal specialist competent to infer independent expert legal rulings from the sources and methods of Islamic law</td>
</tr>
<tr>
<td>Qisas</td>
<td>Equal, balanced; law of retaliation under Islamic law, <em>lex talionis</em></td>
</tr>
<tr>
<td>Qur’an</td>
<td>Holy book; principle source of Islam</td>
</tr>
<tr>
<td>Shari’a</td>
<td>The right path; Qur’an and Sunna; the divine sources of Islamic law</td>
</tr>
<tr>
<td>Shi’a</td>
<td>Second largest denomination of the religion of Islam; Arabic for ‘group’ or ‘faction’</td>
</tr>
<tr>
<td>Sunna</td>
<td>Practice, tradition; the practices of the Prophet Mohammad</td>
</tr>
<tr>
<td>Sura</td>
<td>Chapter of the Qur’an</td>
</tr>
<tr>
<td>Ta’zir</td>
<td>Discretionary punishment under Islamic law</td>
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The two LL.M. theses being published below were delivered in connection with a project introduced in 2004, by the Faculty of Law of the University of Heidelberg and the Universidad de Chile with scientific support from the Max Planck Institute for Comparative Public Law and International Law and the Institute for International Studies at the Universidad de Chile.

The project offers a one year Ph.D. course (International Law – Trade, Investments and Arbitration).

Chairs of the project are Prof. Rüdiger Wolfrum and Prof. Francisco Orrego Vicuña.
Fair and Equitable Treatment: An Evolving Standard

University of Heidelberg, Max Planck Institute for Comparative Public Law and International Law and the University of Chile, March 2005

Marcela Klein Bronfman

Thesis Advisor: Prof. Dr. Francisco Orrego Vicuña

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      a. Occidental Exploration and Production Company vs. The Republic of Ecuador

I. Introduction

As a result of globalization, states have realized that the attraction of foreign investment into their territories is a decisive element in their economic growth. States alone are not capable of generating sufficient economic activity to sustain a steady growth in their economy. This is true mainly among developing countries or capital-importing countries.

There is a concern among states as to the method of stimulating these investment flows into their countries. On the other hand, the in-
vestor’s decision to make an investment depends on a secure and stable environment in the host state. On this basis, states have agreed upon a set of basic standards for the purpose of granting the investor the security he expects and assuring its continuance over time.

Some classical standards such as National Treatment or Non-Discrimination have become insufficient. The reason for this is based on the concern of investors that because those standards are contingent in nature, the protection granted to them may not reach their basic expectations since the treatment provided by the state to its own nationals – which is the basis of the latter standards – is deficient. Thus, although treated in a non-discriminatory way in relation to the host state's nationals, that treatment violates basic rights that are considered essential for an investment to develop effectively. The latter protection is not, therefore, a concern of capital-importing countries only, but also capital-exporting countries that desire to protect their investors worldwide.

In order to grant non-contingent protection to the foreign investor, states have, since the 1960’s, agreed on bilateral initiatives to assure this protection. Bilateral investment agreements began to be signed by many states, constituting a worldwide network of investment agreements. These agreements established a set of standards to grant the foreign investor a safety net for his investment as well as a dispute settlement system that allows for any of the parties or their national investors to have access, in the majority of cases, to chose either the ICSID Tribunal or the UNCITRAL arbitration rules.

Other standards of protection are the Most-Favored Nation, No Expropriation without due Compensation and Fair and Equitable Treatment; this last one constituting the object of the present thesis.

The Fair and Equitable Treatment standard has become the centre of discussion in various forums, and most of all among arbitrators who have applied it. It constitutes one of the most important elements available to a foreign investor to protect his investment in a foreign country, because it provides him with a certain treatment that the host state must grant regardless of the treatment given to its own nationals.

While the standard is applied by arbitrators, the discussion regarding the true meaning of the standard has become a main focus in international investment law. Although most investment agreements grant this standard, they do not provide an indication as to what its exact meaning is and what the criterion is by which it must be applied.

Developed countries have become concerned about the real effect this protection will have on their nationals that invest in capital-
importing countries. Their worry is based on the fact that the standard has been given many different interpretations in arbitral cases (more prolifically within the scope of Nafta), which is acknowledged in many studies, such as the OECD’s. However, this is not good news, considering that instead of promoting stability and certainty among investors, this situation produces exactly the opposite effect.

There have been, however, some initiatives from states to define the meaning of the standard through an interpretation of the agreements they have signed. Such is the case concerning Nafta, where the Free Trade Commission issued an interpretation equating the standard to the minimum standard of customary international law. Although an important initiative, it did not contribute to clarify the meaning of the standard as it will be analyzed below and, moreover, it lowered the protection granted to the investor.

In consideration of the importance of the latter dilemma and its repercussions on investment theory and practice, the present thesis aims to review the main discussion in regard to the meaning of the standard and its consequences on investment practice, proposing a conclusion that will contribute to interpreting the exact meaning that the standard has in international investment law at present.

II. Historical Overview. The Birth of a Non-Contingent Standard

The most debated and analyzed issue regarding the Fair and Equitable Treatment standard is the one relating to its meaning. The evolution of the manner in which judges, arbitrators and scholars have addressed this standard is the decisive matter that will occupy us. However, and as an important feature that may even serve as an element of interpretation in the analysis of the latter, we must deal with the environment and atmosphere in which the standard was first considered to become a part of investment agreements and its historical evolution to this date.

As will be explained, the natural background that investors face in relation to the protection granted to their investments depended exclusively on the host state’s attitude towards investors. The state has the sovereignty to decide the treatment to be granted to all investors in its territory, including alien-owned investments. However, commercial relationships between states have been accentuated, due to the increasing advance of globalization. States have understood that their economies
receive a great deal of benefit from trading with other states as well as investment flows in their own territories.

There was an acknowledgment by states that investment was beneficial to their economies and, therefore, investment should be stimulated. That is the moment in which international law begins to play a greater role. To stimulate investment in their territories, states realized that they must grant the foreign investor the same, and even greater protection, than that which is granted to their own citizens. The latter is accomplished through agreements signed between states in order to grant that protection. Moreover, for some, the standards that are recognized in these agreements have become part of customary international law obliging the whole community of states.

The standard of treatment that is generally granted to aliens by states has evolved and become stricter (property rights, human rights, general investment rights, and so on). “Il regime giuridico del trattamento degli stranieri ha subito nel tempo profonde trasformazioni: si è passati infatti da una fase in cui agli stranieri non era riconosciuta nemmeno la capacita giuridica a una, quella attuale, in cui si ha un’ assimilazione quasi totale degli stranieri ai nazionali.”

International investment law has therefore increased in importance and has become the means by which states grant investors in their territory a stable and secure environment to develop their investment. Fair and Equitable Treatment, an important aspect of international investment law, has become increasingly important in the last 60 years. “Together with other standards which have grown increasingly important in recent years, the fair and equitable treatment standard provides a useful yardstick by which relations between foreign direct investors and governments of capital-importing countries may be assessed.”

The first version of the standard was introduced by the Havana Charter in 1948. The Havana Charter constituted an effort to establish an International Trade Organization. Article 11 (2) established that foreign investments should be assured “just and equitable treatment.”

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After the Charter came a regional initiative. The Economic Agreement of Bogotá of 1948 adopted a series of provisions concerning safeguards for foreign investors. The agreement referred to “equitable treatment” to be accorded to foreign capital.

Both initiatives failed to come into force due to a lack of support; however, they both stated a practice that was to be included in other agreements, especially bilateral investment agreements.

The latter were multilateral efforts which, due to their lack of support by states, do not constitute a decisive influence in the definition of the standard although they serve as an expression of the participating party’s point of view. However, at the bilateral level, there is an important precedent of BIT’s which actually came into force. These are the U.S. treaties on Friendship, Commerce and Navigation (FCN). They were agreed upon after World War I, but it was not until after World War II, and on the basis of what was instituted in the Havana Charter, that most FCN Treaties included the terms “equitable” and “fair and equitable treatment” as a safeguard against violations of the host state. An important exception to the inclusion of the standard in these agreements was the United States–China FCN Treaty. However, the standard was generally introduced in these treaties. The United States signed FCN Treaties with Belgium, Luxembourg, Greece, Ireland, Israel, and Pakistan all of which referred to the standard as “equitable

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5 Friendship, Commerce and Navigation between the US – Belgium available under <http://www.marad.dot.gov/Programs/Treaties/Belgium.html#bel>.
6 Friendship, Commerce and Navigation between the US – Luxembourg available under <http://www.marad.dot.gov/Programs/Treaties/Luxembourg.html#lux>.
7 Friendship, Commerce and Navigation between the US – Greece available under <http://www.marad.dot.gov/Programs/Treaties/Greece.html#gre>.
10 Friendship, Commerce and Navigation between the US – Pakistan available under <http://www.marad.dot.gov/Programs/Treaties/Pakistan.html#pak>.
treatment.” On the other hand, FCN’s agreed upon with Ethiopia\textsuperscript{11}, Germany\textsuperscript{12}, Oman\textsuperscript{13}, and the Netherlands\textsuperscript{14} referred to “fair and equitable treatment.”

Later on, the standard was included in the Draft Convention on Investment Abroad, also called the Abs–Shawcross Draft, developed under the leadership of Hermann Abs and Lord Shawcross. Together with this Draft came along the Draft Convention on the Protection of Foreign Property (the OECD Convention) elaborated in 1967. Both drafts reflected the dominant trend among capital-exporting countries in relation to the standard. “The Draft Convention, although never opened for signature, represented the collective view and dominant trend of OECD countries on investment issues and influenced the pattern of deliberations on foreign investment in that period.”\textsuperscript{15} This collective view among capital-exporting countries favored the agreement among them in relation to the Fair and Equitable Treatment standard.

Up to that moment, there was no argument in favor of establishing this standard as customary international law. Multilateral agreements have not been ratified by countries and the countries that do express their opinion in regard to the standard do not include the vast majority of countries, that is, developing countries. The consent of developing countries in relation to the standard is essential to construing the elements of customary international law. These countries constitute big natural resource providers and, therefore, without their \textit{opinio juris} on the subject, no custom may be formed. There has been no clear consent between capital-importing and capital-exporting states on approval of a multilateral investment agreement that would include the standard.

\textsuperscript{11} Friendship, Commerce and Navigation between the US – Ethiopia available under <http://www.marad.dot.gov/Programs/Treaties/Ethiopia.html#eth>.

\textsuperscript{12} Friendship, Commerce and Navigation between the US – Germany available under <http://www.marad.dot.gov/Programs/Treaties/Germany.html#ger>.

\textsuperscript{13} Friendship, Commerce and Navigation between the US – Oman available under <http://www.marad.dot.gov/Programs/Treaties/oman.htm#oma>.

\textsuperscript{14} Friendship, Commerce and Navigation between the US – the Netherlands available under <http://www.marad.dot.gov/Programs/Treaties/Netherlands.html#net>.

\textsuperscript{15} OECD (ed.), \textit{Fair and Equitable Treatment Standard in International Investment Law}, 2004, 2 et seq. (4).
The OECD Draft had a decisive effect on the bilateral investment agreements that were signed between capital-importing and capital-exporting countries, from the 1970’s onward. At this time, the standard has assumed a determining place in BIT’s.

The MIGA (Multilateral Investment Guarantee Agency) Convention\textsuperscript{16} refers to the standard as a requirement in order for MIGA to guarantee a certain investment. There is no liability in the event the standard of treatment is not provided by a state. However, the fact that MIGA will analyze this to guarantee an investment is an incentive for foreign investors to locate their investment in countries which grant it and, therefore, an extra incentive for states to agree to provide it.

Another important effort on the issue corresponds to the Draft United Nations Code of Conduct on Transnational Corporations.\textsuperscript{17} Both capital-exporting and capital-importing countries agreed that the Code should establish the Equitable Treatment standard for transnational corporations in the host state.

Later on, the MAI (Multilateral Agreement on Investment) negotiated in the OECD\textsuperscript{18} also emphasized the fairness element, but together with the provisions of national treatment and most-favored nation. Although this draft and the OECD draft were negotiated by OECD members, if they had entered into force, they would have become available to non-members, which would have converted it into a multilateral draft agreement.

Other regional efforts came to light, some of which could imply to some degree “the acceptance of the standard among the mainly capital-importing states.”\textsuperscript{19}

Lomé IV\textsuperscript{20} was ratified for a period of 10 years by 12 developed European countries and 68 developing countries from Africa, the Caribbean and the Pacific. They all accepted the possibility of according the obligation of each contracting party to guarantee fair and equitable

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\textsuperscript{19} Vascianne, see note 2, (116).

treatment to nationals of other states that were parties to the convention, to reaffirm the importance of private investment. On the other hand, the 1987 ASEAN Treaty\(^{21}\) between the governments of Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand for the Promotion and Protection of Investments provides for fair and equitable treatment in article IV.

Among other regional agreements that have come into force, Nafta is a major player in the definition of the standard. As analyzed above, Nafta has made a decisive contribution to the determination of the standard’s meaning, especially through the Free Trade Commission’s work. Nafta deals with all standards that are available in international practice for the purpose of promoting and protecting foreign investment, most of them instituted by developed countries.

Besides Nafta, another regional agreement making reference to the standard that is worth mentioning is the Colonia Protocol on Reciprocal Promotion and Protection of Investments\(^{22}\) signed by Mercosur’s Member States, which grants investors from each Mercosur country fair and equitable treatment.

Finally, an instrument that reflects capital-exporting views is the Energy Charter Treaty on the subject of investment. The Charter ensures fair and equitable treatment “at all times.” And “though the Energy Charter is limited to one sector and to the European continent, it nevertheless derives broad significance from the fact that its parties include several states which are currently reliant on capital importation as a part of their basic strategy for economic development.”\(^{23}\)

The Energy Charter Treaty is considered to be one of the most advanced in terms of protection of the investor. “The ECT’s investment regime has been largely adopted from Nafta Chapter XI and UK bilateral investment treaties (BIT’s). It often codifies therefore ‘in a progressive direction,’ contrary to positions taken by the ‘Third World’ and its proponents during the ‘New International Economic Order’ (NIEO) period – customary international law. Given the time of its drafting and the influences on it (the Nafta, the World Trade Organization, the EU’s then draft Energy Directives, BIT practice), it is possibly


\(^{22}\) Colonia Protocol on Reciprocal Promotion and Protection of Investments (Mercosur) available under <http://www.cvm.gov.br/ingl/inter/mercosul/coloni-e.asp>.

\(^{23}\) Vasciannie, see note 2.
the most advanced text in terms of extensive investor protection.”\textsuperscript{24} It definitely puts emphasis on incorporating better treatment through standards provided by international law, including standards originating in other international treaties.

The Energy Charter Treaty has relied much on other investment agreements and arbitral awards. For example, the protection of legitimate investor expectations, which has been taken into account in the Tecmed\textsuperscript{25} and CME vs. Czech Republic cases\textsuperscript{26}, in combination with the principle of transparency, has been recognized in arts 1 and 20 of the Energy Charter Treaty.

The aforesaid historic sequence demonstrates that treaty law is the major source for provisions dealing with the Fair and Equitable Treatment standard. Although there have been many multilateral investment efforts to establish a provision regarding the standard, BIT’s continue to be the main source of information on the standard. Finally, the possibility of considering it a part of customary international law, as will be analyzed, is remote.

III. Fair and Equitable Treatment: The Modern Approach

1. The Search for a Meaning

In a first approach in relation to the treatment applied to a foreign investor and his investment in a host state, it is possible to conclude that according to customary international law, the conditions under which that investment will develop are only those imposed by that state. Accordingly, the host state is sovereign in determining if it will accept the investment in its territory and subsequently, the conditions under which it will be made.


\textsuperscript{25} Técnicas Medioambientales Tecmed S.A. vs. The United Mexican States, ICSID Case No. ARB (AF)/00/2 (Award, May 29, 2003), available under \texttt{<http://ita.law.uvic.ca/documents/Tecnicas-Spanish.pdf>}.

\textsuperscript{26} CME (Netherlands) vs. Czech Republic, UNCITRAL Case (Award, March 14, 2003), available under \texttt{<http://ita.law.uvic.ca/documents/CME-2003-Final_001.pdf>}.
However, in order to promote a certain economic policy, in this case the attraction of foreign investment, states usually limit this sovereign right. States commit, through treaties or investment agreements, to granting foreign investors certain standards of treatment that will stimulate investment in their territories. That is, “il diritto di uno Stato di controllare l’accesso degli stranieri, nonché dei loro investimenti, nel proprio territorio é illimitato, essendo tale diritto una conseguenza della sovranità territoriale.” However, “la liberta assoluta che lo Stato ha nel decidere sul ‘ammissione dello straniero sul proprio territorio svanisce nel momento in cui l’accesso avviene, in quanto da quel momento in poi é imposto dal diritto internazionale allo Stato territoriale l ‘obbligo di garantire allo straniero un determinato trattamento e quindi il regime giuridico da applicare agli stranieri successivamente alla loro ammissione sul territorio dello Stato ospite.”

Standards such as the National Treatment, Most-Favored Nation, Fair and Equitable Treatment and Prompt, Full and Adequate Compensation in the case of expropriation are fundamental standards which are present in almost all international investment agreements available to this date. The Fair and Equitable Treatment standard is contained in almost every agreement of this kind, especially bilateral investment treaties. “Nearly all recent BIT’s require that investments and investors covered under the treaty receive fair and equitable treatment in spite of the fact that there is no general agreement on the precise meaning of the phrase.”

This standard provides a yardstick by which relations between foreign investors and host states must be measured. It constitutes a safety net of fairness for the investor.

Up to 2003, over 2,200 BIT’s had been signed, encompassing 176 countries. The reference to the Fair and Equitable Treatment standard in those BIT’s has increased. Of the 335 BIT’s signed in the early 1990’s, only 28 did not expressly incorporate the standard, and this trend did
not change with the increase of BIT’s in the late 1990’s.\textsuperscript{31} To this date, the standard is referred to in most BIT’s, including those of many Latin American countries that historically had adhered to the Calvo Doctrine, which aimed at putting the foreign investor in the same position as an investor who had the nationality of the host country, therefore leaving foreign investors with the sole option of resorting to the domestic court system of the host state.

Today, the system of BIT’s has tended to form a unified system of law for foreign investments. “Customary international law governing the treatment of foreign investment has been reshaped to embody the principles of law found in more than two thousand concordant bilateral investment treaties. With the conclusion of such a cascade of parallel treaties, the international community has vaulted over the traditional divide between capital-exporting and capital-importing states and fashioned an essentially unified law of foreign investment.”\textsuperscript{32}

This latter process, however, is due to the bilateral treaty system only. No multilateral agreement has entered into force in this respect other than Nafta and the Energy Charter, which are regional agreements and as such, do not contribute extensively to a worldwide system of investment law for foreign investors.

There is a sense of redesign of customary law by these BITs through which states have repeatedly obliged themselves to accord foreign investment the treatment generally provided by these treaties (fair and equitable treatment, full protection and security, compensation for expropriation, etc.). As the United Nation’s International Law Commission said: “An international convention admittedly establishes rules binding the contracting states only, and based on reciprocity; but it must be remembered that these rules become generalized through the conclusion of other similar conventions containing identical or similar provisions.”\textsuperscript{33}

The latter theory, which states that the main elements contained in these agreements may have become customary international law, is nonetheless challenged by the arguments of some who believe that if

\begin{itemize}
\item \textsuperscript{31} UNCTAD (ed.), \textit{Fair and Equitable Treatment}, UNCTAD Series on Issues in International Investment Agreements, 1999, 1 et seq. (22).
\item \textsuperscript{33} Report of the International Law Commission covering the work of its twelfth Session, Doc. A/4425, in: \textit{ILCYB} 2 (1960), 145 et seq.
\end{itemize}
this were true, there would be no need for states to keep including them in the agreements they sign. The most secure acknowledgement of the Fair and Equitable Treatment standard as customary international law may be through its equivalence to the international minimum standard. However, some others will argue that the reason why states still include these standards in investment agreements is because the standard has a stricter meaning than the international minimum standard. This will be discussed later on.

What has converted the Fair and Equitable Treatment standard into such a topic of discussion is its specific legal nature. It differs from other similar standards such as National Treatment or Most-Favored Nation because it does not have a clearly defined point of reference. As opposed to the latter standards, the Fair and Equitable Treatment standard constitutes an absolute and non-contingent standard of treatment, i.e., a standard whose exact meaning is determined by reference to specific circumstances. On the other hand, standards such as National Treatment and Most-Favored Nation are contingent and relative standards which are defined by reference to treatment accorded to other investments. This implies that capital-importing countries have a great deal of control in regard to what will define these standards. For example, in the case of the National Treatment standard, it will be the law of the host state, which will act as a reference in the determination of the standard of treatment that will be granted to the foreign investor.

This is not so in the case of the Fair and Equitable Treatment standard. This special standard cannot be defined by either one of the parties since its lack of reference to other treatments makes it an objective rule. However, the absence of that system of reference leaves the meaning of the Fair and Equitable Treatment standard open to enquiry.

The Fair and Equitable Treatment standard achieves great importance as a non-contingent standard since it constitutes a fixed point of reference for the parties concerned. Although National Treatment and the Most-Favored Nation standards are important principles that avoid discrimination against the foreign investor, they do not assure the investor a certainty in the treatment he will receive. The fact that they constitute contingent standards implies that they might at any moment change if their reference point is modified. The treatment accorded to the investor will therefore also change. “Some commentators also note that non-contingent standards are inherently inflexible: because they constitute a fixed rule, they can normally be changed only when there is
a change in the interpretation of that rule, or when the rule in the relevant treaty is amended.\textsuperscript{34}

It is therefore possible to conclude that: “From the perspective of the investor, the fair and equitable component provides a fixed reference point, a definite standard that will not vary according to external considerations, because its content turns on what is fair and reasonable in the circumstances. The fair and equitable standard will also prevent discrimination against the beneficiary of the standard, where discrimination would amount to unfairness or inequity in the circumstances. Simultaneously, national and MFN treatment, as contingent standards, protect each beneficiary of these standards by ensuring equality or non-discrimination for that beneficiary vis-à-vis other investments.”\textsuperscript{35}

Moreover, the institution of the Fair and Equitable Treatment standard reflects the need for a stricter protection for investors. If we consider that contingent standards, for purposes of their definition, refer to a third treatment, maybe to the treatment granted to nationals (National Treatment) or to third countries (Most-Favored Nation Treatment), these may afford very little protection since this treatment of third parties may be very insignificant. Altogether, “A foreign investor may conceivably believe that, even where protection by the national and MFN standards is offered, the level of protection is insufficient because the host State may provide inadequate protection to its nationals or to investors from the most-favoured nation. In such cases, fair and equitable treatment helps to ensure that there is at least a minimum level of protection, derived from fairness and equity, for the investor concerned.”\textsuperscript{36}

The fact that a state has agreed to incorporate this standard in investment agreements accorded with other states will send foreign investors an important message as to the kind of treatment, according to their own expectations, they will receive in the host state’s territory. “As a general proposition, the standard also acts as a signal from capital-importing countries: for if a host country provides an assurance of fair and equitable treatment, it presumably wishes to indicate to the international community that investments within its jurisdiction will be

\textsuperscript{34} A.A. Fatouros, “Government Guarantees to Foreign Investors”, \textit{Columbia University Press} 1962, 138 et seq.; Vasciannie, see note 2, 107.

\textsuperscript{35} UNCTAD, see note 31, 16.

\textsuperscript{36} Ibid.
Klein Bronfman, Fair and Equitable Treatment: An Evolving Standard

subject to treatment compatible with some of the main expectations of foreign investors.  

However, foreign investors were not defenseless before the creation of the standard. Notwithstanding the birth of the Fair and Equitable Treatment standard, aliens in general have been protected by the “International Minimum Standard,” a rule of customary international law which governs the treatment of aliens, providing them with a set of basic rights which states must grant to them, regardless of their domestic legislation and practices. Violation of this rule engenders international responsibility.

In regard to the latter, it seems that the existence of this international minimum standard has posed the question of whether the inclusion of the Fair and Equitable standard to numerous investment treaties implies that it is a self-contained standard. “The fact that parties to BITS have considered it necessary to stipulate this standard as an express obligation rather than rely on a reference to international law and thereby invoke a relatively vague concept such as the minimum standard is probably evidence of a self-contained standard.” The Fair and Equitable Treatment standard may have been introduced to grant the investor a greater deal of protection above that which is granted by the international minimum standard.

To others, the international minimum standard is tantamount to the Fair and Equitable Treatment standard. However, the latter may be questioned. As the international minimum standard constitutes a rule recognized by customary international law, the inclusion of the standard implies that the aim of the parties when including it in the specific agreement was to impose a stricter standard than that reflected in customary international law. This argument is contested by the fact that there are many cases in which customary law is recognized in treaties, which does not mean that the rule ceases to be a part of customary international law.

Historically, however, the status of the international minimum standard as part of customary international law has also been a matter of tension between developed and developing countries, with several countries challenging its existence. After World War II, the international minimum standard lost strength as an autonomous rule of cus-

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37 Vascianie, see note 2, 99.
tomary international law. Yet the principle has maintained some presence in the protection of property and investments.

Today the international minimum standard is recognized as a rule of customary international law. It provides basic rights to the foreign investors. Its relationship with the Fair and Equitable Treatment standard will be analyzed in a subsequent Chapter.

a. Fair and Equitable Treatment in Treaty Practice

The manner in which the standard is dealt with in different international investment agreements is an important element in establishing its meaning. Although the standard is included in various multilateral treaties as examined in the Historical Overview Chapter, most of them have not come into force due to a lack of approval. Nonetheless, they will be analyzed together with regional investment agreements, bilateral investment treaties and other investment instruments in an attempt to reveal the state's practice in relation to the standard.

aa. Agreement does not refer to the Standard

To this date, only a few BIT's have not included the standard. “... at the bilateral level, the 1978 agreement between Egypt and Japan as well as the agreement between Italy and Romania may be mentioned as instances, among others, in which the standard is not expressly incorporated in inter-State investment relations.”

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The absence of the standard in a treaty has important consequences. There is no certainty as to the possibility that the Fair and Equitable Treatment standard is a part of customary international law. Therefore, if the standard is not incorporated in the agreement, the investor will have no protection against unfair and inequitable conduct by the host state. Only the international minimum standard may be invoked by the alien to protect his investment.

bb. The Hortatory Approach

Although most investment agreements state the Fair and Equitable Treatment standard as obligatory for the parties, there are cases, generally in multilateral agreements, in which its inclusion is not binding.

39 UNCTAD, see note 31, 23.
There is an exhortation to apply it, but it is not obligatory for any of the parties.

This approach may be found in the MIGA Convention\(^{40}\) and in the Havana Charter.\(^{41}\) They are non-binding instruments, thus the reason for not making reference to the standard in a binding format. They both refer to the Fair and Equitable Treatment standard, but do not create an obligation for State parties to provide such treatment in relation to their investments.

The idea behind this approach is to create an incentive for parties to apply the standard of treatment.

**cc. Agreement Refers to the Fair and Equitable Treatment Standard**

**aaa. Terminology**

The manner in which the notion of fairness and equity to be granted to the investor is represented in a treaty may vary. A treaty may not necessarily refer to the treatment as “the Fair and Equitable Treatment standard.” Although the majority do, there are a number of agreements that refer to the standard as “just and equitable treatment” or simply “equitable treatment.” The fact that the use of a different adjective would imply a different standard is questioned, however, as Fatouros suggests: “this variation in the form of words seems to be of no great importance.”\(^{42}\)

The reference to Fair and Equitable Treatment is included in all Friendship, Commerce and Navigation (FCN) treaties signed by the United States, the Abs–Shawcross \(^{43}\) and OECD Drafts \(^{44}\) (referred to in the Historical Overview Chapter), Nafta \(^{45}\) and most BIT’s.
The expression of the latter idea as “just and equitable” or “equitable” figures in the Economic Agreement of Bogotá where article 22 states the following: “Foreign capital shall receive equitable treatment. The states therefore agree not to take unjustified, unreasonable or discriminatory measures that would impair the legally acquired rights or interests of nationals of other countries in the enterprises, capital, skills, arts or technology they have supplied.” The reason the authors referred to the notion as equitable treatment is that at the time, the formulation of it as “Fair and Equitable Treatment” had not yet become the principal form of its expression.

On the bilateral level, the French model and various BIT’s involving Switzerland refer solely to just and equitable treatment.

bbb. The Formulation of the Standard

The manner in which a treaty structures the standard and its association with other standards will be decisive in defining its meaning.

The latter structure differs from one treaty to another. And due to the vagueness of this structure, which provides no enlightenment in resolving the true meaning of the standard, different treaties and investment agreements have evolved throughout the years with the aim of handing over a greater set of tools for the purpose of using this standard in a more uniform way. It is not clear whether the idea of the parties is to completely elucidate the standard’s definition. The fact is that “The attempts to clarify the normative content of the standard itself have, until recently, been relatively few. There is a view that the vagueness of the phrase is intentional to give arbitrators the possibility to articulate the range of principles necessary to achieve the treaty’s purpose in particular disputes. However, a number of governments seem to be concerned that the less guidance is provided for arbitrators, the more discretion is involved, and the closer the process resembles decisions ex aequo et bono, i.e. based on the arbitrators notions of ‘fairness’ and ‘equity’.”

The latter discretion seems, at this point, to have been a key element in the arbitrator’s function in relation to this standard, as will be analyzed below. This notwithstanding, it becomes clear from some Nafta

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46 Economic Agreement of Bogotá, see note 4.
47 Economic Agreement of Bogotá, see note 4, article 22.
48 UNCTAD, see note 31.
49 OECD, see note 15, 2.
awards (Pope and Talbot\textsuperscript{50}, Mondev\textsuperscript{51}) that “the standard is not an opening for personal value judgments of arbitrators (as much as they do naturally play a subterranean role in the awards) but requires that the standard be developed on the basis of an in-depth factual assessment interacting with standards of good governance conduct identified from authoritative and relevant, principally legal instruments.”\textsuperscript{52}

The 1994 Model Draft of the United States establishes the following in relation to the standard:

“Each party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favourable than that required by international law.”\textsuperscript{53}

The latter phrase leads to the belief that the fair and equitable treatment standard is additional to standards required by international law, thus implying a stricter standard. This approach followed by the United States would later be amended, to the point of restricting the standard to be equivalent solely to customary international law. The latter was reflected by the Interpretive Note issued by the Free Trade Commission within the scope of Nafta. Moreover, this view was later introduced to the United States 2004 BIT Model, which states the following:

“Article 5: Minimum Standard of Treatment

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that

\textsuperscript{50} Pope and Talbot Inc. vs. Government of Canada, UNCTITRAL Case (Award, April 10, 2001), available under <http://ita.law.uvic.ca/documents/PopeandTalbot-Merit.pdf>.

\textsuperscript{51} Mondev International LTD. vs. United States of America, ICSID Case ARB (AF)/99/2. (Award, October 11, 2002), available under <http://ita.law.uvic.ca/documents/Mondev-Final.pdf>.

\textsuperscript{52} Wild, see note 24, 385.

\textsuperscript{53} Treaty between the Government of the United States of America and the Government of ... concerning the Encouragement and Reciprocal Protection of Investment, reprinted in: UNCTAD, International Investment Instruments III, 195 et seq.
which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) ‘fair and equitable treatment’ includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) ‘full protection and security’ requires each Party to provide the level of police protection required under customary international law.”

This model would later be used in the investment Chapters of the Free Trade Agreements between the United States and CAFTA (Central America)\(^54\), Chile\(^55\), Morocco\(^56\) and Singapore.\(^57\) Moreover, the Canadian 2004 BIT Model\(^58\) also equates the standard to customary international law alone.

These agreements view the standard as a part of customary international law.

The United Kingdom’s model of bilateral investment agreements, in the same line as the US 1994 Model, also takes us to belief that the standard is self-contained. Article II (2) of the United Kingdom’s model states the following in relation to the standard:

“Investment of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Con-


tracting Party shall observe any obligation it may have entered into
with regard to investments of nationals or investments of the other
Contracting Party.”\(^{59}\)

This article goes far beyond the 1994 US Model. Since “by including
non-discrimination, reasonableness and respect for contractual obliga-
tions as elements of the fair and equitable standard, it accords with the
plain meaning of fairness and equity.”\(^{60}\)

An important contribution to the statement of the standard as self-
contained is the Energy Charter. Article 10 (1) states the following:
“Each Contracting Party shall, in accordance with the provisions of this
Treaty, encourage and create stable, equitable, favorable and transparent
conditions for Investors of other Contracting Parties to make Invest-
ments in its area. Such conditions shall include a commitment to accord
at all times to Investments of Investors of other Contracting Parties fair
and equitable treatment. Such Investments shall also enjoy the most
constant protection and security and no Contracting Party shall in any
way impair by unreasonable or discriminatory measures their manage-
ment, maintenance, use, enjoyment or disposal. In no case shall such
Investments be accorded treatment less favorable than that required by
international law, including treaty obligations. Each Contracting Party
shall observe any obligations it has entered into with an Investor or an
Investment of an Investor of any other Contracting Party.”\(^{61}\)

This multilateral treaty provides for Fair and Equitable Treatment to
investors not in regard to any other standard but as a self-contained
standard. The importance of this Agreement is that although it is lim-
ited to one sector of the economy, it involves the view of many devel-
oping economies. This fact implies a more general and worldwide ac-
ceptance of the status of the standard as self-contained. This is a clear
revision of the developing countries’ appreciation of the standard, apart
from that which has been historically imposed upon them by developed
countries through self-created BIT models.

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\(^{59}\) Agreement between the Government of the United Kingdom of Great
Britain and Northern Ireland and the Government of … for the Promotion
and Protection of Investment, reprinted in: UNCTAD (ed.), *International
Investment Instrument* III, 185 et seq.

\(^{60}\) Vascianie, see note 2, (131).

be/Root/tasks/atmosphere/klim/pub/int/echarter/eTrea
ty_en.htm#A10>.
Moreover, the Australia and Thailand Free Trade Agreement states, in article 909, that: “Each Party shall ensure fair and equitable treatment in its own territory of investments.” Once more, the standard is established as self-contained. This occurs in most investment agreements in which the United States is not involved. This leads us to believe that the general view of the standard is opposed to the stricter appreciation that has been acknowledged by the United States.

In general, at the multilateral level, almost all agreements refer to the standard in a manner in which it is conceived as a standard additional to the standard set by international law. The Draft OECD Multilateral Agreement on Investment of 1998 stipulates that “Each contracting Party shall accord fair and equitable treatment and full and constant protection and security to foreign investments in their territory. In no case shall a contracting Party accord treatment less favorable than that required by international law.”

Also, along the same lines, the 1992 World Bank Guidelines on Treatment of Foreign Direct Investment establish in article III (2) that “each State will extend to investments established in its territory by nationals of any other State fair and equitable treatment according to the standards recommended in the Guidelines.”

In conclusion, the Fair and Equitable Treatment standard has gained strength due to an important set of economic transformations worldwide that have led states to understand that their own economies are linked to the rest of the world’s economies. In this sense, assuring foreign investment, especially in developing countries, has become an essential part of these countries’ economic policy.

The assurance of special treatment to foreign investors reflected in special standard provisions that have been included in investment agreements of all kinds, especially the new-generation agreements, follow this tendency to promote foreign investment in the territory of the parties to the agreement. There is an idea that setting these standards stimulates investment. However, countries like Chile have realized the opposite. After signing a handful of BIT’s, the government has learned that there is no reliable study that confirms that signing these investment agreements actually encourages investment. As a result, Chile has

63 The OECD Draft Multilateral Agreement on Investment, see note 18.
suspended its policy of further BIT negotiations. Notwithstanding this, Chile has continued with the negotiation of Free Trade Agreements with various countries (such as the United States, Canada and so on), most of which include a Chapter on investment, suggesting that this fear of the government in relation to the neutral effects of BIT’s is not yet that powerful.

Aside from the controversy, the Fair and Equitable Treatment standard has been viewed as a key element in the attraction of foreign investment. It is a non-contingent standard, that is, totally independent from third treatment references, allowing for foreign investors to be protected by a secure and objective safeguard in their activities in the host country.

Its meaning, though, continues to constitute the main difficulty in its assessment. Different formulations in different investment agreements and different interpretations by arbitrators have led to a variety of expressions in relation to its true meaning, which ultimately do not contribute to a secure environment for investment. There has been some intent to narrow the scope of its meaning. For example, Nafta’s Free Trade Commission issued its Interpretive Note on the issue, equating the standard to customary international law, as will be analyzed later on. However, at this time, all efforts at interpretation are in the hands of arbitrators, who, in light of the facts, have not proven to be the best means to achieve the clarification of the standard.

2. Latest Tendencies in the Definition of the Standard

The Fair and Equitable Treatment standard has become a major issue in international investment law. It has developed, in Nafta claims alone, into “the alpha and omega of investor arbitration under Chapter 11 of Nafta. Every pending claim alleges a violation of article 1105,”65 In light of this, the indetermination of a clear meaning of the standard is a serious issue. The vagueness in which the standard is conceived becomes a major obstacle for Tribunals when attempting to resolve disputes that have arisen in connection with an investment.

A first approach would suggest that this term be interpreted according to general principles of treaty interpretation outlined in the Vienna

Convention on the Law of Treaties. It will be interpreted in accordance with its plain meaning and in light of the object and purpose of the treaty. The negotiating history of the treaty should also be taken into account if the plain meaning is unclear. However, in practice, the specific facts of each case determine the way in which the principle is understood, where we find a lack of uniformity in the definition.

BIT's and other international investment instruments are usually vague in the definition of the standard. More recent treaties, such as Nafta (particularly in light of the Free Trade Commission’s interpretation, as will be explained below) and the United States–Chile Free Trade Agreement, have made important progress in narrowing the scope of the definition of its meaning in their investment Chapters. Nonetheless, this latest tendency has not sufficed for Tribunals to develop a uniform jurisprudence on the meaning of the term. Although Tribunals rely more and more on other Tribunals' findings, there are still important differences in the approach. “There is a view that the vagueness of the phrase is intentional to give arbitrators the possibility to articulate the range of principles necessary to achieve the treaty’s purpose in particular disputes.” However, this is a matter of concern for governments, as the more one resorts to the discretion of Tribunals, the greater the possibility of cases being resolved under equitable principles, thus undermining certainty for investors, which is the main objective of these investment instruments.

The main approaches that have been formulated regarding the meaning of the standard are (i) equating it to the international minimum standard that is present in international customary law; (ii) measuring it against international law, including all sources; (iii) considering it as an independent standard based on the plain-meaning approach; or (iv) considering it as an independent rule of customary international law.

This Chapter discusses the most important cases in the matter, analyzing the Tribunals’ approach to the standard applicable in each case, and examining their contribution to the development of the standard thus far to date. Reference will also be made to Nafta and the United States–Chile Free Trade Agreements as examples of the latest innovations in the issue.

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67 OECD, see note 15, 2.
Of particular interest are the views of investors in regard to the standard, as well as that of host states. Investors generally argue the more expansive view, that is, conceiving the standard as a self-contained concept, which will extend far beyond the minimum standard approach that limits it to outrageous behavior by the host state, as was established in the Neer case\textsuperscript{68} in the 1920’s. On the other hand, the host state’s argument will tend to limit its liability precisely to the Neer case understanding.

F.A. Mann considers, for example, that "the term fair and equitable treatment envisages conduct far beyond a minimum standard and affords protection to a greater extent and according to a much more objective standard than any previously employed form of words."\textsuperscript{69} Although Mann later restructured his view, as we will see, he asked himself at the time about the usefulness of including the standard in a treaty if it was considered to be a part of customary international law. The other strongly held view stands for equating the standard to the minimum standard of international law, considering that although the standard is present in customary international law, "quite often treaties reiterate rules of customary international law without supposing to add to their content, particularly in instances where there exists disagreement over the existence of such a rule or its exact composition."\textsuperscript{70}

The Nafta regime is the most prolific in awards dealing with the interpretation of the provisions of chapter 11 in relation to the standard. These will be analyzed in this chapter as well as other BIT awards that are also relevant in relation to the issue.

\textbf{a. Bilateral Investment Treaties}

As said before, up to 2003, more than 2,200 BIT’s had been signed, encompassing 176 countries.\textsuperscript{71} Of the 335 BIT’s signed in the early 1990’s, 


\textsuperscript{70} Gross, see note 69.

\textsuperscript{71} UNCTAD, see note 31.
only 28 did not expressly incorporate the standard, and the trend did not change with the increased reliance on BIT's in the late 1990’s. However, and notwithstanding the numerous references to this standard, there is a problem among these investment agreements that consists of a lack of a clear definition as to what its real meaning is.

On the other hand, Nafta represents a very special scenario. In relation to the issue of defining the standard, Nafta adopted a very unusual strategy. As will be analyzed below, article 1105 of Nafta relating to the minimum standard succinctly states that investments of another party shall receive treatment in accordance with international law, including fair and equitable treatment and full protection and security. However, due to the variety of rulings issued by arbitrators, each one containing a different view, the Free Trade Commission took action to define what should be understood by international law, thus restricting the standard’s meaning. The Free Trade Commission, through its Interpretative Note, which is binding upon future arbitral Tribunals, stated that the obligation of a minimum standard of treatment accorded to investments of another Nafta party is “the customary international law minimum standard of treatment of aliens.” Generally, the customary international law standard reflects basic rights of fairness and due process, both administratively and judicially. There was a limitation of the ampleness of the standard through this interpretative note, which in itself was greatly criticized, as will be seen below. “As we now know from the Interpretative Note, the Nafta parties regard article 1105 as no more protective than custom, a qualification apparently designed to confine host state responsibility to settings in which the offending conduct is unmistakably outrageous.”

The main idea was to prevent any investor resorting to other sources of international law that might impose stricter requirements to the treatment granted by the host state to foreign investors. The United States did not wish to incorporate independent treaty obligations to the concept (or more demanding domestic standards).

Nafta has become a source of various interpretations concerning the standard’s meaning. From the emblematic and criticized Pope and Tal-

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72 UNCTAD, ibid., 22.
bot case\textsuperscript{75} to those of Metalclad\textsuperscript{76}, Loewen\textsuperscript{77} and Myers\textsuperscript{78} which will be analyzed below.

One of the most recent approaches to the standard of Fair and Equitable Treatment has been embodied in the US–Chile Free Trade Agreement.\textsuperscript{79}

Chapter 10, which deals with investments, provides, in article 10.4, for the required standard of treatment, as follows:

“1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the Customary International Law Minimum Standard of Treatment of aliens as the Minimum Standard of Treatment to be afforded to covered investments. The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) ‘fair and equitable treatment’ includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) ‘full protection and security’ requires each Party to provide the level of police protection required under customary international law.”

Subsequently, Annex 10 – A, entitled “Customary International Law,” states the following: “The Parties confirm their shared under-

\textsuperscript{75} Pope and Talbot Inc. vs. Government of Canada, see note 50.

\textsuperscript{76} Metalclad Corporation vs. The United Mexican States, ICSID Case No. ARB (AF)/97/1, (Award, August 30, 2000), available under <http://ita.law.uvic.ca/documents/MetacladAward-English.pdf>.

\textsuperscript{77} Loewen Group, Inc. and Raymond L. Loewen vs. United Sates of America, ICSID Case No. ARB (AF)/98/3 (Award, 26 June 2003), available under <http://ita.law.uvic.ca/documents/Loewen-Award-2.pdf>.


\textsuperscript{79} United Sates of America–Chile Free Trade Agreement, 2004, available under <http://www.direcon.cl/tlc_euu.php?sitio=0cc96ba7d750f11bd8edfae a5f2894d>.
standing that ‘customary international law’ generally and as specifically referenced in Articles 10.4 and 10.9 results from a general and consistent practice of states that they follow from a sense of legal obligation. With regard to Article 10.4, the Customary International Law Minimum Standard of Treatment of aliens refers to all Customary International Law principles that protect the economic rights and interests of aliens.”

The Chile–United States Free Trade Agreement is inspired by the Nafta experience and hence, the investment Chapter resembles the one existing in Nafta. However, it innovates by providing a more detailed reference of the standard’s meaning, also substantially reflecting in its text the evolution occurring in light of Nafta decisions. As opposed to article 1105 of Chapter 11 of Nafta, the Chile–United States Free Trade Agreement expressly provides that the minimum standard is in accordance with customary international law. Before the Free Trade Commission’s Interpretative Note, Nafta only referred to international law in general, which of course includes customary international law, treaties, and other sources. Moreover, Annex 10 – A defines, for greater security, what is to be understood by customary law. This last definition might, at first glance, seem unnecessary because of the fact that the same result would be reached by interpreting the term under the Vienna Convention on the Law of Treaties. In any event, customary international law is already binding upon the parties, which makes the clarification in the latter Annex somewhat redundant.

Finally, it defines some aspects that must be included in the terms of Fair and Equitable Treatment and Full Protection and Security to narrow the scope of what must be understood by those terms.

As said, this Chapter reflects the experience of the United States in Nafta. It seems that the United States realized that BIT’s are not only to protect their citizen investors worldwide but may also be used to protect itself from claims by foreign investors in their own territory. Most probably, equating this standard to any source of international law may be deemed by the United States to expand the formulation for them, specifically when they become the respondents in an investment claim. It is interesting to note that while the United States is in transition from a capital-exporting to a capital-importing state, it is adopting restricted criteria.

Other new-generation Free Trade Agreements that establish the obligation to afford the covered investment treatment in accordance with customary international law, including Fair and Equitable Treatment and Protection and Security, are the ones signed by the US with Austra-
lia (March 2004), Cafta (January 2004), Morocco (June 2004), and Singapore (May 2003).

In fact, they are very similar to the US–Chile Free Trade Agreement. As an example, Chapter 11 of the US–Australia Free Trade Agreement is almost identical to the US–Chilean Investment Chapter. The only difference is that the US–Australia Free Trade Agreement does not make any reference to non-discrimination relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

Due to the recent signature of these agreements, no arbitral conflicts have arisen to test the interpretation of their provisions. Nevertheless, an analysis will be made of the more important and recent cases that have been conducted on the basis of previously signed BIT’s and investment agreements that include the Fair and Equitable Treatment standard.

3. Good Faith and Fair Expectations

a. Técnicas Medioambientales Tecmed S.A. vs. The United Mexican States

The facts regarding this case consist in a claim submitted by Tecmed against the United Mexican States in relation to an investment made by that company in land, buildings and other assets of a controlled landfill of hazardous industrial waste. The claim is based on the refusal of the INE (Hazardous Materials, Waste and Activities Division of the National Ecology Institute of Mexico) to renew the operating license of the landfill, and the subsequent request by INE to submit a program for the closure of that landfill. The claimant alleged that the refusal to renew the operating permit constituted an expropriation of its investment and a violation of numerous articles of the BIT between the Kingdom of Spain and the United Mexican States, as well as a violation of Mexican law, all of which resulted in a loss of profits for the claimant.

81 United States–CAFTA Free Trade Agreement, see note 54.
82 United States–Morocco Free Trade Agreement, see note 56.
83 United States–Singapore Free Trade Agreement, see note 57.
84 Técnicas Medioambientales Tecmed S.A. vs. The United Mexican States, see note 25.
that would have derived from the economic and commercial operation of the landfill as an on-going business. The latter also implied the impossibility of recovering the cost of the acquisition of the landfill, its adaptation and preparation and the investments made for this kind of industrial activity.

In its claim, Tecmed alleges that the Mexican authority’s failure to renew the license for its hazardous waste site contravened the Fair and Equitable Treatment standard.

The latter standard is established in the following provision: article 4 (1) of the BIT between the Kingdom of Spain and the United Mexican States, states as follows: “Each contracting party will guarantee in its territory, fair and equitable treatment, according to international law, for the investments made by investors of other contracting parties.”

The Tribunal’s award stated that the Fair and Equitable Treatment standard is an expression of the bona fide principle that is present in international law. The latter requires the Contracting Parties to provide international investments a treatment that does not affect the investor’s basic expectations taken into account in order to carry out its investment. This treatment must be consistent, free from ambiguity, and transparent. The Tribunal finally sustained the claimant’s argument in relation to the fact that INE’s behavior frustrated the claimant’s fair expectations and did not provide clear guidelines in order to allow the claimant to explore a way to maintaining the permit or direct its actions.

b. MTD Equity Sdn. Bhd. and MTD Chile S.A. vs. Republic of Chile

In the year 1997, MTD Equity, a Malaysian company, entered into a foreign investment contract with the Chilean Foreign Investment Committee. The idea behind the investment was the development of a planned community, based on a Malaysian model, in Pirque, a suburb in the city of Santiago. For that purpose, a Chilean company, called MTD Chile S.A, was created, majority-owned by MTD Equity. After MTD had invested several million dollars in capital contributions, the investment process was interrupted by the Chilean authorities’ refusal to re-zone the project. In fact, the Ministry of Housing and Urbanism

85 MTD Equity Sdn. Bhd. and MTD Chile S.A. vs. Republic of Chile, ICSID Case No ARB/01/7 (Award, 25 May 2004), available under <http://ita.law.uvic.ca/documents/MTD-Award_000.pdf>.
(MINVU) rejected the project on the grounds that it conflicted with existing urban development policy.

Due to the latter, MTD brought a claim against the Republic of Chile before the ICSID pursuant to the Malaysia–Chile BIT.

Although MTD’s claim was based on a number of arguments, the Arbitral Tribunal finally rejected them and condemned Chile on the sole argument of having breached the Fair and Equitable Treatment standard that it should have afforded to the Malaysian investor.

The Tribunal began its argument on this point by reference to the necessity of analyzing the issue of the Fair and Equitable Treatment standard in the manner most conducive to fulfilling the objective of the BIT to protect investments and create conditions favorable to investment (an interpretation mandated by the Vienna Convention on the Law of Treaties). “Hence, in terms of BIT, fair and equitable treatment should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment. Its terms are framed as a pro-active statement – ‘to promote,’ ‘to create,’ ‘to stimulate’ – rather than prescriptions for a passive behavior of the State avoidance of prejudicial conduct of the investors.”86

Moreover, the Tribunal relies on the Tecmed case87 (Técnicas Medioambientales Tecmed S.A. vs. The United Mexican States), which, when faced with a similar task, analyzed the standard in the sense that its meaning had to do with the actions of the host state not affecting the basic expectations of the investor, i.e., its actions should lack ambiguity, be enacted in a transparent and consistent manner and, therefore, allow the investor to acknowledge beforehand all the rules and regulations that will govern his investment.

In its award, the Tribunal also accepted MTD’s argument that allowed, under the provision of the Most-Favored Nation (“MFN”) Clause included in the Malaysian–Chile BIT, criteria to be applied in relation to the Fair and Equitable Treatment standard in other BIT’s signed by Chile. Paragraph 1 of article 3 (1) of the Malaysian–Chile BIT provides that: “1. Investments made by investors of either Contracting Party in the territory of the other Contracting Party shall receive treat-
corded to investments made by investors of any third State.” Through 
this text, MTD claimed that the provisions of the BIT’s of Croatia and 
Denmark with Chile dealt with Chile’s obligation to grant permits sub-
sequent to the approval of foreign investment and to fulfill contractual 
obligations that were part of the duty to provide Fair and Equitable 
Treatment.

According to MTD, Chile breached the Fair and Equitable Treat-
ment standard provisions of the BIT when it “created and encouraged 
strong expectations that the Project, which was the object of the in-
vestment, could be built in the specified proposed location and entered 
into a contract confirming that location, but then disapproved that loca-
tion.”

The Tribunal finally rejected the argument that the denial of the is-
suance of the zoning for the project by the Chilean authorities is an ex-
propriation, but considered it to constitute unfair treatment by the state 
when it approved an investment against the policy of the state itself. “It 
was the policy of the Respondent and its right not to change it. For the 
same reason, it was unfair to admit the investment in the country in the 
first place.”

The reference made by the Tribunal to the Tecmed case in order to 
define the standard’s meaning is decisive in its analysis. That case relies 
on and resolves the dispute on the basis of the good faith principle that 
is present in international law, although it made an attempt to formulate 
the standard as an autonomous interpretation. “In one case, however, 
Tecmed S.A. vs. The United Mexican States, the tribunal mentions that 
approach (as an autonomous treaty standard) as one of the alternative 
approaches but it goes on to judge the claim against the international 
law principle of good faith.”

In the MTD case, the standard is featured as a part of international law, including all sources.

However, it is interesting to note that in the Tecmed case, there is a 
reference made to “transparency.” Is it possible to include that concept 
in the meaning of the Fair and Equitable standard?

The inclusion of the transparency requirement in the concept of Fair 
and Equitable Treatment is not clearly established. In the Metalclad 
Corporation vs. United Mexican States case, a Nafta case, the Su-

88 MTD Equity Sdn. Bhd. and MTD Chile S.A. vs. Republic of Chile, see 
note 85, 81.
89 OECD, see note 15, 22.
90 Metalclad Corporation vs. The United Mexican States, see note 76.
Klein Bronfman, Fair and Equitable Treatment: An Evolving Standard

preme Court of British Columbia, which conducted a judicial review of the ICSID Tribunal’s decision, found that the Tribunal had exceeded its jurisdiction by basing its findings on the treaty obligations of transparency. It stated that the Tribunal should not have defined the scope of obligations under article 1105 considering other provisions of the same treaty, one of which was the transparency requirement. It stated that the Tribunal had interpreted the article in a broad manner to include a transparency obligation, without proving that transparency was part of customary law (on the basis of the Supreme Court’s consideration that the Fair and Equitable Treatment standard is equated to customary international law only).

Due to the latter, the argument of inclusion in the MTD case award of the transparency provision as part of the Fair and Equitable Treatment standard, through the application of the Tecmed case, is arguable. However, there are differing opinions on the subject. Some state that the concept of transparency overlaps the Fair and Equitable Treatment standard. “… transparency may be required, as a matter of course, by the concept of fair and equitable treatment … This interpretation suggests that where an investment treaty does not expressly provide for transparency, but does for fair and equitable treatment, then transparency is implicitly in the treaty.”91

The MTD case is currently in a state of annulment proceedings before an ad-hoc Committee.

4. Stability of Legal and Business Framework

a. Occidental Exploration and Production Company vs. The Republic of Ecuador92

Occidental Exploration and Production Company (OEPC), a company registered under the laws of the state of California, entered into a joint venture agreement with Petroecuador, a state-owned company. The objective of the agreement was the exploration and production of oil in Ecuador. The conflict arose when the SRI (Servicio de Rentas Internas)

91 UNCTAD, see note 31, 51.
denied the company the regular reimbursement of VAT tax paid by the company on purchases required for exploration and production under the agreement. This resolution of the SRI was based on their belief that VAT reimbursement was already accounted for in the participation formula under the agreement.

OEPC claimed that Ecuador had breached its obligations under the treaty and international law, particularly the obligations of: (i) Fair and Equitable Treatment; (ii) Treatment not less favorable than the treatment accorded to Ecuadorian exporters; (iii) No impairment, through arbitrary or discriminatory measures, of the management, use and enjoyment of OEPC’s investment; and (iv) No expropriation, directly or indirectly, of all or part of that investment.

The Tribunal ruled based on the following:

Article II (3) (a) of the BIT between the United States of America and Ecuador provides the following:

“Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less favorable than that required by international law.”

Like in the MTD case, on the basis that the standard is not defined in the BIT, the Tribunal also grounded the determination of the standard’s meaning in the application of the international law system of interpretation defined in the Vienna Convention on the Law of Treaties. It takes into account the preamble of the treaty that states that such treatment “is desirable in order to maintain a stable framework for investments and maximum effective utilization of economic resources.” The stability of the legal and business framework is thus an essential element of the Fair and Equitable Treatment standard. This need for stability is also a main issue in arbitral awards, such as the Metalclad and Tecmed cases, which deal with terms such as transparency, predictability, no ambiguity and so on. The Tribunal states in this case that these are all objective requirements that do not depend on whether the respondent acted in good or bad faith.

As expressed in the above-mentioned cases, the Tribunal considered the standard equitable to international law. International law requires a stable and predictable framework in the legal and business area, which the host state did not provide in this case. The Tribunal noted that the framework under which the investment operated had been changed by the actions of the SRI, which led it to conclude that the respondent had
breached its obligations to accord Fair and Equitable Treatment to the investor.

Although the interpretation by the Tribunal is consistent with other Arbitral Awards dealing with the same questions, the Tribunal did not take that into account in this particular case, the wording of the article referring to the standard in the respective BIT is different from that established by the BIT’s involved in the Awards quoted earlier (Tecmed and Metalcald).

The wording of article II (3) (a) of the BIT between the United States of America and Ecuador connotes more the idea that the Fair and Equitable Treatment standard is additional, and not equivalent, to international law. This may lead more to the notion that such article adheres to a wider standard, clearly separating the concepts of international law from those of the standard itself.

The Tribunal has correctly applied the rule of interpretation of the Vienna Convention on the Law of Treaties, which establishes that: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” However, it seems that the ordinary meaning of this particular article does not equate the Fair and Equitable Treatment standard of international law. They seem to be different terms.

Murray J. Belman analyzes the issue and says that when BIT’s use the formula also present in the US–Ecuador BIT, “the fairness requirement would thus be additive to the international law requirement.”93 Most observers conclude that that type of language establishes two different standards, the fairness requirement, plus the minimum standard under international law.

According to the foregoing, it is possible to argue that the parties to the agreement intended to conceive the Fair and Equitable Treatment standard as a more demanding standard, exceeding the criteria that are present in international law. However, in terms of the Tribunal’s final award, the latter analysis does not distort the final condemnation of Ecuador. Its actions are still in violation of the standard. The analysis may only be relevant as a precedent for future cases.

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5. Due Diligence and the Minimum Standard of Customary International Law

a. Asian Agricultural Products Ltd. (AAPL) vs. Republic of Sri Lanka94

The case concerns an investment made by AAPL in the form of an equity interest in a Sri Lankan public company called Serendib Seafoods Ltd., which was established to engage in shrimp fishing. The Sri Lankan company had a farm which constituted its main production centre. That farm was destroyed during a military operation implemented by the security forces of Sri Lanka against local rebels.

As a result, AAPL claimed compensation from the government of Sri Lanka for the damages that it suffered as a consequence of the total loss of its investment.

In order to attribute international responsibility to the government of Sri Lanka, the claimant argued that under the BIT between the UK and Sri Lanka, there was an obligation of the parties to provide the investor of the other contracting party full protection and security.

In relation to the claimed standard, the Tribunal established that contrary to the allegation of AAPL, the Full Protection and Security standard cannot be construed to mean strict liability, as it truly refers to the violation of a general customary international standard of due diligence. This analysis is relevant to the interpretation of the meaning of the Fair and Equitable Treatment standard considering that the standard connotes the same level of treatment as the Full Protection and Security standard, as was pointed out by Judge Asante, in the Dissenting Opinion in this case.

The Tribunal acknowledged the fact that the Full Protection and Security standard may not be inferred to signify a standard that is higher than the International Minimum Standard. “The Tribunal is convinced that in the absence of a specific rule provided for in the treaty itself as lex specialis, the general international rules of law have to assume their role as lex generalis.”95

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95 Asian Agricultural Products Ltd. (AAPL) vs. Republic of Sri Lanka, see note 94.
b. American Manufacturing & Trading (AMT) (US), Inc. vs. Republic of Zaire

The American Manufacturing and Trading Inc. claimed that the Republic of Zaire failed to fulfill the obligations instituted by the BIT signed by the United States of America and the Republic of Zaire. The origin of this failure lay in the destruction, by the armed forces of Zaire, of properties and facilities that belonged to Société Industrielle Zairoise (SINZA), a limited liability company 94 per cent owned by AMT.

This BIT stipulated the following in relation to the treatment of investments: “Investment of nationals and companies of either party shall be accorded fair and equitable treatment and shall enjoy protection and security in the territory of the other party. The treatment, protection and security shall be in accordance with applicable national laws, and may not be less than that recognized by international law … Each party shall observe any obligation it may have entered into with regard to investment of nationals or companies of the other party” (article II (4)).

There is, in consequence, a direct reference in the BIT, to the equivalence between the Fair and Equitable Treatment and the Protection and Security standards and international law. An interesting point, though, is national law being considered by the BIT to be a relevant factor in the determination of the meaning of those standards. However, the Tribunal in this case deemed the analysis of the conformity of the Republic of Zaire’s actions to the international minimum standard of vigilance and care required by international law to be of greater importance.

The Tribunal stated that the practical criteria to determine the breach of the Protection and Security standard by the Republic of Zaire were analyzing whether it constituted a breach of the minimum standard recognized by international law. The Tribunal ultimately concluded that the Republic of Zaire failed to respect the minimum standard required by international law.

This award, as well as the one rendered in the Asian Agricultural Products Ltd. (AAPL) vs. Republic of Sri Lanka, provides us, through the analysis of a standard of the same status, the Protection and Security standard, with a view of the meaning of Fair and Equitable Treatment, which is, therefore, tantamount to the minimum standard found in international law.

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c. CME (Netherlands) vs. Czech Republic\textsuperscript{97}

Finally, in CME (Netherlands) vs. Czech Republic, the Tribunal stated that: “The standard for actions being assessed as fair and equitable are not to be determined by the acting authority in accordance with the standard used for its own nationals. Standards acceptable under international law apply”\textsuperscript{98}

6. Missing a Stricter Standard

a. Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil (US) vs. Republic of Estonia\textsuperscript{99}

A claim submitted by Mr. Alex Genin, Eastern Credit Limited Inc., and A.S. Baltoil against the Republic of Estonia gave birth to this case, which concerned the violation of the US–Estonia BIT in relation to an investment made by the claimants in the Estonian Innovation Bank, incorporated under the laws of Estonia.

Although the ICSID Tribunal dismissed the claim against the Republic of Estonia, it is interesting to note that the Tribunal recognized that the content of the standard was not clear. Yet, it understood it to be equal to the international minimum standard. In this sense, it said that “Acts that would violate this minimum standard would include acts showing a willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith.”\textsuperscript{100}

On this basis, the Tribunal found that the government’s decision to revoke the investor’s banking license for seemingly technical reasons and without prior notice was not a breach of its BIT obligations. Chief among the factors leading to this conclusion was that Estonia’s actions were within its statutory authority, according to applicable procedural

\textsuperscript{97} CME (Netherlands) vs. Czech Republic, UNCITRAL Case (Award, 14 March 2003), available under <http://ita.law.uvic.ca/documents/CME-2003-Final_001.pdf>.

\textsuperscript{98} CME (Netherlands) vs. Czech Republic, see note 97.


\textsuperscript{100} Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil Genin vs. Republic of Estonia, see note 99, 91.
rules, and within reason under the circumstances. Thus, its actions “cannot be said to have been arbitrary or discriminatory against the foreign investors in the sense in which those words are used in the BIT.” Therefore, while the Tribunal found that the government’s decision “invites criticism, it does not rise to the violation of any provision of the BIT.”

The Tribunal’s analysis, however, could have gone further. Article II 3 (a) of the US–Estonia BIT provides that: “Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.” It seems that once again, as already analyzed in the OEPC case, if we rely on the ordinary meaning of that article, and, moreover, if we analyze the object and purpose of the treaty, which is to promote, and assure a stable framework for investment, it seems that the intention of the parties was to establish article II as a more ample standard. This signifies that the Fair and Equitable Treatment standard could not be tantamount to the minimum standard established by international law and has, therefore, a more self-contained meaning that, when added to the minimum standard, creates a stricter standard to be followed by host states. In this case, the above analysis could have shifted the verdict.

As we can appreciate from the above-mentioned cases, the bulk of BIT cases that have dealt with the issue appear to equate the Fair and Equitable Treatment standard to the minimum standard of international law. This tendency is also true in Nafta cases, as will be analyzed below. “In the situations where a violation was found, evidence was presented showing bad faith, discriminatory intent, and/or ultra vires actions on the part of host-State government officials. In all other instances, including instances where host-State actions were not the model of clarity or fairness but which were legally justified and non-discriminatory, no violation was found.”

b. Nafta: Restricting the Standard

In the area of jurisprudence relating to the Fair and Equitable Treatment standard, Nafta has been very prolific and evolutionary in the task of defining the standard.

101 Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil Genin vs. Republic of Estonia, see note 99, 91.
102 Gross, see note 69, 935.
Article 1105 of Nafta states the following:

“Article 1105: Minimum Standard of Treatment

1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”

Currently, almost every submitted claim alleges a violation of article 1105. The latter is caused by the fact that Arbitral Tribunals are generally reluctant to admit claims related to indirect expropriation. The violation of the Fair and Equitable Treatment standard has, in fact, been deemed to constitute a third kind of expropriation. “NAFTA, BIT, and other tribunals have consistently rejected broadly phrased claims of indirect expropriation, refusing to extend the protection to incidental, incomplete interference with investment value. Thus, investors who feel that they have been in some way ‘wronged’ by a host-State and suffered a decrease in the value of their investment as a result, predictably articulate their claims under the rubric of unfair and inequitable treatment.”103

Nafta’s article 1105 considers the Fair and Equitable Treatment standard as a part of international law. In this sense, it does not differ much from the view of BIT Tribunals, as stated before:

“...while Nafta article 1105 provides two standards within its text that could be used to obtain relief for an injured investment (‘fair and equitable standard’ and ‘full protection and security’), one can also look at customary international law and the principles of international law for sources of content for the minimum standard of treatment.”104

However, as opposed to the BIT regime, the standard under Nafta underwent an evolution in the definition of the meaning (and a setback regarding the treatment to be granted to foreign investors) that had its origin in a special Nafta organ’s interpretation that intended to define it more clearly. Given the multiple and diverse interpretations issued by Nafta Tribunals, the Free Trade Commission issued a binding interpretation on 21 July 2001 that restricted the meaning. That interpretation stated the following: “Article 1105 (1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of an-

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103 Gross, ibid., 935.
other party. The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.” Thus, the Fair and Equitable Treatment standard was measured against customary international law and was, therefore, viewed as part of the minimum standard required by customary international law.

The interpretation by the Free Trade Commission had the effect of lowering the standard’s protection capacity. Restricting it to the international minimum standard that is present in customary international law limits it to assuring the investor a set of basic rights established by international law that states must grant aliens, regardless of the treatment granted to their own nationals. Restricting the meaning to the standard of customary international law only limits the interpretative capacity of Tribunals to define it as a stricter standard to be followed by host states. The state will only be responsible for outrageous and shocking governmental conduct.

This interpretative function granted to the Free Trade Commission restricts the interpretative flexibility assigned by Chapter 11 to ad hoc arbitration. However, the Commission’s task is an important one due to its capacity to create uniform criteria through its interpretative powers.

Notwithstanding the latter, the Free Trade Commission’s interpretation has been criticized. C.H. Brower criticizes the notes of the Commission as follows: “It seems evident that the phrase ‘fair and equitable treatment’ is intentionally vague, designed to give adjudicators the power to articulate the range of principles necessary to achieve the treaty’s purpose in particular disputes. By refining ‘fair and equitable treatment’ to prohibit only the most extraordinary forms of government misconduct, one robs tribunals of their creative charge to develop the law.” Moreover, he states that “the members of the Free Trade Commission arguably have exceeded their mandate to interpret article 1105 in accordance with the applicable rules of international law … Those rules cannot reasonably sustain an interpretation that collapses ‘fair and equitable treatment’ into everything short of the most unimaginable forms of government misconduct. In fact, the Nafta parties’ tight-fisted interpretation seems more consistent with their routine demand that tribunals construe Chapter 11 strictly to minimize intrusions into sovereignty.”

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105 Brower, see note 65.
If one considers that article 1131 of Nafta instructs tribunals to decide issues in accordance with the applicable rules of international law, including the principles set forth in the Vienna Convention on the Law of Treaties, and any rules of international law applicable in the relations between the parties, it is clear that the intention of the parties when negotiating Nafta was to surrender to the Arbitral Tribunal flexibility in interpreting the vague terms of the Treaty in each specific case. Although the Free Trade Commission has an important power through its capacity to interpret the Nafta rules, the interpretation that was rendered concerning article 1105 is believed by many to constitute a true amendment of the treaty, which would imply that the Commission has exceeded its functions.

The Free Trade Commission must interpret treaty rules in accordance with the applicable rules of international law. When interpreting a vague term, it must carry out this function taking into account its ordinary meaning and the context of Chapter 11, which is to increase investment opportunities. The interpretation of the Commission may have clearly exceeded its mandate by restrictively interpreting the standard, when it really should have interpreted it in light of the aforementioned criteria.

The Commission’s interpretation, which equated the standard to customary international law, imposes a standard that is below the one established by courts in developed countries. It seems that internationally speaking, developed countries desire to give a minimum protection to their investors abroad, and at the same time they do not want to be obliged by themselves, on an international level, to stricter standards of behavior in relation to foreign investors. “Until recently, the world of investment arbitration knew fairly clear lines between host and investor states. Nations such as Libya and Mexico were the respondent host states, while the United States and Canada were the countries of the investor claimants. Today, however, the United States and Canada under NAFTA have tasted the flavor of being respondent host states in investment arbitrations, with concomitant negative side-effects for economic self-governance.”

The Free Trade Commission’s Interpretive Note has, nonetheless, brought out another series of issues that need to be clarified. “The FTC Interpretation has not completely clarified the scope of article 1105, however. In tying fair and equitable treatment to the international

minimum standard, new debate has begun as to the meaning of the international standard. Investors will certainly argue that it has evolved considerably since the US–Mexico Claims Tribunal’s decision in Neer in 1926, when a State’s behavior had to be shocking, egregious and outrageous in order for an alien to have a cause of action against a State for compensation. Investors will argue that fair and equitable treatment as an independent standard has evolved into a rule of customary international law.”

The Note issued by the Commission was issued after the Pope and Talbot Tribunal had determined that Canada had violated the standard, but before it could award damages. Canada alleged that the Tribunal could not award damages for a breach of article 1105 because Canada and its partners had effectively overruled the previous finding. The Tribunal criticized the Note on the basis of considering it an amendment of Nafta that was implemented through the wrong mechanism. However, the Tribunal decided to rely on the Note to keep Canada from resorting to a guaranteed judicial review of its award.

Finally, one must also consider that many BIT’s do not restrict the standard of customary international law, which allows for the treatment reflected therein to be applied to the Nafta parties resorting to the Most-Favored Nation principle.

The following are the cases heard by Arbitral Tribunals under Nafta, which will provide an overview of the pre- and post-Free Trade Commission Note era.

7. The Initial Broad Interpretation

a. Pope and Talbot Inc. vs. Government of Canada

This case constitutes the most comprehensive and ample interpretation of article 1105 by a NAFTA Tribunal to date since it introduced the vision of Fair and Equitable Treatment as a self-contained treaty standard.

The Pope and Talbot case involved a US lumber exploitation company that brought a claim against the Canadian government in March 1999, alleging Canada’s enactment of export quotas and other measures in its implementation of the United States–Canada Softwood Lumber

107 Kirkman, see note 29, 390.
108 Pope and Talbot Inc. vs. Government of Canada, see note 50.
Agreement. After the proceedings had begun, in a verification review episode, Canada’s Softwood Lumber Division made especially aggressive requests for Pope and Talbot corporate data, not long after that firm filed its notice of arbitration. It was also alleged to have discriminated against Pope and Talbot’s Canadian subsidiary in British Columbia, in violation of NAFTA, specifically articles 1102 (National Treatment), 1105 (Minimum Standard of Treatment), 1106 (Performance Requirements), and 1110 (Expropriation).

The Tribunal found that Canada’s Softwood Lumber Division of the Department of Foreign Affairs and International Trade failed to provide Pope and Talbot fair and equitable treatment.

What makes this case so interesting and sets it apart from the rest is the opinion rendered by the Tribunal when applying article 1105 of Nafta, in that the Fair and Equitable Treatment standard was additive to international law and not actually included in it. In other words, the investor under NAFTA was entitled to the international law minimum, plus the fairness elements. Against Canada’s argument that limited the scope of the standard equating it to customary law on the basis of the Neer case, the Tribunal arrived at the conclusion that the standard should be conceived in a much broader perspective. The Tribunal considered the BIT provisions, many of them signed by the same Nafta parties, which often required Fair and Equitable Treatment in addition to the treatment required by international law. “The Tribunal’s acceptance of the ‘additive’ approach was based on its conclusion that the ‘bilateral commercial treaties negotiated by the United States and other industrialized countries’ – upon which Article 1105 was based – represented an evolution of investor rights to include the fairness elements, no matter what else their entitlement under international law [and] ... free of any threshold that might be applicable to the evaluation of measures under the minimum standard of international law.”

The Tribunal could not conceive that the parties intention was to grant its investors a minimum standard, that is, a standard that was below the standards granted under BIT’s to which the same parties had submitted.

Therefore, considering that under the Most-Favored Nation clause the parties would be entitled to this better treatment established in BIT’s, the Tribunal stated that there was no sense in denying it to them. It did not, however, determine how high the standard to be met by the government was.

The Tribunal was also persuaded by the arguments of F.A. Mann. As previously stated, Mann considered that the standard had a more far-reaching meaning that exceeded customary international law. Mann is cited as the main dissident among the authors who have given their opinion on this subject. He said that it is “misleading to equate the fair and equitable with the minimum standard: this is because the terms fair and equitable treatment envisage conduct which goes far beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard than any previously employed form of words ... The terms are to be understood and applied independently and autonomously.” However, he later changed his view and stated that “In some cases, it is true, treaties merely repeat, perhaps in slightly different language, what in essence is a duty imposed by customary international law; the foremost example is the familiar provision whereby states undertake to accord fair and equitable treatment to each other’s nationals and which in law is unlikely to amount to more than a confirmation of the obligation to act in good faith, or to refrain from abuse or arbitrariness.”

During the proceedings, the Free Trade Commission Note was issued. The Tribunal considered whether the Commission, in issuing the interpretation, had acted within its powers under article 1131 (2) or was, instead, using the interpretation as a guise to amend the treaty, permitted only under article 2202, which required the approval of each of the three governments in accordance with their own constitutional procedure.

The Tribunal finally agreed with the interpretation that established that article 1105 “requires each Party to accord to investments of investors of the other Parties the fairness elements as subsumed in, rather than additive to, customary international law.” However, although the interpretation was mandatory, the Tribunal did not reverse the award. According to the Tribunal, the original award in favor of the claimant under article 1105 would be revocable only if “the concept behind the fairness elements under customary international law is different from

110 F.A. Mann, “The Legal Aspects of Money”, in: OECD, see note 15, 510.
those elements under ordinary standards applied in NAFTA countries.”

The Tribunal rejected Canada’s allegation based on the understanding that the violation had to be “egregious” and “outrageous,” according to a static concept of customary international law. As Mexico and Canada had admitted, there had been evolution in customary international law concepts since the 1920’s (Neer case). It is a feature of international law that customary international law evolves through state practice. International agreements constitute the practice of states and contribute to building the grounds of customary international law. In conclusion, the Tribunal did consider the Free Trade Commission’s interpretation. However, it did not reverse its findings considering that even though customary international law was applicable alone, it had evolved since the Neer case, and, therefore, was not limited to an outrageous conduct of the host state.

The Tribunal in this case made important contributions to the interpretation of a key standard of NAFTA. The Tribunal conducted an extensive analysis in relation to its views on defining the standard, whether or not these interpretations were strictly necessary to decide the case before it.

Until the Free Trade Commission issued its notes, the Tribunal’s decision was greatly criticized. It was evident to many that by applying the rules of interpretation established in the Vienna Convention on the Law of Treaties, article 1105 of NAFTA could not be interpreted so as to put the fairness concept aside from international law, thus broadening the spectrum of the standard. When the Commission’s Interpretive Note came out, the Tribunal, although criticizing it as an amendment instead of an interpretation, adhered to it, even though it maintained Canada’s responsibility due to the evolution of customary law.

Notwithstanding all the foregoing, there is a practical element that must be taken into consideration for this and other cases. It seems that the widening of the standard is now in process and will not stop. Through the Most-Favored Nation clause, investors will be entitled to claim the application of the standard as it is conceived in many BIT’s, in which the fairness element is conceived in addition to the international standard. The US Model Bilateral Investment Treaty of 1987 has already instituted the new standard. Countries such as Canada, the United Kingdom, Belgium, Luxembourg, France and Switzerland have

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111 Gantz, see note 109.
followed the model. It seems that the trend has already started to be imposed, and although many treaties equate the standard to customary international law, it seems that through the Most-Favored Nation clause, more Pope and Talbot’s that refer to other BIT’s will come to the forefront. This is also the case of MTD, where the Tribunal accepted the application of other BIT’s that were signed by Chile and that granted better treatment to the investor.

8. Applying the Free Trade Commission’s Interpretive Note

a. Mondev International LTD. vs. United States of America

Lafayette Place Associates was a Massachusetts limited partnership owned by Mondev International LTD., a real estate company incorporated under the laws of Canada. Lafayette Place Associates had brought a lawsuit against the City of Boston and the Boston Redevelopment Authority for breach of a contract to develop a shopping mall in Boston, finally winning the trial. However, the State’s Judicial Court reversed the judgment in 1998. Due to the latter, Mondev International LTD. submitted a claim against the United States of America before the ICSID, based on the US’s breach of Chapter 11 of Nafta. Specifically, the company claimed the US breached the provisions on National Treatment, Minimum Standard of Treatment, Expropriation and Compensation.

The Tribunal analyzed the implications of the Free Trade Commission’s notes and stated that whether or not an amendment to Nafta, it accepted it. It also clarified that article 1105 referred to a standard existing under customary international law and not to standards established by other treaties of the three Nafta parties (in this part it deviates from the Pope and Talbot case). “If there has been an intention to incorporate by reference extraneous treaty standards in article 1105 and to make Chapter 11 arbitration applicable to them, some clear indication of this would have been expected.”

However, the Tribunal states that “In holding that article 1105 (1) refers to customary international law, the FTC interpretation incorporates current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many

112 Mondev International LTD. vs. United States of America, see note 51.
113 Mondev International LTD. vs. United States of America, see note 51.
treaties of friendship and commerce. Those treaties largely and concor-
dantly provide for ‘fair and equitable’ treatment, and for ‘full protection
and security’ for the foreign investor and his investments.”\textsuperscript{114} The latter
reflects the conviction of the Tribunal in relation to the equivalence of
the standard to the minimum standard of treatment in customary interna-
tional law but in its evolutionary form, in the understanding of cus-
tomy international law as it is conceived today, that is, conveying the
practice of all investment treaties existing to this date.

The Tribunal states that customary international law includes cur-
cent international law and, therefore, the practice contained in the nu-
merous investment treaties. The question is whether there is \textit{opinio juris}
to back up the inclusion of that state practice in BIT’s as customary in-
ternational law. Can we determine that there is customary international
law by the practice conveyed in BIT’s when the meaning of the stan-
dard provided in each differs precisely from the rest? It seems that state
practice is not yet uniform in a way that constitutes customary interna-
tional law.

The problem, as mentioned above, is that these treaties have not yet
uniformly defined the meaning of the standard and, moreover, lack
\textit{opinio juris} to establish a common feature that would define customary
international law for that effect. The award in this sense did not prove
that the two thousand bilateral investment treaties to which it makes
reference are constitutive of customary international law.

\textbf{b. Loewen Group, Inc. and Raymond L. Loewen vs. United States
of America}\textsuperscript{115}

The “Loewen case” originated in the commercial dispute between two
competitors in the funeral home and funeral insurance business in Mis-
sissippi. Mr. Jeremiah O’Keefe filed a claim before the Mississippi State
Court against the Loewen Group, Inc., a Canadian chain of funeral
homes. After the trial, which was allegedly marked by the use of xeno-
phobic language, the jury awarded US$ 500,000,000 against the Loewen
Group. The respondent intended to appeal but was confronted with the
application of an appellate bond requirement which the Mississippi Su-
preme Court refused to lower. The respondent was forced to settle with
the claimant.

\textsuperscript{114} Mondev International LTD. vs. United States of America, see note 51.
\textsuperscript{115} Loewen Group, Inc. and Raymond L. Loewen vs. United States of Amer-
ica, see note 77.
In consideration of the above, the respondent resorted to the ICSID, alleging a violation of Chapter 11 of NAFTA committed primarily by the State of Mississippi in the course of the litigation and, moreover, denial of justice in violation of article 1105 of NAFTA.

On the issue relating to an eventual violation of the Fair and Equitable Treatment standard, the Tribunal resorted to the Free Trade Commission's interpretation. The Tribunal stated the following: “The effect of the Commission’s interpretation is that fair and equitable treatment and full protection and security are not free-standing obligations. They constitute obligations only to the extent that they are recognized by customary international law. Likewise, a breach of article 1105 (1) is not established by a breach of another provision of NAFTA. To the extent, if at all, that NAFTA Tribunals in Metalclad, S.D. Myers and Pope and Talbot may have expressed contrary views, those views must be disregarded.” The Tribunal concluded that “bad faith or malicious intention” was not required. “Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough ... ” Although the Tribunal stated that the whole trial in the local courts and their verdict were improper and discreditable, and cannot be squared with minimum standards of international law and Fair and Equitable Treatment, the Trial Court conduct did not amount to a violation of the standard by the United States because it was not established that the US had failed to make adequate remedies reasonably available to the claimants.

It is interesting to note that the Tribunal deems the Fair and Equitable Treatment standard as such only to the extent that it is recognized by customary international law. What the Free Trade Commission really means by its interpretation is that the standard’s meaning is equitable to customary international law. If the standard is incorporated in a treaty, it exists for the parties and its existence has no need to be proven as a rule of customary international law. From the moment when article 1105 makes reference to the standard, there can be no doubt that the standard exists.
9. Proof of Customary International Law

a. ADF Group Inc. vs. United States of America\(^{116}\)

The case relates to the construction of the Springfield Interchange Project, a highway located in North Virginia. The original Interchange went through a series of changes in the original design and structure of its highways and structures to improve its safety and efficiency. The construction was awarded to a contractor named Shirley Contracting Corporation. This contractor in turn called for bids for the construction of certain parts of the project. The part regarding the supply of steel was awarded to ADF International Inc. for which a subcontract was signed between them. The claim submitted by ADF related to damage resulting from federal legislation that required federally funded state highway projects to use only domestically produced steel.

The findings of the Tribunal in relation to the standard determined first the obligatory nature of the Free Trade Commission’s interpretation. It rendered its award on the basis that Fair and Equitable Treatment is a reference to the customary international law minimum standard. It also recognized that it has an evolving nature. For this purpose, it cited the award rendered in the Mondev case.

The Tribunal stated the following: “We are not convinced that the investor has shown the existence, in current customary international law, of a general and autonomous requirement (autonomous, that is, from specific rules addressing particular, limited contexts) to accord fair and equitable treatment and full protection and security to foreign investments. The investor, for instance, has not shown that such a requirement has been brought into the corpus of present day customary international law by the many hundreds of bilateral investment treaties now extant. It may be that, in their current state, neither concordant state practice nor judicial or arbitral case law provides convincing substantiation (or, for that matter, refutation) of the investor’s position.”

The Tribunal dismissed the investor’s claim in relation to a breach of the standard by the respondent. However, the same observation made in the Loewen case must apply here. Is it necessary to demonstrate the existence of the standard in customary international law or is it just that customary international law is equated to the standard?

\(^{116}\) ADF Group Inc. vs. United States of America, ICSID Case No. ARB (AF)/00/01, (Award, 9 January 2003), available under <http://ita.law.uvic.ca/documents/ADF-award_000.pdf>.
10. Transparency and Predictability

a. Metalclad Corporation vs. The United Mexican States\textsuperscript{117}

The company called Coterin attempted to construct and operate a hazardous waste landfill in La Pedrera in the valley of Guadalcazar, Mexico. This was authorized by the Federal Government of Mexico and the National Ecological Institute. Three months after these authorizations, Metalclad Corporation entered into an agreement to purchase Coterin together with all its permits. The Mexican authorities granted Metalclad a state land-use permit to construct the landfill subject to the requirements that the project be adapted to the specifications and technical requirements indicated by the corresponding authorities.

Shortly after the purchase of Coterin by Metalclad, the Mexican authorities commenced a public campaign to denounce and prevent the operation of the landfill. Metalclad had begun the construction of the landfill believing it had all the authority necessary to construct and operate it. In October 1994, the Municipality ordered the cessation of all building activities due to the absence of municipal permits.

Although Metalclad completed the construction, it was not able to open and operate it. The construction permit was finally denied. Finally, in addition to the latter, the authority issued an ecological decree declaring a natural reserve that included the landfill location. Metalclad resorted to the ICSID.

In what relates to the standard, the findings of the Tribunal were the following: Transparency, which is dealt with in some provisions of Nafta, is a component of the Minimum Standard Treatment guaranteed under article 1105. The Tribunal established that Mexico failed to ensure a transparent and predictable framework for Metalclad’s business planning and investment. It understood the term to include the idea that all relevant legal requirements for the initiation, completion and successful operation of an investment should be capable of being readily known to all affected investors of a party and that there should be no room for doubt or uncertainty.

However, the latter findings were revoked by the Supreme Court of British Columbia, which established that the Tribunal had exceeded its jurisdiction. For the Court, the Tribunal interpreted article 1105 far too broadly, including transparency. It did not, from the point of view of

\textsuperscript{117} Metalclad Corporation vs. The United Mexican States, see note 76.
the Court, determine that transparency is a principle of customary international law.

11. Unjust and Arbitrary Treatment under International Law

a. S.D. Myers Inc. vs. Canada

S.D. Myers Inc. was a US company whose business was the remediation of PCB waste. Using a Canadian affiliate (Myers Canada), S.D. Myers Inc. solicited orders for the destruction of Canadian-owned PCBs at its U.S. facilities. The company’s project was to import electrical transformers and other equipment containing PCB waste into the US from Canada. However, the latter was banned by the Canadian authorities. S.D. Myers Inc. initiated action against Canada under UNCITRAL arbitration rules alleging a violation of arts 1102, 1105, 1106 and 1110.

In the analysis that the Tribunal made of the standard, it concluded that article 1105 had to be read as a whole. This meant that the terms Fair and Equitable Treatment and Full Protection and Security must be read in conjunction with treatment according to international law. “The Tribunal considers that a breach of article 1105 occurs only when it is shown that an investor has been treated in such an unjust and arbitrary manner that the treatment rises to a level that is unacceptable from the international perspective, bearing in mind the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.”

The Myers Tribunal pointed out that to qualify conduct as a breach of article 1105, the treatment must fail to conform to international law. Two examples are Fair and Equitable Treatment and Full Protection and Security, but they are not alone. If a certain treatment is perceived as unfair, it may still not constitute a breach of article 1105 unless it is not in accordance with international law.

The Tribunal further stated that “Myers, Metaclad and Pope and Talbot case findings proceed on the basis that a breach of article 1105 can be found for acts that would not be found to have breached the minimum standard of treatment of customary international law. They also suggest that acts that would survive a legal challenge in a sophisti-
cated and, by international standards, fair domestic legal system can be impugned under article 1105. Myers accepted that article 1105 contains a customary international law standard that in order to attract state responsibility requires a state to engage in an act that is unacceptable from the international perspective. The NAFTA parties have stated that Myers correctly recognized that Article 1105 contains a customary international law standard, but that the majority then incorrectly found that a breach of a conventional international law rule gave rise to a breach of customary international law. Each party has stated that the dissent was correct.120

12. An Outright and Unjustified Repudiation of Regulations

a. Gami Investments, Inc. vs. The United Mexican States121

GAM (Grupo Azucarero Mexico S.A.), a Mexican holding company, acquired sugar mills from the government of Mexico in the late 1980’s and early 1990’s under a privatization program. In 2001, GAM was Mexico’s fourth largest sugar producer. In 1996, 1997 and 1998, GAMI Investments Inc. (GAMI), a US investment corporation, acquired a series of GAM shares, which represented a total of 14.18 per cent.

The Government of Mexico failed in various ways to fulfill its regulatory functions under the regime established pursuant to the Sugarcane Decree of 1991. Export requirements were not enforced; the establishment of production ceilings required by law were not materialized and, as a result, sugar was dumped on the domestic market. Mills were caught between low prices for their products and the regulated high costs of their primary raw material (sugarcane). The latter meant a crisis for the entire industry and the filing of a suspension of payments by GAM. Moreover, the government expropriated all of GAM’s sugar mills through an expropriation decree in 2001.

GAMI initiated UNCITRAL proceedings against the government of Mexico, exercising the option available to it under Nafta. GAMI

claimed that due to the Mexican Government’s actions that caused GAM’s business to suffer, the value of GAMI’s shares were affected.

GAMI’s claims were the following: (A) Failing to accord GAMI’s investment Fair and Equitable Treatment and full protection and security in accordance with international law; (B) Treating GAMI and its investments less favorably than it treated Mexican investors and their investments in like circumstances; and (C) Violating article 1110 of Nafta, that is, indirectly expropriating GAMI’s shares in GAM in a manner inconsistent with the requirements of article 1110.

The Tribunal explained that in addition to not demonstrating a violation of article 1105, GAMI did not prove a specific and quantifiable prejudice of the maladministration of the sugar program. Therefore, the Tribunal would not have been able to award damages in any event, even if it had found a violation of article 1105.

Nevertheless, the Tribunal explained in its award its conclusions that GAMI also failed to establish its claim under article 1105.

GAMI claimed that Mexico had failed to implement and enforce its own internal laws and that this failure was “flagrant and arbitrary.” It mentioned that Mexico had infringed the standard set down in the Tecmed case. Moreover, it referred to the Waste Management II case122, quoting the following:

“Taken together, the S.D. Myers, Mondev, ADF and Loewen cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard, it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.” The Waste Management II case also noted that the violation does not require proof of a kind of outrageous treatment referred to in the Neer case.

122 Waste Management, Inc. vs. United Mexican States (Number 2), ICSID Case No. ARB(AF)/00/3, available under <http://ita.law.uvic.ca/documents/laudo_ingles.pdf>.
Mexico, for its part, did not question the latter, but believed that the Nafta Tribunal had no power to control the application of national law by national authorities. The Tribunal said that international law does not appraise the content of regulatory programs. The inquiry is whether the state abided by or implemented that program. The Tribunal’s duty is rather to appraise whether and how pre-existing laws and regulations are applied to the foreign investor. There must be an identification of the type of maladministration that could rise to the level of a breach of international obligations. “A claim of maladministration would likely violate article 1105 if it amounted to an outright and unjustified repudiation of the relevant regulations … It is the record as a whole – not dramatic incidents in isolation – which determines whether a breach of international law has occurred.” GAMI was not able to show any outright and unjustified repudiation of the relevant regulations.

But, would something less than repudiation still be actionable under article 1105?

GAMI alleged an abject failure to implement a regulatory program indispensable to the viability of foreign investments that relied upon it. So far, the Arbitral Tribunal would have accepted GAMI’s allegations. However, GAMI was not able to prove that the specific failure of the sugar program was attributable to the government of Mexico. “It is on this point that the Tribunal concludes GAMI had not made its case.”

In conclusion, the view of arbitrators concerning the meaning of the standard differs from one ruling to another. There is no clearly defined opinion. A unique initiative that helped to unify the criteria was the Free Trade Commission’s Note; however, it reduced the level of protection, and therefore did not constitute progress in this matter.

IV. Fair and Equitable Treatment: The Formulation of a Standard

1. The International Minimum Standard Approximation.
   A Door to Customary Law

When states agree upon the Fair and Equitable Treatment standard and include it in an investment agreement, they are dealing with the fairness

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123 Gami Investments, Inc. vs. The United Mexican States, see note 121.
and equity concept that is already present in their own legal systems, which they view as a common standard. However, and for the purpose of attaining the status of a common standard at the level of international obligations, an important deal of uniformity in relation to its significance is decisive, which will be achieved through the determination of its main elements.

One of the main theories that exists to define the Fair and Equitable Treatment standard is the one that considers the standard to be a part of the international minimum standard required by international law, which, for many states, is a part of customary international law, as will be discussed below.

The latter conclusion derives from a set of sources in which there is a capital-exporting state perspective on the issue. And although at the doctrinal level, this is an approximation on which there is important literature, it is salient to point out that “it cannot readily be argued that most states and investors believe fair and equitable treatment is implicitly the same as the international minimum standard.”

There is not a general acknowledgment of countries in relation to this approach at the empirical level, as we will establish.

a. The International Minimum Standard

The international minimum standard is a rule of customary international law which governs the treatment of aliens by providing for a minimum set of principles which states, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property. Moreover, “the international minimum standard sets a number of basic rights established by international law that states must grant to aliens, independent of the treatment accorded to their own citizens.”

The violation of this standard may engender international responsibility for the host state.

The international minimum standard is related to the protection of foreign nationals or aliens in general, and has, due to the remarkable growth in international investment instruments, mainly BIT’s, gained an important representation in the area of investment.

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124 UNCTAD, see note 31, 13.
125 OECD, see note 68, 26.
126 OECD, see note 68, 26.
This standard had been already recognized by Vattel in the 18th century and was referred to during the 19th and 20th centuries. The decisive ruling regarding this standard was the Neer Claim\textsuperscript{127} which defined the type of treatment of an alien that would constitute international delinquency (“outrage, bad faith, wilful neglect of duty, an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency”).

Since the 20th century, however, the standard’s existence was challenged by Latin American countries and other developing countries that asserted the rule of national treatment instead. After World War II, the significance of this standard as an autonomous rule of customary international law has persisted only to the extent of the protection of foreign property and investments (in its relationship to the Fair and Equitable Treatment standard).

b. Fair and Equitable Treatment: Part of Customary International Law?

The relationship between the Fair and Equitable Treatment standard and the international minimum standard of customary international law has been regarded by some investment agreements as equivalent terminology. For others, the standard is a part of the international minimum standard of customary international law. However, and with the exception of Nafta (through its Free Trade Commission’s interpretation of the issue) and those investment instruments that expressly equate the Fair and Equitable Treatment standard to the international minimum standard, such as the US and UK BIT Model, “the vast majority of those containing such clause (Fair and Equitable), about 88 percent, make no mention of international law in connection with it … In my sample of that approximately 12 percent that mention international law in connection with fair and equitable treatment, about 88 percent, make no mention of international law in connection with it … In my sample of that approximately 12 percent that mention international law in connection with fair and equitable treatment, almost half designate international law only as a floor, implying that fair and equitable treatment may require more, but never less, than international law.”\textsuperscript{128}

Moreover, “bearing in mind that the international minimum standard has itself been an issue of controversy between developed and developing states for a considerable period, it is unlikely that a majority of states would have accepted the idea that this standard is fully reflected

\textsuperscript{127} Neer Claim, see note 68, 60.
\textsuperscript{128} Coe, see note 74.
in the fair and equitable standard without clear discussion … both stand-
ards may overlap significantly with respect to issues such as arbitrary
treatment, discrimination and unreasonableness, but the presence of a
provision assuring fair and equitable treatment in an investment in-
strument does not automatically incorporate the international mini-
mum standard for foreign investors.”

As a basis for the analysis, it must be noted that the equating of the
Fair and Equitable Treatment standard to the international minimum
standard of customary international law involves the standard of treat-
ment provided by the state parties being below the one that may be
provided if we consider the standard to be a self-contained one. When
the Free Trade Commission in Nafta issued its Interpretative Note, it
prohibited only the most extraordinary forms of government miscon-
duct (a conclusion that comes from the Neer case \(^{130}\) which relies on
egregious, outrageous and shocking conduct). The latter was an inter-
pretation for the specific case of Nafta that must be applied in that con-
text. Nevertheless, in the general area of investment agreements, it be-
comes difficult to believe that considering the evolution in the invest-
ment attraction policy in most states, all those agreements in which the
equating of the Fair and Equitable Treatment standard to the interna-
tional minimum standard is not expressly stipulated, the intention of
the state parties was to minimize the treatment that must be granted by
the host state in order to commit this most “outrageous” conduct. Such
was the Pope and Talbot\(^ {131}\) arbitral Tribunal’s conclusion, prior to the
Free Trade Commission’s note, which although fairly criticized on
some issues, in consideration of the Model BIT of 1987 of the United
States, which afforded a higher level of protection to the investor, ex-
pressed a very valid opinion in the sense that the true intention of the
state parties was to accord a higher level of treatment to the investor.
The latter conclusion is even more relevant if we take into account that
through the Most-Favored Nation clause included in investment
agreements, the investor may demand this high degree of conduct from
the host state since it is more favorable treatment.

Currently and “more contemporarily, an ICSID Tribunal recently
stated that in order to amount to a violation of [a] BIT [guarantee of fair
and equitable treatment], any procedural irregularity would have to
amount to bad faith, wilful disregard of due process of law or an ex-

\[^{129}\] Vasciannie, see note 2, 144.
\[^{130}\] Neer Claim, see note 68, 60.
\[^{131}\] Pope and Talbot Inc. vs. Government of Canada, see note 50.
treme insufficiency of action such that the act in question amounted to an arbitrary act that violates the Tribunal’s sense of juridical propriety. While some Tribunals might not take a position quite as extreme, it does appear that something close to this standard is generally applied.”

This is an arbitral award (Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil Genin vs. Republic of Estonia) on the basis of a self-contained standard. However, on the other hand, Nafta arbitrators had to deal with the standard equated to the international minimum standard of treatment of customary international law as expressly stated in the treaty. States have acknowledged that the interpretation that was imposed by the Free Trade Commission did not equate Fair and Equitable treatment to customary international law as defined in the Neer case. In fact, it referred to what customary international law means at this time, i.e., in its evolved form.

Did the findings of the arbitrators in the above case comply with the definition of this standard as stated by the Free Trade Commission, or did they exceed it? To what extent has customary international law evolved? What is the limit between customary international law as it has evolved to this date and a wholly self-contained standard?

In this sense, “while tribunals differ as to whether they refer to a minimum international standard, the bulk of the BIT and NAFTA cases which have dealt with the issue appear to apply a standard close to a minimum international standard. In the situations where a violation was found, evidence was presented showing bad faith, discriminatory intent, and/or ultra vires actions on the part of host-state government officials. In all other instances, including instances where host-state actions were not the model of clarity or fairness but which were legally justified and non-discriminatory, no violation was found.”

The latter is a fact, Tribunals tend to apply a standard close to the international minimum standard; despite this, many awards, due to the vagueness of the agreement on the issue, have exceeded it.

In the Metalcald case, the Tribunal found a violation of article 1105 (1) due to a lack of transparency in the Mexican legal process. In reviewing the award of the Tribunal, the Supreme Court of British Columbia considered that “the Tribunal has inaccurately read transparency

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132 Gross, referring to the Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil Genin vs. Republic of Estonia case, see note 69.
133 Gross, see note 69.
134 Metalcald Corporation vs. The United Mexican States, see note 76.
provisions of Nafta Chapter 18 into Chapter 11 and that transparency is not a requirement under customary international law.”

Moreover, “it is clear that the Tribunal proceeded on the basis that the scope of Article 1105 extended beyond norms that have become an accepted part of customary international law. This is evident insofar as its decision does not invoke customary international law as the basis for imposing transparency requirements on Mexico; rather, in its view, these requirements flowed from conventional international law, namely the NAFTA … The Tribunal had misstated the applicable law to include transparency obligations and it then made its decision on the basis of the concept of transparency.”

The Metalclad, Myers and Pope and Talbot awards “proceed on the basis that a breach of article 1105 can be found for acts that would not be found to have breached the minimum standard of treatment at customary international law.”

Moreover, in the Maffezini case, Spain was held responsible for violating the treatment clauses in its BIT with Argentina when it conducted a loan transaction without enough transparency so as to be fair and equitable to the investor, although the applicable BIT did not refer to international law; therefore, there was no discussion of international custom by the Tribunal.

In general, “an analysis of the opinions of the arbitral Tribunals, which have attempted to interpret and apply the ‘fair and equitable treatment’ standard, identified a number of elements which, singly or in combination, they have treated as encompassed in the definition of the ‘fair and equitable standard’: due diligence and due process, including non-denial of justice and lack of arbitrariness, transparency and good faith. There is a common understanding among OECD countries that due diligence and due process, including non-denial of justice and lack

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135 Nanda, see note 73.
137 Metalclad Corporation vs. The United Mexican States, see note 76.
138 S.D. Myers Inc. vs. Canada, see note 78.
139 Pope and Talbot Inc. vs. Government of Canada, see note 50.
140 Thomas, see note 120.
141 Emilio Agustin Maffezini vs. The Kingdom of Spain, ICSID Case No. ARB/97/7, (Award, 13 November 2000), available under <http://ita.law.uvic.ca/documents/Maffezini-Award-English.pdf>.
of arbitrariness, are elements well grounded in customary international law which could be accepted as part of the definition of fair and equitable treatment. There are differing views as of the role of transparency as a new or a possible element of a fair and equitable standard linked to evolving customary law. Most OECD countries’ agreements define it as an obligation under a separate provision. OECD countries seem to consider good faith to be more a principle underlying the general obligation rather than a distinct obligation to investors pursuant to the ‘fair and equitable treatment’ standard.”

In the scope of Nafta, the interpretation granted by the Free Trade Commission has not been helpful in clarifying things. “Now that in the light of the Notes of Interpretation, a customary international law standard is to be applied by arbitral Tribunals in interpreting minimum standards of treatment, how will ‘fair and equitable treatment’ be construed? The basic concepts, of course, are fairness and due process, but as article 1105 stands, its language surely is not a model of clarity. Also, as we have seen, no consistent body of jurisprudence has thus far been developed by arbitral Tribunals. As the Metalclad Tribunal and the British Columbia court’s decision diverge in interpreting the pertinent concepts, there is no certainty as to how future Tribunals will construe the phrase. No reliance can therefore be placed on precedent, for the rationale for Tribunal Awards is often conflicting and lacks coherence.”

The Free Trade Commission’s intention, through the issuance of its notes, was to restrict the flexibility of arbitral Tribunals. However, the international minimum standard’s own vagueness as a term did not allow even that since Tribunals, have in practice, exceeded their intentional terms.

The whole divergence between most Tribunals’ decisions seems to confirm that the term is still subject to their own interpretations according to the facts of each case. To many, it seems that tribunals should maintain the opportunity to construe their text. Relying on the principle behind the investment agreement, which is to grant protection to the foreign investor, the restriction of the standard’s meaning to customary international law and, therefore, the restriction of the Tribunals’ own functions, does not help in this respect. “Interpretation must begin

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143 Nanda, see note 73.
with the rules that appear in the Vienna Convention, but it cannot end with the Notes of Interpretation.  

In conclusion, although some investment agreements do equate the Fair and Equitable Treatment to the international minimum standard in customary international law, it cannot be concluded that this is the general meaning that the standard has adopted in international law. Even Nafta Tribunals that were restricted in their interpretation exceeded customary international law, which leads us to conclude that the meaning is still mainly in the hands of each Tribunal, eventually applying a plain-meaning approach to it.

c. Conversion into a Customary International Rule?

Lastly, is it possible to conclude that the Fair and Equitable Treatment standard has been transported into customary law? “Perhaps a useful working hypothesis is that though originally only a conventional standard, fair and equitable treatment may be poised to enter and thus enlarge custom.”

The consequence of the standard becoming part of customary international law is its application to those states which have not made reference to the standard in their own investment agreements.

Considering that rules governing foreign investment between states are set out mainly in treaties, most references to the Fair and Equitable Treatment standard may be found there. The question in relation to it becoming a part of customary international law may have its origin in these treaties that make reference to the standard. “It is a matter of theory that the standard of fair and equitable treatment has become a part of customary international law. This possibility arises from the fact that, in some instances, where a treaty provision is norm-creating in character, this provision may pass into customary law once certain criteria are satisfied.”

The latter, however, has proven not to be the case. There is a lack of a real demonstration by states of their willingness (opinio juris) to incorporate the standard in customary international law. The latter is revealed in the multilateral as well as bilateral conduct of states.

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144 Brower, see note 65.
145 Coe, see note 74.
146 UNCTAD, see note 31, 17.
At the multilateral level, most of those investment agreements that make reference to the standard (Havana Charter, Abs–Shawcross Draft and the OECD Draft) failed to come into force. Although a certain opinio juris from states could derive from pronouncements issued when negotiating these instruments, it is unlikely that it would suffice to constitute customary international law. The latter is a consequence, for example, of the OECD Draft or other investment agreements such as Nafta, representing only the opinion of capital-exporting countries, therefore not being able to constitute a customary international rule generally worldwide in range, but rather merely reflecting a regional consensus, hence not including a broad consensus among the rest of the states.

In the bilateral sphere, there is a clear indication of the possibility of the wide number of BIT’s containing the standard to provide evidence of conforming customary international law on the basis of the general practice and possible opinio juris that is reflected among them. Moreover, the Most-Favored Nation clause further extends the impact of the standard. However, the reality is that those agreements may be only an expression of general practice. There is a lack of opinio juris by developing countries that have accepted the inclusion of the standard more for political or economical reasons that may be imposed by developed countries than on the basis of conviction. “Individual developing countries, hoping that an infusion of foreign investments may generate growth, are inclined to accept bilateral investment treaties in the terms proposed by capital-exporting countries.”

Moreover, an unequal bargaining power may contribute to this. The aforementioned may be seen for example in the negotiating of a compensation formula in the event of expropriation. “Many developing countries conclude BIT’s to promote economic development despite their formal opposition to the Hull doctrine. This inconsistency in the behavior of developing states in bilateral treaties has been described by some authors as double standard or paradoxical behavior on their part. Therefore in this state of conflicting norms and paradoxical behavior on the part of developing countries, it is hardly possible to say that any opinio juris has arisen by the State practice on BIT’s by which one can conclude that BIT norms are binding on all states.”

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147 The Havana Charter, see note 3.
148 Vasciannie, see note 2, 126.
Nevertheless, “as the number of bilateral investment treaties between developing states increases, however, the point concerning inequality of bargaining power may lose some of its vigour, for developing country support for the fair and equitable standard in their relations inter se could prompt the perception that the developing countries concerned regard the standard as having acquired customary status.”

It seems, nonetheless, that although we could consider that there is a general practice concerning the standard, there is clearly a lack of opinio juris thus far to date.

The practical conclusion is that if the Fair and Equitable Treatment standard is not referred to in the investment agreement, it will not be applicable in protection of the foreign investor. There is a need for an explicit provision of the standard in an agreement.

Notwithstanding the latter conclusion, there is a thought that should not be left out. The Fair and Equitable Treatment standard has its own expression in municipal law. The idea behind this standard can be found in municipal law in the form of respect for the fair and legitimate expectations granted by the government to an investor as well as the principle of good faith that should constitute the framework in which economic relations must develop. If we consider that these principles are applied in each country and that there is a conviction of each one of them in regard to constituting law, we may be able to argue that the standard has effectively become customary international law. The concern regarding the protection of the legitimate expectation granted by a government to an investor has transgressed municipal law, and in international law, has become connected with the Fair and Equitable Treatment standard.

2. A Self-Contained Standard?

The Fair and Equitable Treatment standard conceived as a self-contained standard relies on the idea that the standard of treatment is given its plain meaning, that is, each word contained in the standard must be analyzed on the basis of its own general definition. Therefore, the assessment to be carried out to determine the content of the standard, which will be afforded to the foreign investor, is based on the proper meaning of the terms “fair” and “equitable.” Still, this is only

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150 Vasciannie, see note 2, 159.
the basis on which the determination will be made. Other elements will be taken into account, most importantly, the facts and special features of the case. The plain meaning approach “is no doubt entirely consistent with canons of interpretation in international law.”  

A treatment will thus be fair “when it is free from bias, fraud or injustice; equitable, legitimate … not taking undue advantage; disposed to concede every reasonable claim”; and by the same token, equitable treatment is that which is characterized by equity or fairness … fair, just, reasonable.”

An important ruling concerning this theory was issued in the Pope and Talbot case, which established that the fairness element in article 1105 is additional to the requirements of international law. This conclusion was based not on the wording of article 1105 itself since the Tribunal recognized that, in fact, the article suggested otherwise, rather the interpretation was based on the consideration of BIT’s signed by the United States both before and after Nafta, which granted a higher standard of treatment to the investor.

On the other hand, the Pope and Talbot case considered that if we take into account the Most-Favored Nation clause, it becomes absurd to deny an investor the better treatment granted in other investment agreements, considering that through this clause, the investor will have access to this improved treatment. The Pope and Talbot Tribunal considered that the standard set by Nafta was equal to that granted by BIT’s that preceded Nafta. The Tribunal did not approve the idea that the intention of the parties would have been to deny the investors under Nafta the better treatment existent under BIT’s.

The plain-meaning approach entails a series of advantages, such as “the considerable advantages of uniformity.” After all, why should “fair and equitable treatment” mean something different depending on which BIT applies? This is not a minor issue. It seems that this approach would surely improve the uniformity of the interpretation of the standard issued by Arbitral Tribunals. If we consider the standard in its plain meaning, arbitral rulings would become more uniform and vary only in a degree according to the facts of each case. It seems much easier

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151 Id., see note 2, 103.
152 Id., see note 2, 103.
153 Pope and Talbot Inc. vs. Government of Canada, see note 50.
154 Pope and Talbot Inc. vs. Government of Canada, see note 50.
155 Coe, see note 74.
to rely on the general meaning granted to a word than to determine what special standards of customary international law are equivalent to the Fair and Equitable Treatment standard. The decision, considering the case's facts, must simply be based on whether the conduct at issue is fair and equitable or unfair and inequitable.

Another approach to the issue is the view of F.A. Mann, who considered that the obligation of Fair and Equitable Treatment constitutes the overriding obligation. This overriding obligation includes other standards, such as the Most-Favored Nation Clause and National Treatment standards. These standards are, in his view, granted to ensure that the Fair and Equitable Treatment standard is not impeded. However, the latter is a minority position. Generally, the Most-Favored Nation and National Treatment standards are independent of the Fair and Equitable Treatment standard.

Notwithstanding the latter, Mann states that “it is misleading to equate the fair and equitable standard with the international minimum standard: this is because the terms ‘fair and equitable treatment’ envisage conduct that goes far beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard than any previously employed form of words. A tribunal would not be concerned with a minimum, maximum or average standard. It will have to decide whether in all circumstances the conduct in issue is fair and equitable or unfair and inequitable. No standard defined by other words is likely to be material. The terms are to be understood and applied independently and autonomously.” 156

However, to others, “fair and equitable treatment is not to be assessed according to customary international law, but rather represents an expanded, contemporary understanding of customary international law.” 157

If we analyze the facts, we will appreciate that even those arbitral rulings that based their findings on an investment agreement that equates the standard to the international minimum standard, clearly exceeded the terms of that investment agreement, granting the standard a meaning that is beyond the international minimum standard as it is acknowledged at this time. It seems that Tribunals are more confident in

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156 OECD, see note 15, 23.
making use of the rules of interpretation of international law and define the standard in consideration of the treaty’s objectives and the facts of the case. In conclusion, they have applied the theory of the Fair and Equitable Treatment standard as a self-contained standard. The reason for this is that most investment agreements, as stated in the preceding Chapter, do not make the Fair and Equitable Treatment standard interchangeable with the international minimum standard, while in those that do, it is not equated to the international minimum standard of customary international law (with some exceptions).

An important view is that of R. Dolzer and M. Stevens, who say that “the fact that parties to BIT’s have considered it necessary to stipulate this standard as an express obligation rather than rely on a reference to international law and thereby invoke a relatively vague concept such as the minimum standard is probably evidence of a self-contained standard. Further, some treaties refer to international law in addition to the fair and equitable treatment, thus appearing to reaffirm that international law standards are consistent with, but complementary to, the provision of the BIT.”

The consideration of this theory is nevertheless not without difficulties. A plain-meaning approach may become subjective and lack precision. However, “in some circumstances, both the states and the foreign investors may view lack of precision as a virtue, for it promotes flexibility in the investment process.” Therefore, it seems that many existent arbitral rulings have headed towards this self-contained standard theory anyway. It might require some extra arbitral rulings to totally define the meaning’s standard on the basis of the theory’s elements. Professor P. Julliard refers to this: “… the interpretation of the fair and equitable treatment, an imprecise notion – ‘notion aux contours imprécis’ – will be progressively developed through the ‘praetorian’ work of the arbitral tribunals.”

Notwithstanding all the latter, when defining the meaning of the Fair and Equitable Treatment standard, Arbitral Tribunals must take into account the real intention of parties when signing an investment agreement, which is to grant reliable protection to the foreign investor to stimulate investment in their territory. This will certainly avoid equating it to the international minimum standard, which takes away a real and efficient protection.

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158 Dolzer/ Steven, in: OECD, see note 15, 23.
Professor Muchlinski states that: “The concept of fair and equitable treatment is not precisely defined. It offers a general point of departure in formulating an argument that the foreign investor has not been well treated by reason of discriminatory or other unfair measures being taken against its interests. It is, therefore, a concept that depends on the interpretation of specific facts for its content. At most, it can be said that the concept connotes the principle of non-discrimination and proportionality in the treatment of foreign investors.”

It must be concluded that the Fair and Equitable Treatment standard still remains a vague and undetermined concept that needs further developing by Arbitral Tribunals. The point, however, is to determine the starting point on the basis of which these Arbitral Tribunals must rule in the future. Will we accept the rules of interpretation of international law and decide based on the facts, the best protection to be granted to the foreign investor, or will we limit its delimitation to a standard, such as the international minimum, that grants a very basic protection to the investor which already exists in customary international law? Unless the agreement specifically orders the Arbitral Tribunal to equate the standard with the international minimum standard, the answer is a self-contained standard approach. It seems that the current evolution in the investment area regarding the protection of foreign investors provides a clear statement: for the sake of the liberalization of investments, investor protection must not regress. This is the intention behind investment agreements, and the interpretation of all standards established therein (including the Fair and Equitable Treatment standard) must be oriented in that direction.

V. Conclusions

The Fair and Equitable Treatment standard, present in international investment law, has gained importance as a mechanism against unfair and unequal behavior of host states against foreign investors. It has arisen as a fundamental response to a new type of expropriation (different from the traditional direct and creeping types of expropriation) that could be enacted against the investor.

This new type of expropriation amounts to a behavior of the host state that does not involve a physical taking of property (direct expro-

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159 P. Muchlinski, “Multinational Enterprises and the Law”, in: OECD, see note 15, 635.
Klein Bronfman, Fair and Equitable Treatment: An Evolving Standard

appropriation) or conduct that makes it impossible to make proper use of the property (creeping expropriation). It consists of a certain treatment by the host state that would eventually impair the investor’s ability to develop the investment, thus affecting his property rights in regard thereto. For example, a lack of transparency by the host state which does not allow the investor to learn of all regulations that must be complied with, resulting in the above-mentioned impairment.

The Fair and Equitable Treatment standard is often invoked by foreign investors before arbitral tribunals, who claim that although they are not affected by the traditional forms of expropriation, they are incapable of developing their investment due to a host state’s conduct.

The main conflict in relation to this standard is the vagueness in which it is conceived. Views issued by scholars and arbitrators, as well as the expression of what is contained in investment agreements, demonstrate that there is no uniformity in the matter, a situation that is present to a greater degree in various cases that have dealt with the issue of determining its true meaning.

The OECD\textsuperscript{160} states in this regard that “because of the differences in its formulation, the proper interpretation of the ‘fair and equitable treatment standard’ is influenced by the specific wording of the particular treaty, its context, negotiating history or other indications of the party’s intent.”

Some investment treaties specifically link the standard with the minimum standard of customary international law. If this were always the case, there is no doubt that this would be the interpretation to assign to the standard. However, in the case of other agreements, which constitute the majority, no such link is made, implying that the standard may be considered to signify a lot more than the minimum standard of customary international law. There is a common consensus as to what the defining elements are in the minimum standard of customary international law (which, by the way, evolves continuously). Nevertheless, whenever there is no express equating to the minimum standard, there is no general agreement as to what we may consider the Fair and Equitable Treatment standard to mean.

In consequence, and although we must await further rulings by Arbitral Tribunals to better shape the standard, we must assume that thus far, the majority of investment agreements do not equate the standard to the minimum standard of customary international law, and, there-

\textsuperscript{160} OECD, see note 15, 2.
fore, are not bound by that interpretation. Moreover, arbitral rulings have exceeded in their interpretation the general elements that constitute that minimum standard of customary international law (for example, reference to transparency), which leads us to believe that they had the intention of elevating the level of protection to the foreign investor and not limiting it to customary international law.

Although investment agreements that equate the standard to the international minimum standard are obliged to make that interpretation, and although there are some arbitral rulings that establish this nexus, these sparse cases do not suffice to transform that interpretation into the general approach to the meaning of the standard. We must take into account international rules of interpretation, the intent of the parties, all of which leads us to realize that a plain-meaning approach must be applied. In relation to the standard’s meaning, “il suo contenuto non sembrerebbe essere determinabile in maniera assoluta e definitiva, essendo esso un principio astratto e relativo; il trattamento giusto ed equo assumerà però un significato concreto quando é inserito in un contesto giuridico particolare.”

It is true, there is a general concern that this approach may not help in dealing with the arbitrariness that may appear when there is no direct guidance for arbitrators. However, this is a view that will be readily corrected through jurisprudence, which has so far established some recurrent elements that are a part of the standard, such as due diligence, due process, non-denial of justice and transparency.

The real intention of the parties when signing an investment agreement is, in most cases, to grant the best protection to the investor, allowing the free-flow of investment into its territory. The most important benefit of a plain-meaning approach is that it allows the standard to be interpreted according to the real intention of the parties. In other words, grant the best protection to the investor, which implies the fairest and most equitable conduct by the host state in regard to the specific facts of the case. Equating the standard to the minimum standard of customary international law is lowering the protection to the most basic elements of customary international law. “In tal senso esso potrebbe essere inteso come il principio di buona fede del diritto interno, per cui l’obbligo di concedere un trattamento giusto ed equo imporrebbe alle Parti di tenere un comportamento conforme agli obiettivi dell’accordo e quindi, alle Parti contraenti dei BIT’s un comportamento che non osta-

161 Mauro, see note 1, 193.
coli la promozione e la protezione degli investimenti stranieri.”

In consequence, the aim of protecting foreign investment is the fundamental issue to be taken into account in the interpretation of the standard. Moreover, “It is in a more general way a functional minimum standard of treatment of private business, quite different, however, from the traditionally known legal minimum standard of the so-called civilized nations.”

Finally, whatever the evolution of the growing jurisprudence of Investor-state Tribunals, called upon to explore the meaning of fair and equitable treatment may be, other questions in regard to the standard will surely arise. For example, what will be the criteria to determine the compensation to be granted to the affected investor in the event a violation of the standard is detected? Can we apply the elements that arbitrators use to determine the compensation for a direct expropriation (Hull Formula)? Can we equate the violation of the Fair and Equitable Treatment standard to a direct type of expropriation and, therefore, apply fair market value criteria in order to compensate the affected investor?

In this sense, the Chilean model of BIT establishes that where the market value or property compensation cannot be ascertained, compensation may be determined in accordance with “generally recognized equitable principles of valuation, taking certain factors into account.”

Although this is certainly not a clear rule, at least it is dealt with. But what are the criteria when there is no conventional or treaty guidance? The issue becomes even more problematic if we consider that developing and developed countries have a different perspective as to whether the Hull Formula must be applied.

In the case of MTD Equity Sdn. Bhd. and MTD Chile S.A. vs. Republic of Chile, in which the only argument by which the state of Chile was charged was a violation of the Fair and Equitable Treatment standard, the Tribunal recognized that the BIT between Malaysia and

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162 Mauro, see note 1, 191.
163 S. Preiswerk, “New Developments in Bilateral Investment Protection”, cited in Mauro, see note 1, 191.
164 Agreement between the Government of the Republic of Chile and the Government of … on the Reciprocal Promotion and Protection of Investments, UNCTAD International Investment Compendium III, 143 et seq., in: Vasciannie, see note 2, 149.
165 MTD Equity Sdn. Bhd. and MTD Chile S.A. vs. Republic of Chile, see note 85.
Chile does not establish the equivalent to the criteria of prompt, adequate and effective compensation for expropriation in the case of breaches of the BIT on other grounds. In this case, the parties agreed to apply the criteria of the Chorzow Factory case ruled by the PCIJ that states “that compensation should wipe out all consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that had not been committed.”  

Although this is a reasonable and just criterion, could it be applied in those claims in which there is no agreement between the parties and no reference is made to it by the investment agreement? Could the term “adequate” compensation in the Hull Formula amount to wiping out all consequences of the illegal act? Moreover, does the fair market value apply or not?

In the Marvin Feldman vs. Mexico case, the Tribunal acknowledged that “Nafta does not provide further guidance as to the proper measure of damages or compensation for situations that do not fall under article 1101 (expropriation); the only detailed measure of damages specifically provided in Chapter 11 is in article 1101 (2-3) ‘fair market value,’ which necessarily applies only to situations that fall within that article 1101.”  

Considering that there is no criteria to adhere to, the Tribunal finally determined damages on a discretionary basis.

Finally, in relation to the amount of compensation to be granted to an investor that has suffered a violation of the Fair and Equitable Treatment standard, a discussion will certainly arise in regard to the possibility that the compensation be calculated in regard to the fair market value of the whole investment, considering that such a violation made it impossible for the investor to develop his investment, which, in practice, is equivalent to confiscating property.

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The New Chilean Arbitration Law: 
Will Chile Become a New International 
Arbitration Venue?

University of Heidelberg, Max Planck Institute for Comparative Public 
Law and International Law and the University of Chile, 
March 2005

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I. Introduction


The recent “success” of international commercial arbitration practice in the field of international law has already become a trend worth analyzing. As the globalization of the economy had naturally led to the multiplication of free trade agreements, bilateral investment treaties and foreign investment protection, the disputes arising from these new trade relationships have called for new settlement mechanisms.

However, the solution established in international commercial arbitration soon faced the obstacles presented by inconsistencies between the various national legislations on this issue.

Aware of the need for appropriate legislation, in 1966 the United Nations General Assembly created the United Nations Commission on International Trade Law (UNCITRAL). This Commission has adopted many important arbitration instruments, but certainly, the most important objective achieved after two decades of Commission sessions was the adoption of the UNCITRAL Model Law on International Commercial Arbitration in June 1985.

1 For instance the “UNCITRAL Arbitration Rules” in 1976.
This Model Law\(^2\) was approved with the recommendation that “all nations give consideration to the international commercial arbitration Model Law in view of the desire to standardize arbitration procedural laws and the specific needs of international commercial arbitration practice.”\(^3\)

Therefore, this Model Law is merely a document that is submitted to the consideration of the different Member States with the ultimate goal of incorporating it into their respective domestic legislation. It aims at improving and harmonizing domestic laws on arbitration, providing them with a general framework to follow while facilitating cross-border and/or international business transactions.

The UNCITRAL Model Law consists of eight Chapters (and thirty-six articles) that spell out the essential elements of an arbitration agreement, the composition and jurisdiction of the arbitral tribunal, the conduction of the arbitral proceedings, and the enforcement of the tribunal’s award.

As defined in Chapter One (arts 1 to 6), an arbitration is considered to be “commercial” if it covers matters arising from commercial relationships of any nature, whether contractual or not.\(^4\) Examples of relationships of a commercial nature are the transactions for the supply or exchange of goods and services, distribution agreements, construction of works, commercial representation, and joint ventures.

In addition, the Model Law states that an arbitration is international if “the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States.”\(^5\) Beside this hypothesis, an arbitration is also considered to be international when it meets the requirements of article 1.3 (b): when the place of arbitration or execution of the contract, or the subject of the dispute, is in a state other than where the parties have their regular places of business, or when the parties have expressly agreed that the object of the dispute is related to more than one country.

\(^2\) Available under <www.uncitral.org>.
\(^4\) This notion follows the modern trends in international commercial arbitration, where the aim is to broaden the matters included in the scope of definition of “commercial”. P. Fouchard/ E. Guillard/ B. Goldman, Traité de l’arbitrage commercial international, 1996, 38-47.
\(^5\) UNCITRAL Model Law, article 1.3 (a), available under <www.uncitral.org>.
Chapter Two of the Model Law (arts 7 to 9) deals with definitions concerning the scope and form that must be given to an arbitration agreement of an international nature; it establishes the limits to the exception of arbitration agreements and foresees the possibility of any party filing for interim protective measures before a domestic court.

Chapter Three (arts 10 to 15) regulates the composition of the arbitral tribunal: on this matter, the principle consists in giving the parties the freedom to define the number of arbitrators and the procedure to appoint them. In the event that the parties do not reach an agreement on this issue, additional regulations are provided. In like manner, it deals with court procedures for appointing arbitrators as well as causes and procedures for challenging them.

Chapter Four (arts 16 and 17) deals with issues related to the competence of the arbitral tribunal to determine its own jurisdiction (usually known as the \textit{kompetenz-kompetenz} principle): thereby ensuring the autonomy of the arbitration agreement in relation to other contract provisions. Therefore, the nullity of the latter would not lead to the nullity of the former.

Chapter Five (arts 18 to 27) establishes ancillary regulations in the event that the parties to an arbitration fail to reach an agreement. Although the guiding principle is that parties shall be free to establish their own arbitration procedures regarding the place of arbitration, the language to be used, the procedures to submit claims and to defend against them, the nature of the hearings and the rules for submitting evidence, the effects of a party’s default and its consequences upon the arbitration, among others, are regulations stipulated clearly and in extensive detail.

Chapter Six (arts 28 to 33), provides rules on the nature of arbitral procedures and their preparation, arbitral awards and their contents, among other special provisions.

Chapter Seven (arts 34 and 35) defines the terms concerning the review of the arbitral award. Its annulment before the domestic courts is the course of action to be followed by a party pursuing such aim. In short, this Chapter establishes the grounds for setting aside such award and the requirements, formalities and periods of time for such submission.

Finally, Chapter Eight (article 36) deals with the recognition and enforcement of the arbitral award.

As explained above, the UNCITRAL Model Law deals with harmony and coherence in the establishment of arbitration as an interna-
tional commercial practice. Consequently, many countries have already introduced its provisions into their domestic legislation, in some cases making a clear distinction between their domestic arbitration rules and those applicable to international arbitration proceedings, and in others covering both the domestic and international arbitration proceedings.

2. How Do We Define an “International Arbitration Venue”?

A “venue” is usually defined as “a) the place or country where the alleged events from which a legal action arises take place; or b) the place from which a jury is drawn and in which trial is held”.

Therefore, it seems important to note that a distinction should be made in relation to the notion of venue and seat for international arbitration: basically – and in the sense given in this paper –, it is a general understanding that a country eventually becomes a venue only after having been chosen as a place of arbitration on several occasions.

On these grounds, the parties to an international arbitration proceeding seeking a suitable venue have a difficult decision to make, since many elements must be considered in choosing a country as an international arbitration venue. Briefly, we can list the following:

a. Supportive Legal Environment

No legal obstacle must exist which would jeopardize the conduct of the arbitration and equally importantly, the successful party must be able to obtain legal enforcement in the country where the other party has assets.

Therefore, the ideal situation is for the place (country) where an international commercial arbitration is to take place, to at least have incorporated in its own legislation the following laws:

- The UNCITRAL Model Law of 1985 (in its entire form or with minor amendments): the adoption of the UNCITRAL Model Law ensures that parties seeking to arbitrate their disputes would do so within a familiar legal framework, one which has been enacted to date in nearly 40 countries.

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6 From The Merriam-Webster Dictionary of the English Language.

7 Concerning references about this law and its most important provisions please see the first part of this Chapter.
- The New York Convention, 1958: it is essential that once an award is issued, the successful party is able to enforce it in the country in which the losing party has assets.

- The Panama Convention, 1975: This text aims at the same objectives as the New York Convention. This particular Convention, however, is regional in nature; it meets the need of international business to guarantee the enforcement of arbitration agreements and arbitral awards concerning international commercial transactions by the local domestic courts.

There are two somewhat contrasting aspects of the interrelationship between courts and arbitration. Firstly, it is highly undesirable for there to be an excessive level of interference by the courts in the arbitral process. In international arbitration, it is highly unlikely for the parties to choose a country as a venue if its laws permit the courts to interfere with the arbitration or with the award. At the same time, however, court assistance in support of the arbitration is desirable. There may be circumstances where one of the parties may need to resort to the courts to assist the arbitral process; for instance, injunctions against further moves or precautionary measures to protect assets or the status quo or to preserve evidence. In those circumstances, it is crucial that a party to an arbitration has ready access to the local courts, and that it can be fa-

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8 The above Convention was adopted in New York on 10 June 1958. It refers to the recognition and enforcement of awards made in the territory of a state other than the state where such recognition is sought. Article III of the Convention provides that: “Each contracting state shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon”, see under <http://www.uncitral.org/english/texts/arbitration/NY-conv.htm>.

9 The Inter-American Convention on International Commercial Arbitration, 1975 (also known as the Panama Convention) entered into force on 16 June 1976. It was enacted at the end of the First Specialized Inter-American Conference on International Private Law sponsored by the Organization of American States (OAS), see under <http://www.sice.oas.org/dispute/comarb/iacac/iacac2e.asp>.

10 Two other major conventions on international arbitration are the Geneva Protocol on Arbitration Clauses of 1923 (the Geneva Protocol) and the Convention on the Execution of Foreign Arbitral Awards of 1927 (the Geneva Convention). The reason why they are not analyzed in this paper is because neither the Geneva Protocol nor the Geneva Convention had significant practical effects (i.e., none of the Latin American countries ratified the Geneva Convention and Brazil was the only one that ratified the Geneva Protocol).
ciliated by an early hearing. In conclusion, it is of vital importance that domestic commercial courts appreciate the independence and significance of arbitral proceedings and that they are rigorous in enforcing arbitral awards and agreements.

Finally, it is important for the place (country) of arbitration to be in good standing and deserve the respect of the international business community. To that effect, conditions of neutrality, along with political and economic stability are desirable.

b. Respected and Well-Prepared Legal Professionals

It is important to have internationally renowned arbitrators who are knowledgeable on commercial matters and have proven experience in international cases. Further skilled practitioners are necessary. The state to be a place of arbitration must contain a certain number of law firms and renowned international arbitration specialists. Finally representation through foreign lawyers: the parties before an arbitral tribunal need to be allowed to be represented by the qualified legal practitioners of their choice from any other jurisdiction.

c. Resources and Facilities

The parties to an international commercial arbitration value that the place chosen is equipped with institutions and facilities of high standard to support the arbitration process and to ensure that it runs efficiently. These resources include, for example, office headquarters providing such essential services as hearing rooms, translation services, etc. In most cases, such structure is provided by 1) International Organizations (such as the International Chamber of Commerce)\(^\text{11}\), 2) National Chambers of Commerce, or 3) independent Arbitration Centers.

3. Reasons for Comparing the Chilean and the Spanish Cases

Although at a first glance the reason for comparing these two countries may not appear so obvious, it is essentially quite simple. Chile and

\(^{11}\) The International Chamber of Commerce (hereinafter, ICC) was established in 1919 with the aim of promoting worldwide trade and investment, See under <www.iccwbo.org>.
Spain have many points in common in this regard: perhaps the most noticeable one is that they share a common cultural heritage, social origins and language. And thus, like other Latin American legal systems, Chile has inherited many laws and legal provisions from Spain. Besides this fact, in the field of economics and trade, they share many similarities in the trend of their commercial policies and growth. Despite their different geographical location and state of development, both of them exhibit an active and increasing participation in the fields of international trade. Moreover, they soon became aware of the importance of international arbitration as a convenient mechanism to settle disputes arising from trade relations and foreign investments. And finally, in line with the observation made above, both Chile and Spain have recently adopted the UNCITRAL Model Law: Spain in December of 2003 and Chile in September of 2004.\footnote{Although these laws will be analyzed in detail in further chapters, see under <www.bcn.cl> (Chilean arbitration Law) and <http://www.boe.es/boe/dias/2003-12-26/pdfs/A46997-46109.pdf#search=ley%2060/2003> (Spanish arbitration Law).}

Their respective and prompt legislative ratification of the UNCITRAL Model Law on International Commercial Arbitration, added a number of factors to the competitive advantages of these countries, establishing them as suitable international arbitration venues and positioning them along similar development paths.

II. International Commercial Arbitration in Chile

1. Background


During the last decades, Chile has traveled a tortuous path to approve adequate commercial arbitration legislation. This situation is explained by the fact that as of the date of enactment of Law 19.971, Chile did not have specific regulations in the field of international commercial arbitration: the regulations in effect at the time governed, on the one hand, national arbitration procedures and, on the other, certain regulations...
that were taken from International Treaties and applied to specific hypothesis in this field. A summary of them is given below:

*Domestic Legislation Regulations:*

The Organic Judiciary Code [Código Orgánico de Tribunales (COT)] and the Code of Civil Procedure [Código de Procedimiento Civil (CPC)]

Chile’s arbitral legislation dates back to 1875 and it was later subsumed into the Code of Civil Procedure, in its arts 628 to 644.

As stated by Blackaby and Spinillo, Chile’s 1995 draft arbitration law (whose detailed analysis will be undertaken in the following Chapter) was based primarily on such regulations. These regulations, which in principle were meant to govern international commercial arbitration procedures, actually governed arbitral proceedings among nationals and those in which foreign parties subjected themselves to arbitration in Chile. On the other hand, the CPC contains, in arts 242 to 251, regulations applicable to the enforcement of foreign arbitral proceedings. It should be noted, however, that such regulations have a narrow field of application since they govern exclusively those cases where the New York Convention or the Panama Convention do not apply.

*Decree 2349/78*  
This Decree allows Chilean state and public sector companies, when bound by the provisions of an international contract of a patrimonial nature, to include among their clauses one that would grant jurisdiction to foreign courts, whether arbitral or ordinary.

*The Code of Commerce*  
This Code includes a number of provisions related to international arbitration; such as, for example, those referred to the termination and asset distribution of commercial companies.

*Decree Law 600 of 1974*  
This Decree governs foreign investments in Chile and its provisions apply to conflicts between Chile and foreign investors.

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14 Ibid.
16 Available under <www.bcn.cl>.
17 Available under <www.bcn.cl>.
18 Ibid.
This text establishes that disputes emerging from contracts executed between Chile and foreign investors and governed by Decree Law 600, may not be settled by arbitral courts, whether domestic or foreign.

Since this text refers only to foreign investment hypotheses, and since it specifically does not consider arbitration, its provisions do not fall under the aegis of the topic under study here. Additionally, because of Chile’s ratification of the ICSID (International Center for the Settlement of Investment Disputes) Convention, nowadays a foreign investor facing a dispute with Chile is entitled to resort to the ICSID Convention pursuant to its own rules and regulations, provided it is eligible under bilateral investment treaties or other mechanisms that consider arbitration to settle disputes.

b. International Treaty Regulations

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)

In September 1975, Chile ratified this Convention – without reservations – thus enacting the most widely adopted agreement regarding the international enforcement of arbitration agreements and ensuing arbitral awards.

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19 Available under <www.worldbank.org/icsid/>
21 We will not include among the above-mentioned regulatory bodies, the Convention on the Settlement of Investment Disputes between States and Nationals of other States (Washington Convention, 1965, which established the International Center for the Settlement of Investment Disputes and entered into force in Chile in 1991), because it lies beyond the strict concept of international commercial arbitration, governing exclusively the relationship between foreign investors and Chile, in this instance as the investment recipient.
22 For further comments on this Convention, cf. under I.
Cherro Varela, The New Chilean Arbitration Law

The Inter-American Convention on International Commercial Arbitration (Panama Convention)\(^{23}\)

Chile signed this Convention in 1976 which – as mentioned above – deals with the enforcement of foreign arbitral awards and other important provisions concerning the nationality of arbitrators.

MERCOSUR’s Agreement on International Commercial Arbitration and the Agreement on International Commercial Arbitration between MERCOSUR, Bolivia and Chile\(^{24}\)

The Agreement on International Commercial Arbitration between MERCOSUR Member Countries and the Republic of Bolivia and the Republic of Chile, attempted to install a uniform and broadly applicable system of dispute settlement. Both agreements are substantially identical, except that in the second one non-member countries such as Bolivia and Chile are parties to the Agreement. These instruments govern arbitration agreements (arts 4 to 8) and proceedings (arts 11 to 25), including arbitral awards and appeals (arts 20 to 22) and the applicable law to the dispute (arts 9 and 10). Significantly, neither of these agreements provide rules concerning the recognition and enforcement of awards. Article 23 provides that in enforcing awards, the rules to follow will be those of the Panama Convention, the Las Leñas Protocol,\(^{25}\) and the 1979 Montevideo Inter-American Convention on Extraterritorial Applicability of Court and Arbitral Awards,\(^{26}\) all of them signed by MERCOSUR’s four member countries.\(^{27}\)

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\(^{23}\) Ibid.

\(^{24}\) MERCOSUR’s Agreement on International Commercial Arbitration was executed at the XIVth Common Market’s Meeting held in Buenos Aires and Ushuaia in July 1998. These regulations were integrated to associate countries (Bolivia and Chile) via MERCOSUR’s Council Decision No 4/98, 1998, see under <http://www.mercosur.org.uy/espanol/snor/normativa/decisiones/Dec398.htm>.


\(^{26}\) Available under <http://www.oas.org/dil/CIDIPV_home.htm>.

Free Trade Agreements (FTA) signed by Chile

Each of the free trade agreements signed by Chile includes special arbitration mechanisms in order to settle disputes arising between the signatory parties.

c. Previous Legislative Attempts

On 16 April 1985, a Senate Commission approved a draft bill on international commercial arbitration aimed primarily at correcting existing deficiencies in the positive legislation on this subject matter. Nevertheless, this bill was never passed and, consequently, it never became law. In short, the main reasons why such avenue was frustrated were the following: first, certain regulations were introduced that placed restrictions on the autonomy of the will of the parties. This topic was not treated satisfactorily in this bill, which extended an insignificant autonomy to the parties in arbitral procedures including arbitrators bound by legal principles ("árbitros en derecho"), and an autonomy reduced to its minimum expression in those cases managed by mixed arbitrators and by arbitrators in equity ("árbitros arbitradores"). The inevitable consequence of this provision was that arbitrations became mechanisms with few advantages to parties seeking an out-of-court settlement of their disputes and a broader freedom and field of action. Second, the bill was not governed by the principle of autonomy of arbitral agreements. Therefore, if the contract in which such arbitration clause is ultimately inserted was to be invalidated, it would fatally impact the outcome of the latter. Closely linked to this topic is the jurisdiction principle (kompetenz-kompetenz principle), which consists in the power of arbitrators to decide about the existence, breadth and

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28 To date, Chile has signed Free Trade Agreements (FTA) with the following countries or block of countries: Canada, United States, Mexico, Korea, Central America & the Caribbean, and with EFTA Member States. The country also signed an Economic Association with the European Union.

29 Another draft bill was presented some years later, in 1992, by the Executive; nevertheless, its only aim was to regulate — with further details — the domestic arbitral proceedings. See under <http://sil.congreso.cl/pags/index.html>.

30 The referred draft bill intended to create three types of arbitrators: (i) Arbitrators bound by legal principles; (ii) Mixed arbitrators; and (iii) Arbitrators not bound by legal principles but solely by their discretion (arbitrators in equity or so-called amiables composites). These categories are also common to the UNCITRAL Model Law (cf. under <www.uncitral.org>).
scope of their own jurisdiction; a topic that was not explicitly addressed in this draft bill.

Another unfortunate decision was the incorporation of forced arbitration procedures: this institution entailed the parties’ obligation to submit to arbitration certain previously described subject matters.31 Such a mechanism runs counter to the very essence of arbitration, which must be voluntary and consensual. Finally, the draft bill did not clearly establish the legal remedies that were available against arbitral awards. And, what is even more awkward, it established as a matter of principle that awards could be challenged in the same manner as judicial decisions. Such approach clashes head on with the prevailing principle in comparative law: i.e., that awards may be appealed on limited grounds. This is the guiding spirit of the UNCITRAL Model Law, which admits motions to invalidate awards only in specific circumstances; in our opinion, it is the wisest approach.

As may be inferred from this overview, Chile did not have a harmonious and adequately structured body of regulations in order to meet the legal requirements of modern international commercial arbitration proceedings until 2004. As properly stated by Mr. Ricardo Lagos Escobar, President of Chile, in his message to submit the draft bill on International Commercial Arbitration to congressional debate: “International commercial arbitration proceedings are not specifically regulated in our legal system (...) considering that domestic regulations were conceived for domestic arbitration proceedings, they are inadequate for international cases; thus, it is possible to conclude that there is a legal void in Chile’s legislation that is necessary to fill in terms of international commercial arbitration.”32

31 Article 230 of the draft-bill established which issues were compulsory to arbitration proceedings: among them, services, bank operations, buying and selling.


The following will include a review of those articles deemed most significant and specific under the regulations of law 19.971. Prior to this analysis, it is worth noting that the regulation referred to establishes a special and autonomous legal system for international commercial arbitration proceedings that operates in perfect harmony and coherence with the projected regulations applicable to domestic commercial arbitration proceedings as well as with the treaties currently in force.

a. Arbitrability

This expression defines the suitability of a subject to be submitted to arbitration.\(^{33}\) It encompasses those features and requirements that must be present in a dispute in order to be governed by this law.\(^{34}\)

First, it is important to highlight that the law has clearly defined the breadth and scope of the two features that are intrinsic to this type of arbitration: i.e. its commercial nature and international dimension.

The commerciality requirement – among other definitions and rules of interpretation – is explained in article 2 of the law, which states:

“Article 2 – Definitions and Rules of Interpretation
For the purposes of this law:
g) The term “commercial” must be understood in a broad sense in order to cover all issues related to this type of relationships, whether contractual or not. Subsumed under the latter, for example, any commercial operation to supply or exchange goods or services, distribution agreement, representation or commercial agency, transfer of credits for collection, leasing of equipment with option to buy, construction of works, consulting, engineering, license concessions, investments, finance, banking, insurance, development agreements or concessions, corporate associations and other forms of industrial or commercial cooperation, transport of merchandise or passengers by air, sea, railroad or surface.”

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34 Although the aim of arbitration laws is to embrace most subject matter, all nations treat some categories of claims as incapable of resolution by arbitration. See G. Born, *International Commercial Arbitration*, 2001, 245.
The notion of what is indeed commercial, finds in this law a much broader field than that conceded to the *acts of commerce* by Chile’s Code of Commerce. \(^{35}\) Additionally, it matches the scope that the UN-CITRAL Model Law gives to commercial practice and usage. On the other hand, the “international” nature of the arbitration is regulated under its various hypotheses in article 1.3, which states:

“Article 1 – Scope of Application

3) An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

In this manner, the law lists the different elements that can give a certain situation an international character. Beyond this – and as stated in the message of Chile’s President prior to the congressional debate – “the recognition of the will of the parties has its limits in as much as one could not declare as international a controversy lacking relevant foreign elements or violating the public order (...).”

Finally, it must also be noted that this law introduces another principle deeply ingrained in Chilean Positive law: the principle of territoriality. To this effect, the provisions of this Law shall apply exclusively if the place of arbitration is in Chilean territory.

b. Autonomy of the Arbitration Agreement. The Principle of **Kompetenz-Kompetenz**

As mentioned above, these two principles, although different and independent from each other, are very much related and they have been given particular relevance in the arbitration rules. The principle of

\(^{35}\) Chile’s Code of Commerce, article 3, see under <www.bcn.cl>.
autonomy responds negatively to the question as to whether or not the eventual nullity of the main contract implies the nullity of the arbitration agreement. It has been extensively debated whether the arbitration agreement is actually independent from the contract. The crucial point is determining whether the arbitration agreement is valid, and thus submitting to arbitration is possible even when the main contract is null. The modern position favors that the arbitration agreement be independent and autonomous from the rest of the contract. This position implies that such agreement is in itself a different contract, at least for the purpose of the subject of nullity. In this manner, one would have to consider whether the contract is valid according to its specific rules and whether the arbitration agreement is also valid according to its specific rules. Among the reasons advanced by those postulating that autonomy means that the eventual nullity of the main contract is extended to the arbitration agreement, mention is made of the fact that it would unduly restrict the manifestation of the will, aimed at submitting any future litigation before an arbitrator. Moreover, the cause of the arbitration agreement is different from that of the main contract. The autonomy of the will of the parties, stated in the arbitration agreement, plays a significant role in modern systems: it is in both the UNCITRAL Model Law and in Law 19.971.

Article 7 of Law 19.971 states as follows:

"Article 7 – Definition and Form of Arbitration Agreement

“Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement."

Insofar as the jurisdiction of the arbitrators is concerned, it must be noted that this question arises at the time of determining who has the right to decide on the competence of an arbitral tribunal when confronted with the objection of one of the parties. In this respect, there are two positions: the traditional one, that holds that the decision as to whether an arbitral tribunal is competent to resolve a conflict is incumbent upon the ordinary courts of justice, and the modern one, that holds that the arbitral tribunal itself is entitled to resolve any objection regarding its own jurisdiction.
This approach has been introduced in Law 19.971 in article 16:

“Article 16 – Competence of Arbitral Tribunal to Rule on its Jurisdiction
1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause, which forms part of a contract, shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.”

c. Composition of the Arbitral Tribunal

The law has followed the international practice on this point: the agreement of the parties prevails, and, if there is no explicit agreement of the parties or should there be a disagreement regarding their opinion, the number of arbitrators shall be three.

“Article 10 – Number of Arbitrators
1) The parties are free to determine the number of arbitrators.
2) Failing such determination, the number of arbitrators shall be three.”

d. Exceptional Intervention of Chile’s Ordinary Courts of Justice

This principle is established under article 5 of Law 19.971:

“Article 5 – Extent of Court Intervention
In matters governed by this Law, no court shall intervene except where so provided in this Law.”

This regulation limits the intervention of Chilean courts in matters submitted to the international arbitration law to the minimum. Those cases where such intervention is accepted are:

- Appointing an arbitrator in the absence of an agreement of the parties.
- Challenging and removing an arbitrator.
- Decision of the arbitral tribunal declaring it to be incompetent.
- Application for setting aside the arbitral award.

Limiting the field of action to the Chilean courts of justice generated a debate in the draft bill’s legislative proceedings. Determining the in-
tervention of domestic courts of justice in arbitration proceedings is a topic of international as well as national concern.36

e. Review of the Arbitral Award

Following the spirit of the UNCITRAL Model Law, article 34 of Law 19.971 permits the application for setting aside as the only legal remedy against an arbitral award.

"Article 34 – Application for Setting Aside as Exclusive Recourse against Arbitral Award

1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article."

The Chilean Appeal Courts ("Cortes de Apelaciones") are designated to have competence in such cases. The grounds for setting aside an award are limited and described in detail in article 34 of the law. Among other provisions, some of these grounds are: the lack of proper notice to a party or a party’s inability to present its case, that the award refers to questions not submitted to arbitrator decision or not capable of settlement by arbitration, etc. This article, analyzed together with article 5, was the point of departure for several doctrinal discussions relating to the intervention of the Chilean Judicial Courts in arbitral proceedings, especially concerning the possibility of presenting other legal remedies against the awards apart from the action for setting aside.37

III. International Commercial Arbitration in Ibero America

1. Legislation on International Commercial Arbitration in Some Latin American Jurisdictions: Mexico, Brazil, Argentina and Uruguay

To analyze the position of certain Latin American countries with respect to international commercial arbitration might be somewhat com-

36 This topic was submitted by Mr. Miguel Otero Lathrop on the occasion of the Seminar on the new International Commercial Arbitration Law held in Valparaiso, Chile, in November 2004.

37 Further explanations on this topic will be developed later on.
plex if, previously, one does not consider certain landmarks that have set an identifiable pattern for the entire region.  

“The lack of an arbitration culture” was the most commonly identifiable feature only a few decades ago. The refusal to accept arbitration as a means to solve disputes was grounded in the so-called Calvo Doctrine based on national sovereignty principles, postulating the equality among national and foreign citizens and among territorial jurisdictions. Basically, such doctrine argued that sovereign states were entitled to remain free from any form of interference from other states. It is further argued that foreigners enjoyed the same rights as national citizens, and in case of lawsuits or claims, they were under the obligation to exhaust all legal remedies before domestic courts without resorting to the diplomatic protection of their respective countries of origin. 

The Calvo Doctrine inspired and permeated the attitude of Latin American countries in another manifestation of this spirit in which they persistently and collectively rejected the international arbitration mechanism proposed by the World Bank in 1964. A second feature of the region has been that the commercial policies followed by Latin

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40 Carlos Calvo’s ideas (Argentina, 1822-1906) materialized, on the one hand, in the “Calvo Clause”, which postulated that agreements with foreign citizens should include a provision whereby foreign nationals accept to submit their cases to the territorial jurisdiction in place, thereby waiving diplomatic protection from their respective governments; and, on the other hand, it materialized into the so-called “Calvo Doctrine”, which is nothing but the institutional recognition of such principle. For further comments on this theory see F. Tamburini, “Historia y destino de la “Doctrina Calvo”: ¿Actualidad u obsolescencia del pensamiento de Carlos Calvo?”, *Revista de Estudios Histórico-Jurídicos* 24 (2002), 81 et seq.  
41 In addition, the Ninth Pan-American Conference (Bogotá 1948) established the Calvo Doctrine in the regional sphere with the Chart of the Organization of American States, whose article 14 states: “The jurisdiction of the States applies within the limits of the national territory and is equally exercised over all its inhabitants, whether national or foreign.” The same Conference approved the Bogotá Pact, whose article 7 follows the same line. Likewise, it shows up in several Latin American constitutions, among them the Argentinean Constitution (article 116); and, in the international sphere, also within the United Nations.  
42 Tamburini, see note 40.
American countries did not favor international commercial arbitration: the so-called “import substitution” policy – applied by many countries of the region during the decade of the 1960’s – favored primarily domestic market growth, propelled by strong state support. Within this context – devoid of incentives to foreign investments or international commercial agreements – an international arbitration mechanism was clearly not a favored mechanism.

Years later, however, the recognized obsolescence of the Calvo Doctrine and the increasing liberalization of the markets launched Latin American countries into a quick transition from a system that scarcely knew anything about international arbitration to another where it is not only well accepted but also strongly promoted. 43

Mexico

Although nowadays it enjoys the privilege of being the most widely sought after arbitration seat in Latin America, Mexico’s history in this respect does not go back very far. In 1993 this country adopted the UNCITRAL Model Law and, since then – whether by mutual agreement between parties or as instructed by the Court of Arbitration of the ICC – it has been the seat for over 35 international arbitration proceedings.

Arbitrations in Mexico are governed by article 1051 of the Code of Commerce, 44 which provides that the applicable commercial procedure may be freely and mutually agreed between the parties – albeit with the restrictions spelled out in the Code. In this respect, it also establishes that the latter may be either a conventional proceeding before domestic courts or an arbitral proceeding, in which case the provisions of Title Four (arts 1415 to 1463) apply. These regulations were refurbished in 1993 as a result of the adoption of the UNCITRAL Model Law. 45

Mexico adopted this law almost to the letter: only certain modifica-

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45 N. Blackaby/ D. Lindsey/ A. Spinillo, International Arbitration in Latin America, 2002, 155 et seq.
tions were introduced; among the most important of which are the following:

1) Mexico adopted a monist system upon providing that its arbitration regulations were meant to govern both domestic and international arbitrations.

2) It is provided that in the event that the parties do not specify the number of arbitrators, it shall be one, and not three as suggested by the UNCITRAL Model Law.

3) With respect to the substantive legislation applicable to the litigation, should the parties fail to reach an agreement on this subject matter, the arbitrators shall be empowered to apply that which they deem most adequate to the circumstances of the case. Here also it departs from the Model Law, since the latter provides that in such a case the regulations governing the conflict of law shall apply.

4) In relation to the legal remedies eligible to challenge the award, the Mexican Law deprives local courts of jurisdiction to review arbitral awards. Should any such remedy be filed before them, they must directly declare themselves incompetent.

Brazil

Being an economic and commercial power – not only at the regional but also at the world level – Brazil did not have adequate arbitration regulations until the decade of the 1990’s. However, as a consequence of its strong commercial opening, followed by the ratification of the Panama Convention and, years afterwards, the New York Convention, Brazil set itself on the path to commercial arbitration. On 23 September 1996, the Brazilian Government issued this country’s very first Arbitration Act, Law No. 9307, inspired by the UNCITRAL Model Law, the Spanish arbitration act of 1988 and the Panama and New York Conventions.

This law introduces several modifications to the Model Law, most notably, that Law preserves the distinction between an arbitral clause in a contract and what is known as an “arbitral compromise”. The objec-

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46 Available under <www.planalto.gov.br/ccivil_03/Leis/L9307.htm>. Also, see Kleinheisterkamp, see note 43.

47 In some Latin American legislations the distinction between the “compro- miso arbitral” and the “clausula compromisoria” still prevails, a trend largely criticized by the modern arbitration doctrine. In fact, many countries had modified this concept by introducing a unique notion: the arbitral
tive of the “arbitral compromise” is to give a more precise definition of the terms included in the arbitral clause, which is more general. To that extent, article 7 of Law 9307 requires a formal submission to national courts in order to validate certain arbitral proceedings (for instance, if the parties do not reach an agreement in relation to the scope of the arbitral compromise, a national court must decide on this matter).48

Among other relevant differences, we find:49

a) The Brazilian Act applies to both domestic and international disputes; thus, international arbitrations are not defined and their elements are not analyzed.

b) Arbitral Tribunals must be comprised of an odd number of arbitrators.

Also, – and in line with the Model Law – the principles of impartiality and independence of the arbitrator are expressly considered.

c) Besides the rule of fair and equal treatment of both parties (article 18 Model Law), the Brazilian Act adds a reference to the principles of impartiality and freedom of decision of the arbitrators, as well as total observance of the adversary principle (principios do contradiário) throughout the proceedings.

d) In relation to the time limit to file a challenge, the Act refers to “the first opportunity for the party to manifest itself”. Since it does not establish the 15-day time limit suggested by the Model Law, this provision is somewhat controversial.

e) If the challenge is denied by the arbitral tribunal, while the Model Law provides for recourse to the court within thirty days, the Act orders that it be left for an eventual setting aside action.

f) The Act also differs from the Model Law with respect to the place (seat) of arbitration: such a place must be indicated by the parties upon submission, prior to the formal constitution of the arbitral tribunal. If the parties have not so indicated, the place of arbitration shall be determined by the court in the proceedings.
g) Under the Act, arbitration commences when all the members of the arbitral tribunal accept their mission.

h) The parties are free to choose the law applicable to the merits, provided this choice is not in violation of good morals and public order. Parties may also agree on the application of general principles of law, international rules or trade usages. If expressly authorized by the parties, arbitrators may act as *amiable compositeurs*.

i) The Act allows a dissenting arbitrator to attach a dissenting opinion to the award. If a majority cannot be formed, the President of the arbitral tribunal shall cast the deciding vote. Furthermore, the award must be reasoned (even an award on agreed terms). Other formal requirements include a description of the facts, the decision, and an indication of the time limit granted for the execution of the award by the party or parties, as the case might be.

j) The Act allows correcting the award, as well as an additional award or an interpretation of the award, but it sets shorter time limits for the application than those set by the Model Law. The correction, additional award, or interpretation must be applied for within five days of receiving the award, and the arbitral tribunal is allowed ten days to process the application.

k) With respect to challenges against the award, the Brazilian Act provides fewer grounds for setting aside than the Model Law. The main grounds are: nullity of the submission, incapacity of an arbitrator, non-observance of the formal requirements for the award, and the award being *extra petita* or *infra petita*.

l) Finally, the Act contains a Chapter on the enforcement of foreign awards, thus putting an end to the old “double homologation” system which was extremely troublesome. Now the enforcement of domestic and international awards is dealt with in separate Chapters. Moreover, the grounds for refusal of enforcement of a foreign award are limited by article 38 of the Act and are similar to those suggested in article 36 of the Model Law.

**Argentina**

A marked trend has been observed in Argentina toward the acceptance of arbitrations in the last two decades; there is an increasing ac-

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50 The previous Arbitration Law required a “double exequatur”: Foreign arbitral awards ought to be confirmed, in the first place, by the courts of the country of origin; and, in the second place, by the Brazilian Supreme Federal Court (*Supremo Tribunal Federal*).
ceptance to include arbitration clauses in international contracts, particularly in those executed by private companies. Toward the end of the 1990’s, the official ICC statistics showed Mexico and Argentina leading the share of arbitral proceedings filed under the aegis of that institution. Noteworthy among them is the renowned activity carried out by the Arbitral Tribunal of the Buenos Aires Stock Exchange, an experience that has been emulated by other similar provincial entities.

However, this incipient development of arbitration proceedings both domestic and international has, unfortunately, not gone hand-in-hand with a modern legislation adapted to today’s commercial arbitration needs.

Nowadays, the regulations in effect are those of the Code of Civil Procedure (CPC), which also governs federal commercial affairs. The CPC establishes a procedure that in principle appears in favor of arbitration, but in practice has many shortcomings as a consequence of its numerous modifications. In April 2001 – following the “failure” of five earlier draft bills – a new federal arbitration bill was drafted – but not yet passed – based on the UNCITRAL Model Law and on modifications introduced into it by doctrine, jurisprudence and the arbitration practice of the last years. One peculiar feature of the Argentinean Law consists in its attempt to improve the Spanish version used in the UNCITRAL Model Law, taking its terminology from its original English version. On the other hand, this law establishes an identical treatment

51 Blackaby/ Lindsey/ Spinillo, see note 45, 22.
52 The Tribunal acts like an arbitrator bound by legal principles or an amiable compositeur, pursuant to the modality chosen by the parties; in the absence of any such provisions, such arbitrator must act and decide as amiable compositeur (Regulations, art. 2). See M. Noodt Taquela, “Avances del proyecto de ley argentina de arbitraje respecto de la ley modelo UNCITRAL”, in: Avances del Derecho Internacional Privado en América Latina. Liber Amicorum – Jürgen Samtleben, see note 27, 719 et seq. Also <www.bcba.sba.com.ar/>.
54 An example of the foregoing is the non-unanimity (among scholars and jurisprudence) in what concerns the mandatory nature of the arbitration clause. Frutos-Peterson, see note 38.
55 The last drafts to adopt the UNCITRAL Model Law may be checked by visiting <www.senado.gov.ar>.
56 Noodt Taquela, see note 52, 719-721.
for domestic as well as international arbitrations: although on this point it follows the Model Law, it is a feature to be noted because it had not been considered in the previous drafts of the bill. With respect to the elements that internationalize arbitrations (article 1.3), a variant is introduced: the Argentinean law expands the concept of international arbitration given by the Model Law, incorporating two new elements: on the one hand, it maintains the concept of “facilities of the parties in different States”, but adding the notion of “domicile of the parties in different States.” On the other hand, it also includes the concept of “controlling foreign companies”, with the assumption that the parties may own facilities and domiciles in Argentina although – one or both – may be controlled by persons domiciled abroad. The other special feature of the draft bill relates to the federal structure of the Republic of Argentina: although the Argentinean Law governs both domestic as well as international arbitrations without any difference in treatment, it must be clarified that if the arbitration is international the law applies nationwide; but, if domestic, it applies only to federal disputes and to those incumbent upon a Buenos Aires judge, in the absence of an arbitration agreement (article 1b and 1c). With respect to the matters subject to arbitration (arbitrational), the law is not limited to the field of commerce, but also encompasses civil matters, including corporations and inheritance (article 9).

In a different realm, the Argentinean law also concerns itself with another ambit not regulated by the Model Law, which has to do with third party interventions; their acceptance – which is not positively and exclusively regulated in order not to place limitations – shall remain subject to the discretion of the arbitrator (arts 6 and 7). Article 11 establishes another novelty in arbitral matters; namely, the acceptance of multiple party arbitrations. With respect to legislation applicable to the merits of the litigation, the Argentinean law also offers a variant regarding the Model Law: although both acknowledge the autonomy of the will of the parties in this field, if the parties fail to reach an agreement, the arbitrator will not resort to the conflict laws of international private law, rather it grants the parties the right to choose the legislation which they deem appropriate (article 28.2).

58 The Argentinean draft bill follows on this point the provisions of art. 17 of the Rules of Arbitration of the International Court of Arbitration of the International Chamber of Commerce.
Finally, the draft provides in relation to the means available to challenge arbitral awards, as a requirement for the subsequent appeal for declaration of nullity, that the party considering that there is a flaw that might cause the nullity of the award, is responsible for submitting it to the tribunal via a “request for clarification” (arts 33 and 34).

Uruguay

In line with the assessment of Claudia Frutos-Peterson, we can say that Uruguay – along with Argentina, Costa Rica and El Salvador – joins the group of Latin American states that have introduced legislative modifications of importance in the last years. The General Procedural Code (Código General del Proceso – CGP, Law 15.982 of 1988) regulates arbitrations, recognizing as fully legal the awards issued by those “arbitration chambers” to which the parties may decide to subject themselves. The foregoing has facilitated the possibility of opting in favor of one of the permanent arbitral tribunals established by the arbitration chambers, which, in turn, facilitate the selection of particularly specialized judges and, generally, at an acceptable cost. Domestic arbitrations are regulated by the CGP in arts 472 to 507. In turn, international arbitrations are regulated by the New York Convention and the Panama Convention. The enforcement of international arbitration awards is governed by the regulations established by the CGP in arts 502, 537 et seq. Finally, Uruguay also subscribed – although its ratification is pending – the Inter-American Convention of International Private Law (Convención Interamericana de Derecho Internacional Privado – CIDIP V) regarding international contracts.

59 Frutos-Peterson, see note 38, 239.
60 <www.parlamento.gub.uy>.
61 In Commercial Law, there were cases of forced commercial arbitration that were subsequently derogated. Thus, for example, article 511 and 512 of the Code of Commerce regulated corporate matters among partners throughout the existence of the company, its liquidation or partition; article 633 regulated the interpretation of the letters of credit and the obligations stemming there from; article 601 regulated the topics arising from commercial leasing contracts.
Part of the *jus privatista* doctrine considers that the progress to be achieved, in terms of international arbitration in Uruguay, is consubstantial to the recognition of the autonomy of the will of the parties regarding the choice of law and procedure. With the sole exception of a few scholars, the Uruguayan doctrine denies specifically the possibility of choice regarding the applicable law in international arbitrations; their understanding is, rather, that the Appendix of the Civil Code is applicable to that effect, thereby eliminating the will of the parties in this matter. The same problem emerges with respect to the possibility of autonomy of the will of the parties in terms of their choice of the law governing international legal relationships. The fact that Uruguay ratified the Panama and New York Conventions reflects the validity – at the domestic level – of an international arbitration agreement.

At any rate, the existence of opposing jurisprudence criteria, as well as the diversity of doctrinal opinions has caused a kind of legal insecurity that has not contributed to the development of institutions of an arbitral nature, all of which require a high degree of certainty and foresee ability of legal solutions. Uruguay’s ratification of the CIDIP V would put an end to the prevailing climate of uncertainty and become an incentive to the development of international arbitration in this country. Based on the foregoing and mainly because of the international prestige enjoyed by Uruguayan jurists and institutions, it would be highly desirable for the country to adopt a more specific arbitration system.

2. The New Spanish International Commercial Arbitration Law

Although Spain’s deep reform of its arbitration system in 1988 had suggested a bright future – particularly because of its reform of the old system in force from 1953 – the fact is that this law was rapidly overcome by the needs and requirements of international markets that opened up with Spain’s full entry into the European Union and the

economic growth accompanying it\textsuperscript{65} Thus, at the request of the Spanish government, the General Codification Committee\textsuperscript{66} was appointed to prepare a draft bill to restructure the arbitration system: it was submitted in February 2003 and approved by both congressional chambers on 18 November 2003. It was enacted a month later (on 23 December 2003), becoming effective on 26 March 2004.\textsuperscript{67}

This law is largely inspired by the UNCITRAL Model Law. However, as opposed to the Mexican case, it was not incorporated into Spain’s legislation in an identical and literal manner; instead, it raised “significant modifications that take into account not only the criticisms the Model law has received over the years but also the most recent work that UNCITRAL has done on arbitration, as well as advances in jurisprudence, both domestic and foreign.”\textsuperscript{68} We cannot fail to mention that two domestic laws have also served as a guide for this new Spanish law; these are the Swiss law – in its provisions regarding a) the arbitrability and b) the \textit{in favorem validitatis} principle – and the French law, regarding the criteria adopted in order to define the international nature of arbitrations.\textsuperscript{69} Among the most noteworthy provisions of this law, are the following:

\textbf{International Arbitration}

This concept is precisely defined by the Spanish legislation following, in the main, the criteria applied by article 1.3 of the UNCITRAL Model Law. But, it adds a complementary criterion: the notion of “interests of international trade.” This precision – taken from the French law, as mentioned earlier – broadens the scope of those arbitrations that cannot be considered international by virtue of the requirements posed by article 3.1 of the new law and that cannot be considered domestic in the strict sense of the word, since they are linked to interests of international trade.

\textsuperscript{66} The following jurists comprised the Commission: Evelio Verdera y Tuells, Manuel Olivencia Ruiz, Ignacio Diez-Picazo and Fernando Mantilla-Serrano.
\textsuperscript{67} Available at <www.boe.es/boe/dias/2003-12-26/pdfs/A46097-46109.pdf>.
\textsuperscript{69} J. Poudret, “L’originalité du Droit français de l’arbitrage au regard du Droit comparé”, \textit{Revue Internationale Du Droit Comparé} 1 (2004), 133 et seq.
“Article 3 – International Arbitration

1. An arbitration is international when any of the following circumstances are met:
   a) When, at the time the arbitration agreement is made, the parties have their legal residence in different countries;
   b) When the place of arbitration as determined in the arbitration agreement or pursuant to it, the place of performance of a substantial part of the legal obligations from which the disputes arises, or the place where the dispute has its closest ties, is situated outside of the country where the parties have their legal residence;
   c) When the legal relationship from which the dispute arises affects the interest of international trade.

2. For the purposes of the above, if any of the parties has more than one legal residence, the legal residence is that which has the closest connection to the arbitration agreement; and if a party does not have a legal residence, its habitual residence shall apply.”

Arbitrability

With respect to those topics amenable to international arbitration, the new Spanish law also adopts the general criterion established in article 2.1; i.e. arbitral matters are all those that can be freely disposed of by law70; but, once again, adding two complementary criteria:

a) Neither the states nor state entities are entitled to invoke the privileges of domestic laws in order to avoid the obligations assumed by virtue of the arbitration agreement (article 2.2).71

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70 “Matters capable of free disposition are not exactly defined in Spanish Law, and it is not clear how the Courts will interpret «free disposition» in this context. If it is narrowly interpreted, then it might exclude disputes arising from economic rights subject to mandatory rules, such as unfair competition, intellectual property ... and agency disputes”, D. Cairns/ A. Lopez-Ortiz, “Spain’s new arbitration Act”, *International Arbitration Law Review*, 2004. For further explanations on this matter, see J. Chillón Medina/ J. Merino Merchán, *Tratado de Arbitraje Privado Interno e Internacional*, 1991, 169-180.

71 Article 2 Law 60/2003 states: “Article 2. Subject matter of Arbitration. 1. All disputes relating to matters within the free disposition of the parties according to law are capable of arbitration. 2. Where the arbitration is international and one of the parties is a State or a company, organisation or enterprise controlled by a State, that party shall not be able to invoke the pre-
b) A controversy may be subjected to arbitration if it meets one of the requirements mentioned in article 9.6, which covers nearly all cases, thus making practically all topics arbitrable.

**Arbitration Agreement**

The *in favorem validitatis* principle finds its fullest expression in this law. The new law is more flexible regarding the form and content of the arbitration agreement than the Model Law. Thus, for example, the requirement that this agreement be in writing refers not only to the classic manner of writing, but also to other means that carry a subsequent record of the same (for example, via electronic or optical means of support).

**Arbitration according to the Principles of Law or Equity**

The old law established the difference between an arbitration bound by legal principles – issuing decisions according to the law – and an arbitration in equity – issuing decisions *ex aequo et bono* – which are the remains of old legal traditions adopted not only by Spain but also by most Latin American countries. The new law encompasses all of these concepts and hands them over to the arbitrator as one of the powers available at the time of issuing the decision.

The silence of the parties shall be interpreted as the parties’ withholding empowerment from the arbitrator to issue decisions.

**Arbitrators**

The number of arbitrators must always be an odd number. As opposed to what is established in the Model Law, in the event of silence of the parties, the arbitrator shall be only one (and not three). It is also important to note the provision of article 15 regarding the procedure to follow in order to appoint arbitrators in cases of multiple parties. Regarding the jurisdiction of arbitrators, their actions are governed by the rogatives of its own law in order to avoid the obligations arising from the arbitration agreement.”

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*Article 9 Law 60/2003:*

“Article 9: Form and content of the arbitration agreement. 1. The arbitration agreement, which may be in the form of a clause in the contract or in the form of a separate agreement, shall express the will of the parties to submit to arbitration all or some disputes which have arisen, which may arise between them in respect of a determined legal relationship, whether contractual or not contractual (…). 3. The arbitration agreement shall be verifiable in writing, in a document signed by the parties or in an exchange of letters, telegrams, telex, fax or any other means of telecommunications that provides a record of the agreement.”
principle of kompetenz-kompetenz (article 22.1),73 thereby leaving no room for doubt that arbitrators shall be entitled to decide all – and not just a few – of the exceptions submitted to challenge their jurisdiction. Another provision of interest is article 23.1, which grants arbitrators the authority to adopt interim measures, “regardless of the form they may take”.

Testamentary Executions

This is recognized in article 10 and obligates the inheritors or beneficiaries to subject any litigation resulting from the inheritance to arbitration. Since these cases are very uncommon, their inclusion is mostly for historical reasons.

The Arbitral Award

One of the most interesting features of this law is that it establishes a time limit for the preparation of the award. Article 37.274 fixes this time limit at six months counted from the date of submission of the statement of defense or the expiry of the deadline for its submission. The new law does not require – as opposed to its predecessors – to formally register the award with a Notary Public as a requirement for the presumption of authenticity; this act becomes optional. Another feature has to do with the challenge to the award: the term “appeal” is not employed here; rather, it is called an “action for setting aside.” Last, in relation to the enforcement of the award one finds one of the most innovative aspects of this Law. Article 45.1 grants the award its maximum effectiveness, establishing its immediate enforcement, even if an action for setting aside was initiated. Therefore, this action shall not result in

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73 Article 22.1 states: “Article 22: Competence of the Arbitrators to rule on their own Jurisdiction. 1. The arbitrators may rule on their own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement or any other objection the acceptance of which would prevent the arbitrators from entering into the merits of the dispute. For this purpose, an arbitration agreement which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrators that the contract is null and void shall not entail by itself the invalidity of the arbitration agreement”.

74 “Article 37. Time, Form, Contents and Notification of the Award – 2. Unless otherwise agreed by the parties, the arbitrators ought to decide the dispute within six months from the date of the submission of the statement of defence referred to in Article 29 or from the expiry of the period to submit it. Unless otherwise agreed by the parties, this period of time may be extended by the arbitrators, for a period not exceeding two months, by means of a reasoned decision”.

the award being suspended; thus, should it be filed, it will not impede the execution of the award. The aim here is to discourage challenges filed solely with a view to prolonging the procedures, although this suspension may be explicitly applied for by the losing party – if deemed convenient.

IV. Comparative Analysis of the Arbitration Systems in Effect in Chile and Spain and their Future Perspectives

The Goal sought: Arbitration to become an effective Means to solve International Commercial Disputes

It appears evident that the paramount objective – both of the promoters of the new arbitration laws and of those who instrumented their launching – is to have modern legislation systems which introduce arbitration as the preferred mechanism to solve conflicts arising from commercial transactions. Within this context, adopting a law based on UNCITRAL’s Model Law is almost a necessity: the latter has been solidly established in the practice of contemporary international arbitration as a modern law that considers all aspects of arbitration and is applicable to various systems of law, while its acceptance and recognition is universal. Ultimately, this was the path followed by both the Spanish as well as the Chilean legislators.

Awareness of the Need to Adapt the Legislation to the Changing Needs of International Trade

Both Spain and Chile became immersed in the last few years, in a process of commercial openness and liberalization of their economies: Spain given its privileged position within the European Union, and Chile because of its solid and stable economic development, partly owing to its entry into multiple free trade agreements. A common feature among these two countries is that prior to passing their respective laws, both of them were limited by “archaic” laws in terms of commercial arbitration. Chile’s regulations on this matter had been promulgated over one century ago. Spain, on the other hand, notwithstanding the fact that it had a relatively newer law (1988), did not specifically include international arbitration proceedings and instead it included several provisions linked to old commercial usage. For example, the requirement of having awards formally registered by a Notary Public for validating them – all of which rendered the system inappropriate to deal with the new trade
practices, particularly when foreign actors intervened in the process. In this context, in sharp contrast with the above-mentioned economic development, the need to modify the legislation became more evident and acute in these two countries.

**Monist and Dualist Laws**

From what has been stated in the previous Chapters, it should be clear that the option favored by the Chilean legislation was to adopt a dual system: thus, international commercial arbitration proceedings are nowadays governed in this country by the provisions of its new law 19.971, while domestic arbitrations on the other hand, continue to be governed by the specific regulations in effect (COT and CPC). One part of the doctrine has been inclined in favor of this type of arbitration regulation, since it entails special advantages given the particular connotations of international arbitration proceedings, all of which make it advisable to have an organic body of specific norms. Nevertheless, such vision has its detractors. Based on these doctrinal positions, as well as on the previous experience acquired in the field of arbitration, Spain opted in favor of a monist system.

Thus, the Preamble of law 60/2003 states: “(...) In the context of what has been denominated the alternative between dualism (where international arbitration is governed completely or in large part by different rules than domestic arbitration) and monism (where, save for a few exceptions, the same rules apply equally to domestic and international arbitrations) this Law follows the monist system. The rules that require a different system for international arbitration than for domestic arbitration are few and clearly justifiable. Despite the awareness that international arbitration responds many times to different demands, this Law starts from the premise – ratified by the current tendency in this field – that a good regulation for international arbitration must be a good regulation for domestic arbitration as well, and vice versa. The Model Law, as a product of UNCITRAL, is conceived specifically for international commercial arbitration; but its inspiration and solutions are perfectly valid, in the large majority of the cases, for domestic arbitration. In this aspect, the Law follows the example of other recent legislation from abroad that has deemed the

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76 In this respect, it should be noted that the monist conception is becoming more recognized and proliferating in an increasing majority of countries.
Model Law to be appropriate not only for international commercial arbitration but also for arbitration in general (...).”

Therefore, we consider the Spanish law to be monist, since by definition it establishes one single system for domestic and international arbitration.

“Article 1 – Scope of Application
1. This Law shall apply to all arbitration proceedings, whether domestic or international, with their place of arbitration within Spanish territory, but nothing in this law shall be taken to affect the provisions of any treaties to which Spain is a party or any laws containing especial provisions on arbitration.”

It should be noted that – as stated in the statement of motives of the law – this is perfectly consistent with the fact that certain norms exist in Spain’s new arbitration law that are solely meant for international arbitrations: the specificity of the subject matter therein regulated justifies the need to have such special provisions. A clear example of this may be found in article 3, of the Spanish law.

Contrariwise – although this is less usual – one may also find certain provisions that are solely applicable to domestic arbitrations, such as for example the rule requiring that arbitrators be practicing attorneys.

Adopting a monist system – although it might entail a more difficult implementation process – carries along with it, in our understanding, the coverage of a system that in the long term will be more beneficial than the dualist system. This because, on the one hand, it enjoys the unquestionable benefit of making arbitral procedures uniform (thereby simplifying and making the process more familiar to its participants), and, on the other, because of a practical verification: the field of international arbitration has had a more noteworthy evolution and modernization than domestic arbitration, as a result of which, the latter will ultimately benefit from more flexible and recent norms.

Laws of General Application

It may be considered that a law is of “general application” when it applies to all procedures – in this case, arbitrations – without a special

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78 Mantilla-Serrano, see note 77, 481
79 See III. 2 of this paper.
80 Article 15.1 Law 60/2003: Appointment of arbitrators. 1. In domestic arbitrations that are not to be decided ex aequo et bono, pursuant to article 34, arbitrators will be required to be practicing attorneys, save an express agreement by the parties to the contrary.”
system, or, even if having one, such law will apply in a supplementary manner.

The new Spanish Arbitration Act is meant to govern all the arbitral proceedings occurring in Spain. Therefore, its general scope is meant to harmonize all the provisions that exist in other Spanish laws.

There is only one exception to this rule: the “labor arbitration”. This type of arbitration is compulsory and follows its own specific rules.\(^{81}\)

The Chilean law is also of general application, since it must be applied to all arbitration procedures that meet the commercial and international criteria established in it, with the above-mentioned limitation (non-inclusion of domestic arbitrations).

**Specific and Autonomous Laws**

The general principle that guides the provisions of both the Chilean as well as the Spanish law consists in assisting commercial arbitration proceedings with specific and autonomous regulations.

Their specificity is given by the special and concrete regulation that both countries dedicate to arbitral procedures. As a corollary of the foregoing — in line with our previous analysis — we can say that the Chilean law enjoys a greater degree of specialization than that of Spain, since it regulates international commercial arbitrations exclusively.

Secondly, their autonomy is ensured by the independence of this regulatory body from others: its effective application does not depend on other norms and neither does it need other norms for the interpretation of its terms.

In any case, as it often happens in the practice of law in general — which benefits precisely from the interaction between its different norms — this autonomy must not be understood as being absolute: arbitral laws will eventually need to resort — for example — to Civil Code norms applicable to contracts, or even to certain provisions of the Code of Commerce on the subject. Once again, we understand that given the interrelationship between the Spanish law and the rest of its legal system, this autonomy is perhaps more evident in the Chilean law.

The establishment of the “*in favorem validitatis*” principle

This principle, which inspires both the Chilean as well as the Spanish laws, seeks as a general rule to defend the validity of the arbitration

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\(^{81}\) Labor arbitration intends to settle disputes between unions and employers, and is established in decree-law 2/1995. Mantilla-Serrano, see note 68; and Chillón Medina and Merino Merchán, see note 70, 202-215.
agreement when confronted with any circumstance that may originate more than one interpretation.

The foregoing is not only applicable to the arbitration agreement itself, but is also extends to any other agreement between the parties, to the arbitration procedure as a whole, and to the arbitral award.

The acceptance of this principle reflects the general concern that is perceived in the field of international law on contracts, governed in broader terms by the “favor contractus” principle, by virtue of which – given the self-sufficient nature of the latter contracts – they become the “law for the parties.”

Thus, the “in favorem validitatis” principle may be observed in two different stages: (i) in the spirit of the law (and, consequently, in that of the legislators); and, more importantly, (ii) from the viewpoint of the arbitrator when deciding the controversy: as opposed to a domestic judge, who is under an obligation to apply certain specific norms, international arbitrators have a greater margin for discretion at their disposal, all of which may lead them to opt in favor of one solution over another in order to give priority to the will of the parties.

V. Chile’s Past Achievements and Future Challenges as a Center of International Arbitration

This Chapter intends to weigh the pros and cons of, on the one hand, the improvements already introduced into Chile’s arbitration system and, on the other, to visualize aspects – whether regulated or not – that might be substantially improved upon in the future.

It is unquestionable that Chile meets several of the eligibility requirements for a state to become an international arbitration center, as mentioned in Chapter I of this paper.\footnote{See under I. of this paper.}

In the first place, it enjoys the advantages of being a nation undergoing an economic boom and a revitalization of its economy. The various free trade agreements (FTA) and bilateral investment agreements (BITs) signed by Chile constitute a reflection of the strength acquired by the Chilean economy as a whole.

In the second place, it is important to highlight the benefit of a modern and recently approved Law 19.971 on international commercial ar-
bitration. Without such a regulatory body, this economic prosperity, propelled by, among other factors, the commercial agreements described above, would appear incomplete. As stated by Gonzalo Biggs,\textsuperscript{83} this law is a perfect complement to Chile’s commercial and economic policies.

Moreover, Chile’s ratification of the New York and Panama Conventions goes hand-in-hand with this law, rounding up this overall panorama.

In the third place, Chile enjoys a good degree of international prestige: the solid image of its public institutions and the confidence that they generate in the international community, because of their transparency and low level of corruption, rank Chile number twenty among the 146 countries analyzed worldwide, and number one in Latin America.\textsuperscript{84} Clearly, this fact is particularly related to the existing perception of the judiciary (and justice in general) and the other public institutions linked to arbitral processes.

Likewise, having outstanding arbitrators and jurists constitutes another of Chile’s major strengths: currently, there is a quite broad list of professional arbitrators with experience in both domestic and international commercial arbitration. This phenomenon is also apparent regarding lawyers and other professionals akin to commercial affairs who have lately shown increasing interest in specializing in this subject matter.

Regarding the question of arbitrators, it must be noted that one of Chile’s significant advantages is that – like other Latin American countries – arbitrators are professionals traditionally trained in the study and practice of the law. This situation, although it may appear obvious at first, in fact is not: in other cultures, such as the Common Law tradition, for example, the belief prevails that the capacity of professional arbitrators must not necessarily be bestowed upon juridically trained persons.\textsuperscript{85}

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\textsuperscript{83} Biggs, see note 3, 8.
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\textsuperscript{84} Chile was given 7.4 points (ranking 20 in the list) in the 2004 annual report prepared by Transparency International, a non-governmental organization that monitors and combats corruption. See under <www.transparency.org> and <www.chiletransparente.cl>.
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\textsuperscript{85} However, it should be noted that a certain sector of the doctrine sees a disadvantage in this excessive presence of jurists in the field of arbitration in Hispanic countries: “… arbitration in our countries is open to the allegation that it is excessively formal. It is even said that arbitration in Hispanic
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Further, Chile is equipped with institutions and facilities of high standards in order to support the arbitration process. The continuous development of its means of transportation and the modernization path assumed by Chile in this sense, no longer hide the country on the extremities of the world, but rather, places it as one of the region’s main interconnecting air (airports) and land (highways) centers. Today’s strong telecommunications development also places Chile at the vanguard of the other countries of the region.

Equally noteworthy are Chile’s advantages in terms of arbitration costs; this is a subject matter of considerable significance to all actors in general, since Santiago is a city with a relatively low cost of living; but, it becomes particularly important to small and medium-size Chilean companies which, in arbitrations submitted prior to the approval of Law 19.971, had to have deep pockets in order to finance the expenses implied by arbitration procedures since they had to be carried out abroad.

As with any new law, the system introduced by Law 19.971 also has its “weak spots”. The first obstacle – and challenge – faced by Chile today is that the new law is indeed so recent that no arbitration cases have yet been submitted to its jurisdiction. Consequently, as of today, Chile lacks jurisprudence in international commercial arbitration cases. Since the only “cure” to this circumstance is the passage of time – as international cases begin to be progressively submitted to its local jurisdiction – the country’s primary role at this time should be to elicit the confidence of commercial actors thereby motivating them to partake of this procedure.

Another key aspect would be to establish in which ambit, or under the aegis of which institutions, arbitrations should – or should not – be carried out. Currently, there are at least two institutions in Chile that perform commercial arbitrations: the Santiago Chamber of Commerce (CCS) and the Chilean American Chamber of Commerce (AmCham).
Although the resort to a National Chamber of Commerce to support arbitrations has been criticized by some scholars, both the Santiago Chamber of Commerce and the Chilean American Chamber of Commerce appear to have come a long way in terms of gaining exposure to domestic arbitration proceedings.

All this augurs an encouraging future for the development of international commercial arbitration proceedings brought under them.

Regarding the development of arbitral proceedings as such, one aspect has generated debate ever since the congressional debate of Law 19.971 and until after its promulgation; namely, the role to be played by foreign lawyers in arbitral proceedings to be carried out in Chile.

Here, we must distinguish between two different hypotheses. With respect to the participation of foreign lawyers as arbitrators, in principle, there should be no problem since the law (in addition to the general principles that guide the arbitration rules) has already ruled in this respect, as expressly mentioned in the President’s message upon submitting the draft bill for congressional debate and approval.

Additionally, the Law establishes in its articles the primacy of the will of the parties in order to appoint the arbitrator. This is provided in article 11.1 of Law 19.971.

“Article 11 Appointment of Arbitrators

Unless otherwise agreed by the parties, the nationality of a person shall not obstruct that person’s performance as arbitrator”.

Nevertheless, the debate hovers around the performance of defense lawyers having a nationality other than the Chilean one.

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87 <www.amchamchile.cl>.
88 See Frutos-Peterson, see note 38, 214-217; and M. Wilkey, “Multinational Arbitration: Mitigating the Clash of Legal Cultures”, in: Papers of the International Commercial Arbitration Conference AmCham, see note 20, 138.
89 For instance, statistics show that the Mediation and Arbitration Center of the Santiago Chamber of Commerce has received some 500 cases over the years since the date of its inception, exhibiting a continuous increase to this date. See under <www.camsantiago.com>.
90 See II. 2. of this paper. From the text of the presidential message, it may be inferred that the draft bill constitutes a closed regulatory body meant to govern both the substance as well as the form of arbitrations with international elements.
The COT,\textsuperscript{91} in its article 526, states the requirement that lawyers, in order to practice their profession within the Chilean territory, must be nationals of this country.

“Article 526: Only Chileans may exercise the legal profession. The foregoing shall be understood without prejudice of the provisions of international treaties currently in effect.”

This controversy was not explicitly settled by Law 19.971, all of which has allowed room for various interpretations.

Although many scholars – as well as congresspersons who debated the law – favor the provisions contained under article 11 of Law 19.971, unequivocally establishing the spirit of the law regarding arbitrators and, consequently, its prevalence over the COT provisions, the fact is that the subject matter remains wide open to debate. And, it is equally true that the lack of certainty on this topic makes it possible that in the future one of the parties to arbitration, for example, may file for the annulment of its counterpart’s actions based on the alleged lack of legitimacy of the defense lawyer.

Although this is a controversial topic, a single precedent of this type would suffice for the country to have a “black spot” in its jurisprudence history that might, in turn, dissuade potentially interested parties against choosing this arbitration seat.\textsuperscript{92}

This is no minor issue and, given the repercussions and contradictory versions that it has generated, we believe that it deserves to be clarified. To this effect, a legislative clarification would be best.

Another topic of an essentially practical nature regards the use – within arbitration proceedings – of a language other than Spanish; i.e. English.

The ability to carry out an entire arbitration procedure in English is an indispensable tool to compete successfully in this global world. And, on this point, Chile still has a long way to go. On the one hand, this is a very important matter that ought to be taken into consideration by the Arbitration Centers (as seats of arbitration proceedings) when implementing their resources and facilities. On the other hand, although this country has many professionals and arbitrators that are fluent in English, this situation is not evenly applicable around the country – neither at the academic level nor at the practical commercial level. Therefore, since the number of people who have an adequate command of the

\textsuperscript{91} Código Orgánico de Tribunales, see under <www.bcn.cl>.

\textsuperscript{92} In fact, this already happened in one case presented a few years ago.
English language remains insufficient – albeit not too difficult to solve – this is a question worth considering within the overall implementation of arbitral proceedings.

Also directly connected with the implementation of these new proceedings, a further aspect needs to be mentioned: it should be noted that although the judges called upon to intervene in arbitration proceedings come from superior hierarchical echelons (judges of the Courts of Appeal), they are ill-equipped in the specialized field of international law, since such topics lie beyond their own field of jurisdiction.³

On this point, a task to be carried out in the future by those institutions called upon to support arbitral proceedings, such as the Chilean Supreme Court, on the one hand, and the Chilean Judicial Academy and the Institute of Judicial Studies, on the other, should be to provide specialized training courses and updating opportunities on this subject.⁴

Finally, one last point that still generates uncertainty with respect to the development of international commercial arbitrations in Chile has to do with the eventual attitude of Chilean courts when called upon to intervene in arbitration proceedings.⁵

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³ Wilkey, see note 88, 136-147.
⁴ Article 79 of Chile’s Constitution, states as follows: “Article 79. The Supreme Court is empowered with the directional, correctional and economic superintendence of all the courts of law of the nation. The exceptions to this norm are the Constitutional Tribunal, the Electoral Tribunal, the regional electoral tribunals, and military tribunals in times of war ...” Also, article 506 of the COT states as follows: “Article 506. The management of the human, financial, technological and material resources allocated toward the operation of the Supreme Court, the Courts of Appeal and the Courts of First Instance, of Minors and of Labour shall be exercised by the Supreme Court through an entity called Judicial Branch Management Corporation (Corporación Administrativa del Poder Judicial). The Judicial Branch Management Corporation shall be responsible for: 4 Organizing courses and conferences aimed at educating and training judicial employees...” (emphasis added).
⁵ In sum, Chile’s courts of law are required to partake of Law 19.971 in: A) appointing and challenging the arbitrators (article 11 3) and 4), and article 13 3); B) all matters referred to the processing of evidence, as a form of aiding the arbitral tribunal, and; C) annulling arbitration awards.
Article 5 of Law 19.971, as stated earlier, provides as a general rule:

“Article 5 Extent of Court Intervention
In matters governed by this Law, no court shall intervene except where so provided in this Law.”

The practice in this field – given the courts’ exposure to domestic arbitration cases – is that Chilean judges have been extremely respectful of the independence of arbitral proceedings and, consequently, they have limited their actions in them to the minimum.

Nevertheless, during the parliamentary debate sessions of Law 19.971, the question related to the recourses that could be presented against the arbitral award. At this stage, the Senate Commission pointed out the Chilean Supreme Court of Justice observations in relation to the fact that article 34 of the law was not sufficiently precise about determining which recourses were admissible. Specifically, the controversy was presented in relation to all those recourses regulated in the Chilean Constitution, as the appeal for inapplicability based on unconstitutionality of the law ("recurso de inaplicabilidad por inconstitucionalidad de la ley"). Although consensus was finally reached regarding the acceptability of those legal recourses, the discussion concerning the legal remedy of complaint ("recurso de queja") remained inconclusive. The core of the discussion was if arts 5 and 34 of the Law were taking away part of the Chilean Supreme Court of Justice's correctional, disciplinary and economic jurisdiction to decide over the arbitrators. Concerning this matter, the Chilean Constitutional Tribunal, in a report submitted to the Senate, decided on the constitutionality of the Chilean draft bill on international commercial arbitration, including its arts 5 and 34. This decision was based on the fact that the above mentioned provisions have no effect on either the attributions given to the Supreme

96 Patricio Aylwin states (...) “Arbitrators, in their capacity as judges, are subject to correctional, disciplinary and economic jurisdiction of the Supreme Court of Justice. (Chilean Politic Constitution article 84) (...) By virtue of this circumstance, Chile's jurisprudence has unanimously acknowledged the appropriateness of remedies of complaint ("recurso de queja") filed against them, which may be exercised in spite of any waiver in order to seek punishment for faults or abuses eventually committed by arbitrators while exercising their duties and to obtain a prompt remedy for the evils motivating such complaints (COT, arts 540 and 541)”. See P. Aylwin, El juicio arbitral, Fallos del Mes, 1982, 511-512.

97 Oficio Nr. 2117 del Tribunal Constitucional.

Court of Justice by the Chilean Constitution, nor on the judicial actions that the latter enables in favor of those who may be affected in their fundamental rights even though the international commercial arbitration law applies.

The remedy of complaint stems from article 79 of the Constitution of Chile, which states: “The Supreme Court has the directive, corrective, and economic superintendence of all the courts of justice of the nation ….”

The remedy of complaint is governed by arts 545, 548 and 549 of the COT. It may be defined as that recourse exercised before the hierarchically superior court and against the inferior judge or judges who

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99 See note 94.

100 When referring to the “correctional” superintendence, the constituent alluded precisely to the disciplinary powers in virtue of which a remedy of complaint is processed (enabling the Supreme Court to amend or correct whatever is wrong or defective, such as repressing or censuring the party incurring in it).

101 The article states the following: article 545. – The sole objective of the remedy of complaint is to correct gross negligence or serious abuses committed upon issuing jurisdictional resolutions. It is appropriate only when such gross negligence or abuse is committed in an interlocutory judgment putting an end to a lawsuit or making its continuation or finalization impossible, and that it is not eligible for any remedy whatsoever, ordinary or extraordinary, notwithstanding the authority of the Supreme Court powers to act on its own initiative pursuant to its disciplinary powers. The exceptions are appealable final judgments issued by arbitrating arbitrators, in which case the remedy of complaint is indeed appropriate, in addition to the appeal for annulment on grounds of breach of a procedural right. The decision honoring a remedy of complaint shall contain the precise considerations demonstrating the negligence or abuse, as well as the manifest error or omissions that constitute them and that exist in the resolution motivating the recourse, and shall determine the measures toward remedying such negligence or abuse. Under no circumstance whatsoever shall it be permissible to modify, amend or invalidate judicial resolutions regarding which the Law contemplates ordinary or extraordinary judicial remedies, unless it is a remedy of complaint filed against an appealable final judgment issued by an arbitrating arbitrator. Should a superior court of justice, upon exercising its disciplinary authority, invalidate a judicial resolution, it must apply the disciplinary measures that it deems appropriate. In that case, the courtroom shall make arrangements to inform the full court about the background information in order to apply the pertinent disciplinary measures, given the nature of the negligence or abuse, which may not be inferior to a private warning.
would have issued – in a case tried by them – a resolution tainted by gross negligence or abuse, requesting the judge or judges to promptly remedy the evil motivating the complaint by means of an amendment, revocation or invalidation of such resolution. Any appropriate disciplinary sanctions would still be applied.

In order for a remedy of complaint to be appropriate, the procedural law requires:

1) That in issuing a judicial resolution, the judge or judges would have incurred gross negligence or abuse;

2) That such gross negligence or abuse would have been committed in issuing a certain specific kinds of judicial resolutions indicated by the law (final or interlocutory judgments, provided that they put an end to the lawsuit or make its continuation impossible); and

3) That the judgment making appropriate a remedy of complaint according to its juridical nature is not eligible for any legal recourse.

Considering the aforementioned, it is doubtful whether the remedy of complaint is appropriate against those arbitrators that are governed by Law 19.971. The foregoing, not only because such law is inspired by the need to generate an international arbitration procedure that is sufficiently simple, quick and effective (lacking in stalling delays to which an international commercial dispute cannot be exposed), but rather, because upon analyzing Chile’s legal system, more than sufficient reasons arose to deny its appropriateness.

Nevertheless, as was mentioned before, two arguments can be outlined in relation to whether the remedy of complaint is appropriate or not:

a) Appropriateness of the Remedy of Complaint within the Arbitral Procedure governed by Law 19.971:

A position favorable to the appropriateness of the remedy of complaint could be inferred from an erroneous interpretation of the reports issued by the Constitutional Tribunal as well as by the Supreme Court during the legislative debate. In such reports, both organs stated the need to “salvage” the authority granted by the Constitution to the Supreme Court (particularly under article 79). Thus,

102 The use of the expression “against the arbitrators” is consequence of the fact that the remedy of complaint is not filed against a resolution, but against the judge or judges who issued a resolution incurring gross negligence or abuse, so that if such fault or abuse is accredited it be modified, amended or left without effect in order to promptly end the evil.
it could be argued that the Supreme Court shall always retain the directive, correctional and economic superintendence of the courts of justice of the nation, including the international arbitral tribunals of the law under study. Moreover, it may be pointed out that precisely because it was deemed necessary to include an explicit reference to it within the articles of Law 19.971, such constitutionally consecrated superintendence is always applicable, and international commercial arbitrations should not be an exception.

Finally, it may be held that Law 19.971 establishes that an award may be challenged when it is deemed “contrary to Chilean public order.” In this respect, Prof. Patricio Aylwin Azócar indicates that the fact that the parties waive certain legal recourses in the “arbitration clause”, does not mean that this waiver “empowers the arbitrator to violate public order provisions, whether in the hearing of the case – for example, by disavowing the right to defense – or in the verdict – for example, by judging against the provisions of a public order norm” – (and Prof. Aylwin continues) “... we believe that in our legal system, hypotheses such as those referred to above, represent gross negligence or abuses susceptible of being corrected by way of the remedy of complaint, which – as we shall see – is by its very nature unrenounceable. Consequently, even if the parties had waived all legal recourses against the arbitrator, the arbitrator’s violation of public order norms shall be always susceptible to challenge via a remedy of complaint (...).”

b) Inappropriateness of the Remedy of Complaint within the Arbitral Procedure governed by Law 19.971:

As mentioned before, it seems clear that both the spirit as well as the intention of those who promoted this law, was to make this arbitral procedure as expeditious, clear and effective as possible. Consequently, it is reasonable to assume that, if Chile aspires to provide the globe with a procedural tool that is truly effective in the mechanism for solving commercial disputes, it would be preferable that the remedy of complaint was not considered.

In effect:

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103 Aylwin, see note 96, 291 et seq.
104 It is important to highlight that the preceding statement was written by Prof. Aylwin not only prior to Law 19.971, but also in reference to those arbitral tribunals governed by the COT and not – as will be explained herein below – to the international arbitral tribunals of Law 19.971.
1) The arbitrators of an international arbitration procedure are not included within the concept of “special tribunals” of article 5 of the COT\textsuperscript{105} since they are not omitted from the jurisdiction of ordinary courts on any subject matter, but rather, they decide on subject matters heretofore not regulated by Chile’s positive law. In this manner, international commercial arbitrations, although entailing a jurisdictional activity, would not be left to nor remain dependent upon the national jurisdiction system, except in those matters in which the law specifically bestows authority upon some courts of the Republic (as is the case of the action for the setting aside Law 19.971, but not the remedy of complaint). Thus, upon the silence of the law, it would not be lawful to presume or bestow any authority upon the Supreme Court nor upon any other superior court with respect to these conflict resolution mechanisms.

As stated during the parliamentary debate, what the draft bill (nowadays Law 19.971) intended was “… that the intervention of Chilean courts be as limited as possible, which does not mean that they be left without jurisdiction; but rather, that they should intervene only when called upon to do so, and in all other matters, to let the autonomy of the will of the parties operate.” This is a way of saying that the courts would be called upon to participate only “by exception.”

\textsuperscript{105} Article 5: “The courts mentioned in this article shall hear all judicial matters filed within the territory of the Republic of Chile whatever their nature or the capacity of the persons intervening in them, notwithstanding the exceptions established by the Constitution and the Laws.

The ordinary courts of justice of the Judicial Branch are: the Supreme Court, the Courts of Appeal, Court Presidents and Ministers, the oral courts on criminal matters, the first instance courts and the guarantee courts. The special courts of the Judicial Branch are: Minor Courts of First Instance, Labour Courts of First Instance, and Military Courts in times of peace, which shall be governed – insofar as their organization and powers are concerned – by the statutory legal provisions contained in law 16.618, in the Labor Code, and in the Military Justice Code and its complementary laws, respectively, whereas the provisions of this Code shall be applicable to them only inasmuch as the referred legal bodies expressly remit to it. All other special courts shall be governed by the laws that establish and regulate them, without prejudice of remaining subject to the general provisions of this Code. Judges and arbitrators shall be governed by Title IX of this Code.”
Additionally, one must consider that there are literal reasons that deny the appropriateness of the remedy of complaint. In effect, the latter remedy is appropriate against resolutions that – among other characteristics – are not subject to recourses of any kind – and, since arbitral awards can indeed be set aside, the remedy of complaint would be inappropriate.

In any case, the fact that arbitral awards cannot be challenged via a remedy of complaint should not trigger apprehension or fear, since – as it was held by the procedural expert, Prof. Cristian Maturana, in his intervention in the Senate Commission that studied the draft bill – the present Law provides sufficient protection to the national legal system and to our sovereignty “because it establishes respect of the respective public order” (Chile’s public order). Consequently, he stated “… from the point of view of procedural law, the primary principle is to make this draft bill consistent with the UNCITRAL model”, adding that “the experience of those countries that have excessively modified such model law has been quite negative, since it has had no effect at all”.

VI. Conclusions

Since about two decades ago, international commercial arbitration has been gathering momentum worldwide. For historical reasons, this growth has been most pronounced in Latin America. In this region, as in the rest of the world, arbitrations have become the natural place for encounters, conciliations and agreements derived from commercial practice.

Circumstances appear to have demonstrated that it is important not only to promote arbitral justice, but also, to take sides in favor of it. On the one hand, arbitrations entail improving the quality of service of the judicial system, by helping the parties to elucidate more complex controversies, contributing a greater degree of specialization and, by offering more technically-equipped locations on the respective subject matters. On the other hand, it becomes indispensable by conferring upon those who take part in trade and international exchange activities, clear, efficient and safe conditions in order to resolve the disputes that inevitably arise from them.

Mindful of this reality, several countries – among them, Spain and Chile – have opted in favor of following the path towards establishing a system that would provide effective, well-respected and trustworthy
arbitral proceedings, choosing to modernize their domestic arbitration legislations on the basis of the UNCITRAL Model Law.

Spain chose to emulate the spirit of the Model Law, but not limit itself to following its articles in a strict manner; instead, it introduced certain modifications that its earlier commercial practice had already consolidated as being useful and necessary. Thus, following a rapid legislative debate, Law 60/2003 became effective implementing an expeditious and efficient arbitral procedure that governs both domestic as well as international arbitrations. This legislation includes several innovative features, among which must be noted the acceptance of multiple parties, maximum periods to conclude arbitration proceedings and the right to have awards enforced immediately after their issuance (even if an action to set it aside should be pending), among others.

Chile, on the other hand, decided to follow the UNCITRAL Model Law more closely. Its new Law 19.971 filled the legal void in international commercial arbitration and harmonized its new regulations with the provisions contained in the New York and the Panama Conventions. In this manner, it has been able to regulate international arbitral procedures in a clear and concise way; all of which will surely bring about increased development possibilities in the field of international arbitration.

If Chile aspires – as we believe it does – to become an effective international arbitration venue in the not too distant future, it must further develop its own strengths: i.e. sustained economic growth, a solid image among the other countries of the region, the confidence generated by the transparency of its institutions, etc. While all of these factors will be very much taken into account by the parties upon choosing Chile as their seat of international arbitration, ultimately, however, they are merely part of the context surrounding arbitration procedures. The legal cover provided by the arbitration system, albeit in need of some improvement, is soundly rooted in the UNCITRAL Model Law.

From now on, the work to be carried out in Chile by those institutions entrusted to house arbitral proceedings will become very relevant. However, the trust placed in the new system and in the expertise to be acquired on the topic of domestic arbitration places/seats, permit, in principle, a promising outlook.

Notwithstanding the foregoing, it is advisable to exercise a certain degree of moderation in order to avoid generating excessively high expectations that might not be fulfilled. It should be taken into account that Chile will compete with several other states – such as Mexico, for
example – that already enjoy a long-standing and well-consolidated experience as international arbitration centers. Because of this, it is advisable to approach this challenge slowly but surely. First, Chile’s initial steps should be focused, for instance, in developing international commercial arbitration proceedings that connect small and medium enterprises (SMEs) of this country seeking for settlement of their commercial disputes. And, in a second stage, Chile should take advantage of its leading position in the Latin American region, and by nurturing this, aim at a first stage of regional consolidation. In that sense Chile is likely to enjoy a good start in benefiting from its MERCOSUR membership condition in order to capture that important market. Nobody denies that the arbitral procedure installed by this regional group has not managed to operate as expected; a reason why Chile may become a valid alternative to be seriously considered.

To sum up, Chile must take heed of its unquestionable advantages and improve its shortcomings. One way of doing this would be to launch and set in motion as soon as possible its new mechanism to solve commercial conflicts through arbitration.

Unfortunately, little time has yet elapsed since the enactment of Chile’s new arbitration law and its incorporation into the country’s juridical system. Consequently, it is not yet possible to undertake a detailed study of its repercussions in the country’s commercial practice.

In spite of the foregoing, this system – as well as that of Spain, with similar features and chronology – admits a theoretical examination of the provisions contained in the letter of the law and a projection of some of the consequences envisaged. The purpose of this paper, therefore, has been to attempt to explain and develop such eventual consequences.
Book Reviews

Andrew F. Cooper (ed.): Tests of Global Governance. Canadian Diplomacy and the United Nations World Conferences

This book examines the interesting interface between the “classical" diplomatic method and new forms of global governance which have developed since the early 1990s, in particular within the framework of the UN world conferences.

The Canadian UN scholar, Cooper, Associate Director of the Centre for International Governance Innovation (CIGI), explores, on a case study basis, the new chances and challenges, as well as the obstacles and limits of the “new diplomacy" – as it is called by many scholars – in its multilateral orientation and its interplay of state and non-state actors within the multi-faceted forms of global governance.

Cooper analyzes a number of main UN world conferences – the 1992 Rio UNCED Conference, the 1993 Vienna Conference on Human Rights, the 1994 Cairo Conference on Population and Development, the 1995 Copenhagen World Summit for Social Development, the 1995 Beijing Conference on Women and the 2001 Durban World Conference against Racism – with regard to the role that Canada, its political leaders, diplomats and NGO representatives have played in the preparation of and in the negotiations at the conferences. This concrete basis of reference provides Cooper with ample empiric material, but entails the danger of generalizing Canadian experiences too quickly as common trends of global diplomacy. Thus the reader should take the Canadian experience as a thought-provoking example for new forms of diplomacy, but not as frame of reference for the study of diplomatic interactions in other countries, since they might differ considerably from the Canadian example.

Having noticed this slight reservation, the reviewer would like to turn to the strengths of the book: in the first two chapters it depicts the history and common features of the early world conferences and the gradual change to the world conferences of the 1990s. It presents the disputed political perspectives on the world conferences, being coloured by great hopes and expectations on the side of the multilateralists and the global movements and by profound scepticism and ideological animosity on the side of the neo-liberal and more conservative opponents of the world conferences, who gained the upper hand in 1997, when the United States administration successfully urged UN Secretary-General Kofi Annan to reduce drastically the number and the format of the world conferences.

The following chapters examine the conferences from a particular perspective: partnership (between state actors and civil society actors) in chapter 3, leadership (the role of the prime minister) in chapter 4, discipline (imposition or negotiation of the system of governance) in chapter 5, sovereignty (dealing with the claims of self-determination of minorities etc.) in chapter 6, different concepts of civilisation (dialogue across cultural boundaries) in chapter 7, difference (in the context of the Beijing Conference on Women) in chapter 8 and value orientation (in the context of the Durban Conference on Racism) in chapter 9.

This method of discussing separately the underlying principles of international negotiations has the advantage that the reader is able to get a deeper insight into the practical methods of diplomatic work, its peculiar conflicts and forms of dialogue between the different state and non-state actors, representing often conflicting concepts with respect to the principle under discussion, be it leadership, discipline, sovereignty or civilisation. It provides the reader with the impression that the state actors (political leaders and diplomats) in Canada have expanded their understanding of world politics considerably by inserting new concepts and value orientations.

The diplomats had to learn in the last fifteen years to integrate NGO representatives into their conference delegations, to change their familiar habit of confidentiality and log-rolling and to try open forms of diplomacy, using public opinion as a means of politics. The book conveys the impression that the style of diplomacy in Canada has changed greatly in the direction of “new” multilateral diplomacy.

Whether this can also be said about the political actors in other countries, remains open and should be studied further. As a middle power without colonial legacy and in a modest rivalry with its superpower neighbour United States, Canada has developed a long-standing
tradition of supporting multilateralism in international politics; it is not by accident that a Canadian politician, Lester B. Pearson, conceived the innovation of the UN peacekeeping forces in 1956. Canada sees a comparative benefit in taking the multilateral stance, as it may gain political prestige as well as economic advantages through its mediating role. It would be worthwhile to examine the preconditions for and advantages of an explicit multilateral stance in foreign policy for a country like Germany, which seems at least to have discovered the advantages of this role when it hosted the Afghanistan conference series.

In the case studies, the book also demonstrates that the old forms, goals and concepts of diplomacy have not completely disappeared, but that there is a mixture of both in the diplomacy of most countries, with different degrees of multilateralism in the different countries, since there are strong vested, mostly economic, interests behind the classical diplomatic form of interaction which keeps the bargaining mostly hidden from the public. As effective multilateral forms of diplomacy are essential for keeping world peace and for looking successfully for solutions for the large number of common global problems, the book should be read by all diplomats and NGO representatives preparing for international conferences. It will provide them with a realistic first-hand impression of where the problems and boundaries of their work will probably lie and what they can achieve when they form an effective network with the people at home and have support from their government.

Dr. Helmut Volger, Falkensee

Mae Ngai (ed.): Impossible Subjects. Illegal Aliens and the Making of Modern America

Mae Ngai’s rich and thought-provoking book focuses on the largely understudied period of immigration and citizenship history in the United States from the enactment of the nation’s first comprehensive law of restriction on immigration, the Johnson-Reed Immigration Act of 1924, to the passage of the more liberal Hart-Celler Act of 1965. Ngai maps the origins of the illegal alien in U.S. law and society and establishes the regime of immigration restriction as instrumental in shaping the concept of illegal alienage. Ngai further reveals the fluidity of the concept, demonstrating that “illegal alienage is not a natural or fixed condition but the product of positive law; it is contingent and at times it
is unstable” (page 6). In case studies discussed below, Ngai deftly traces the histories of Filipino, Mexican, Chinese and Japanese migrants and exposes the blurred lines between illegal alienage, legal alienage and citizenship. In a related theme, Ngai also explores how the new regime of immigration restrictions resulted in new racial formations, solidifying the boundaries of the “white race” and the foreignness of Asians and Mexicans.

In Part I, entitled “The Regime of Quotas and Papers,” Ngai analyzes the regime of restriction that came into being in the 1920s. The Johnson-Reed Immigration Act of 1924 ended the era of open immigration from Europe and placed numerical limitations on immigration. The Act embodied a quota system that ranked the world “in a hierarchy of desirability for admission into the US,” according to nationality and race (page 17). Seeking to restrict the numbers of immigrants entering from southern and eastern Europe, the law employed the highly flawed system of allocating quotas to countries to which the American people traced their origins. The law excluded all nonwhite populations from the count, resulting in high quotas for European countries and small quotas for other countries (16 per cent to southern and eastern Europe and 84 per cent to northern and western Europe). Ngai points out that the national origins quota system was grounded in the conviction that the United States was, and should remain, “a white nation descended from Europe” (page 27). Once enacted into law, the national origins of the American people unquestioningly “assumed the mantle of fact” (page 35).

Ironically, though the national origins quota system instituted a hierarchy among Europeans, Ngai argues that the system ultimately served to deracialize Europeans as white. In contrast, immigrants from outside of Europe were further marginalized as nonwhite and permanently marked as foreign. All persons of eastern and southern Asia were excluded as “racially ineligible for citizenship.” And though Mexicans continued to be exempt from numerical quotas and perceived as white for the purposes of immigration and naturalization, their “legal whiteness” proved to be insecure. Administrative means of border control, including passports and other entry requirements, soon resulted in many Mexicans crossing the border without permission and the construction of Mexicans as illegal aliens began to take root. With the onset of more aggressive border enforcement, prompted by a post-World War I world of nation states emphasis on territorial integrity, crossing the border became the fundamental act of illegal immigration. Mexicans became and to this day remain the quintessential illegal or criminal alien.
Ngai also provides a fascinating examination of the increased racialization of US deportation policy during the 1920s and 1930s and its grave impact on non-European populations. Deportation policy “came of age” in the 1920s as the 1924 law added “entry without inspection” as a ground for deportation and removed the statute of limitations on deportation (page 58). At the same time, aggressive border patrol enforcement was instituted along the southern border (though the northern border remained largely unmonitored). As deportations began to affect not only Mexican communities but also European communities, public protest against “unjust” deportations of “deserving” illegal immigrants swelled (page 76). Administrative law reform efforts to counter public outrage centered on European immigrants and seldom on Mexicans. Many Europeans were permitted to “unmake” their illegal alienage through selective administrative measures, e.g., preexamination, a procedure whereby Europeans took voluntary departure to Canada, received a visa for permanent residence from the U.S. consulate in Canada and returned to the U.S. as permanent residents. Such privileges rarely extended to Mexicans. Thus, while numerical quotas and other restrictive measures transformed previously lawful immigrants into those subject to deportation, the deracialization of European immigrants and the racialization of non-white aliens served to demarcate the deserving from the undeserving illegal aliens, rendering only the latter subject to deportation.

In Parts II and III, entitled “Migrants at the Margins of Law and Nation” and “War, Nationalism, and Alien Citizenship,” Ngai provides in depth case studies of the experiences of Filipinos, Mexicans, Japanese and Chinese in the context of the legal regime of restriction. In particular, Ngai depicts the malleability of the legal and racial categories imposed on the above groups, exploring the evolution of Filipinos from U.S. nationals to undesirable aliens, the shifting contours of the Mexican bracero and undocumented populations, and the disenfranchisement of Japanese and Chinese Americans during and after World War II.

As U.S. nationals, a new legal status confirmed by the Supreme Court articulation of the Philippine Islands, Puerto Rico and Guam as “unincorporated” territories rather than as colonial territories, Filipinos enjoyed freedom of movement in the U.S. and migrated to the U.S. in significant numbers in the 1920s to replace Japanese farm labor. Filipinos soon faced significant racial violence from whites due to unfounded anxiety over job competition and miscegenation. A nativist and exclusionist agenda towards Filipinos combined with a waning hegemonic
need for direct political rule over the territory resulted in the passage of the Philippines Independence Act of 1934. The Act established the Philippine Islands as a commonwealth with a 10-year transition period to independence and an immigration quota of 50 was imposed. Filipino nationals living in the U.S. were now considered aliens and in order to reduce their numbers, pressured to voluntarily repatriate to the commonwealth.

Apart from the fluidity of Filipino legal status, Ngai’s discussion of Filipino history in the U.S. also provides a striking example of the fluidity of racial categories. Due to Filipinos’ acculturation (they were Christian, spoke English, wore western clothes), the grounds for Asiatic exclusion (often due to alleged insurmountable racial and cultural difference) could not be readily affixed to the Filipino population. In order to ensure the exclusion of this acculturated group however, white Americans identified Filipinos with African Americans, representing them as sexually aggressive and pursuing white women.

Ngai then turns to the bracero program and the introduction of foreign contract labor from Mexico. The program constituted a significant departure from the 1885 prohibition on foreign contract labor for being an antithesis to free labor. The bracero program intended to eliminate illegal migration and curb the exploitation of laborers; the program instead fueled illegal migration and failed to stem the abuse of workers. While the Migrant Labor Agreement set bracero wages at the domestic prevailing rate and guaranteed transportation, housing, food and repatriation to its participants, employers often paid braceros less than the amount specified in the contract. Housing and other conditions violations were also common. While some braceros filed grievances, enforcement was minimal. Many braceros deserted the program, thus becoming illegal aliens. In addition, throughout the bracero program, many farmers continued to employ “wetback” labor which was cheaper and not subject to red tape. Alarmed by the continued existence of illegal labor, the Immigration & Naturalization Service (INS) reconfigured the program to motivate employers to hire braceros and simultaneously launched Operation Wetback to enforce the deportation of undocumented workers. Until the advent of the civil rights movement and the termination of the bracero program in 1964, bracero and illegal labor continued to coexist with Mexican nationals transitioning fluidly between the two populations.

In Part III, Ngai explores the histories of Japanese Americans and Chinese Americans from World War II through the 1950s in the context of what Ngai refers to as “alien citizenship.” Ngai describes alien citi-
zenship as a permanent racial marking held by those who are born in the United States and legal citizens, but who remain “alien in the eyes of the nation” (page 8). The internment of 120,000 Japanese and Japanese Americans during World War II occurred in stark contrast to the individual investigation of those of German and Italian descent. Japanese Americans were transformed from citizens to an enemy race and effectively nullified of their citizenship. The internment camps were designed as “Americanizing projects” to enhance the assimilation of Japanese Americans and justified as a means of dealing with a population considered to be “racially inclined to disloyalty” (page 175). A number of measures were used to identify the truly disloyal, including the infamous, confusing loyalty questionnaire and voluntary renunciations of citizenship. At Tule Lake, the most notorious segregation center for “disloyal” Japanese Americans, 85 per cent of all citizens renounced their citizenship in the midst of the confusion and resentment surrounding the renunciation of citizenship initiative. In response to lawsuits that the renunciations occurred under conditions of duress, the Justice Department later restored citizenship to the majority of the renunciants.

Similarly, Ngai asserts that the “dominant image of Chinese lurched from despised oriental ‘other’ to wartime ally to dangerous Communist threat” (page 203). The Chinese exclusion laws which barred the vast majority of Chinese from entry and from naturalization were not repealed until 1943 when China emerged as an important U.S. ally in World War II. However, the annual quota of 105 imposed on Chinese migration evinced ongoing hostility towards Chinese for unlike other immigration quotas, it applied to all Chinese nationals regardless of country of residence. The exclusion era had generated illegal immigration from China through false claims of derivative citizenship or “paper sons” – sons only on paper. During the Cold War, in an attempt to halt the flow of paper sons, the INS launched the Confession Program, enabling Chinese to voluntarily disclose their fraudulent status in exchange for legalized status under their real names. While the process ensured legal legitimacy for participating confessors, in the context of Cold War politics where all Chinese were perceived as illegal and dangerous, they were not granted concurrent “social legitimacy” (page 223).

In the book’s final section, entitled “Pluralism and Nationalism in Post-World War II Immigration Reform,” Ngai reinterprets the passage of the Hart-Celler Act of 1965 which repealed the overtly racist national origins quota system. Inspired by the civil rights movement and
often celebrated as watershed reform, the Act introduced a system of formal equality into immigration admission with all countries being subject to identical quotas. While the law provided for increased opportunities for migration from southern and eastern Europe, Asia and Africa, numerical restriction had now emerged as a normative feature of the U.S. immigration system. Moreover, Ngai contends that an internalization of the “naturalized condition of the illegal Mexican immigrant” and a misguided commitment to the abstract concept of formal equality caused liberals to ultimately surrender on the issue of western hemisphere quotas. Ngai argues that formal equality fails to account for disparities in size, need and historic relations between sending countries and the U.S. The emphasis on formal parity has resulted in a surge of suddenly illegal immigration from western hemisphere nations, particularly Mexico, and has served to “recast Mexican migration as ‘illegal’.”

Ngai has provided a valuable contribution to understanding the origins of illegal immigration and its emergence as the central focus of contemporary U.S. immigration policy. The book also serves as a grave reminder of the ongoing short-sightedness of efforts to counter illegal immigration through restrictionist measures. The past two decades have been replete with restrictionist legislation and current debate in Washington centers on the construction of a wall along the southern border. In her epilogue, Ngai reminds us that illegal immigration is the result of the convergence of “push” factors from sending countries and “pull” factors from receiving countries. As potential resolutions, she highlights measures that target these factors, including strengthening the economies of sending countries, lifting the ceiling on legal migration, reintroducing a statute of limitations on deportation and providing amnesty to undocumented immigrants.

Ngai’s book also offers a fascinating reinterpretation and critique of the United States as a mythicized “nation of immigrants.” Ngai demonstrates the critical role that colonialism, foreign policy considerations and racial politics played in shaping U.S. immigration and national identity. Notions of exclusion rather than inclusion framed the U.S. immigration landscape. Ngai’s book is an extraordinary contribution to U.S. immigration history and a stimulating read.

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Max Planck Institute for Comparative Public Law and International Law

Zeitschrift für ausländisches öffentliches Recht
und Völkerrecht
- ZaöRV -
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Subscription price for a complete volume (4 issues and index; about 900 p.) from vol. 22: € 171,00 (plus € 10,75 for postage and handling)

Single issues: € 44,80

Indexes: € 23,80

W. Kohlhammer GmbH, Heßbrühlstraße 69, 70565 Stuttgart