Max Planck Yearbook
of
United Nations Law

Volume 14
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Max Planck Yearbook of United Nations Law

Founding Editors
Jochen A. Frowein
Rüdiger Wolfrum
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LL.M. Thesis:
Laowonsiri, Akawat
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
Brook. J. Int’l L.  Brooklyn Journal of International Law
B. U. Int’l L. J.  Boston University International Law Journal
BVerfGE  Entscheidungen des Bundesverfassungsgerichtes (Decisions of the German Federal Constitutional Court)
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Name</th>
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<td>BYIL</td>
<td>British Yearbook of International Law</td>
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<tr>
<td>Cal. L. Rev.</td>
<td>California Law Review</td>
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<td>Cal. W. Int’l L. J.</td>
<td>California Western International Law Journal</td>
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<td>Cal. W. L. Rev.</td>
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<td>Case W. Res. J. Int’l L.</td>
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<tr>
<td>Chi. J. Int’l L.</td>
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<td>CLJ</td>
<td>Cambridge Law Journal</td>
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<tr>
<td>CML Rev.</td>
<td>Common Market Law Review</td>
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<td>Colum. J. Transnat’l L.</td>
<td>Columbia Journal of Transnational Law</td>
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<td>Colum. L. Rev.</td>
<td>Columbia Law Review</td>
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<td>Comunità Internaz.</td>
<td>La Comunità Internazionale</td>
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<td>Conn. J. Int’l L.</td>
<td>Connecticut Journal of International Law</td>
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<td>Cornell Int’l L. J.</td>
<td>Cornell International Law Journal</td>
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<tr>
<td>CTS</td>
<td>Consolidated Treaty Series</td>
</tr>
<tr>
<td>CYIL</td>
<td>Canadian Yearbook of International Law</td>
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<td>DGVR</td>
<td>Deutsche Gesellschaft für Völkerrecht (German Society of Public International Law)</td>
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<tr>
<td>Dick. J. Int’l L.</td>
<td>Dickinson Journal of International Law</td>
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<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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<tr>
<td>EA</td>
<td>Europa-Archiv</td>
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<td>ECOSOC ed.</td>
<td>Economic and Social Council editor</td>
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<td>Abbreviation</td>
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<td>e.g.</td>
<td>exempli gratia</td>
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<td>EJIL</td>
<td><em>European Journal of International Law</em></td>
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<td>ELJ</td>
<td><em>European Law Journal</em></td>
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<tr>
<td>Env. Policy &amp; Law</td>
<td><em>Environmental Policy and Law</em></td>
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<td>EPIL</td>
<td><em>Encyclopedia of Public International Law</em></td>
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<td>et al.</td>
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<td>et seq.</td>
<td>et sequentes</td>
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<td>etc.</td>
<td>et cetera</td>
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<td>EuGRZ</td>
<td><em>Europäische Grundrechte-Zeitschrift</em></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>
<td><em>Florida Journal of International Law</em></td>
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<td>Fordham Int’l L. J.</td>
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<td><em>Fordham Law Review</em></td>
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<td>Foreign Aff.</td>
<td>Foreign Affairs</td>
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<td>Foreign Pol’y</td>
<td>Foreign Policy</td>
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<td>Ga. J. Int’l &amp; Comp. L.</td>
<td><em>Georgia Journal of International and Comparative Law</em></td>
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<td><em>Georgetown Law Journal</em></td>
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<td>GYIL</td>
<td><em>German Yearbook of International Law</em></td>
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<td>Harv. L. Rev.</td>
<td><em>Harvard Law Review</em></td>
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<td>HRLJ</td>
<td><em>Human Rights Law Journal</em></td>
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<td>HRQ</td>
<td><em>Human Rights Quarterly</em></td>
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<td>Abbreviation</td>
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<td>HuV-I</td>
<td><em>Humanitäres Völkerrecht – Informationsschriften</em></td>
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<td>IAEA</td>
<td>International Atomic Energy Agency</td>
</tr>
<tr>
<td>ibid.</td>
<td>ibidem; in the same place</td>
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<tr>
<td>IBRD</td>
<td>International Bank for Reconstruction and Development</td>
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<td>ICAO</td>
<td>International Civil Aviation Organization</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICLQ</td>
<td><em>International and Comparative Law Quarterly</em></td>
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<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes</td>
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<td>id.</td>
<td>idem; the same</td>
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<tr>
<td>IDA</td>
<td>International Development Association</td>
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<tr>
<td>i.e.</td>
<td>id est; that is to say</td>
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<tr>
<td>IFAD</td>
<td>International Fund for Agricultural Development</td>
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<tr>
<td>ICC</td>
<td>International Criminal Court</td>
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<tr>
<td>IJIL</td>
<td><em>Indian Journal of International Law</em></td>
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<td>ILA</td>
<td>International Law Association</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<tr>
<td>ILCYB</td>
<td>Yearbook of the International Law Commission</td>
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<td>ILM</td>
<td><em>International Legal Materials</em></td>
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<td>ILO</td>
<td>International Labour Organization</td>
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<td>ILR</td>
<td><em>International Law Reports</em></td>
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<tr>
<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. Int’l &amp; Comp. L. Rev.</td>
<td><em>Indiana International and Comparative Law Review</em></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>Int’l Aff.</td>
<td><em>International Affairs</em></td>
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<td>Abbreviation</td>
<td>Magazine/Book Title</td>
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<tr>
<td>Int’l Law.</td>
<td>The International Lawyer</td>
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<td>Int’l Rev. of the Red Cross</td>
<td>International Review of the Red Cross</td>
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<td>Iowa L. Rev.</td>
<td>Iowa Law Review</td>
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<tr>
<td>IP</td>
<td>Die internationale Politik</td>
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<tr>
<td>Isr. L. R.</td>
<td>Israel Law Review</td>
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<td>Isr. Y. B. Hum. Rts</td>
<td>Israel Yearbook on Human Rights</td>
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<tr>
<td>J. History Int’l L.</td>
<td>Journal of the History of International Law</td>
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<td>J. Int’l Aff.</td>
<td>Journal of International Affairs</td>
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<td>JA</td>
<td>Juristische Arbeitsblätter</td>
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<tr>
<td>JIEL</td>
<td>Journal of International Economic Law</td>
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<tr>
<td>JIR</td>
<td>Jahrbuch für internationales Recht</td>
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<tr>
<td>JPR</td>
<td>Journal of Peace Research</td>
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<tr>
<td>JWT</td>
<td>Journal of World Trade</td>
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<tr>
<td>Law &amp; Contemp. Probs</td>
<td>Law and Contemporary Problems</td>
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<tr>
<td>LJIL</td>
<td>Leiden Journal of International Law</td>
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<td>LNTS</td>
<td>League of Nations Treaty Series</td>
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<td>Loy. L. A. Int’l Comp. L. Rev.</td>
<td>Loyola of Los Angeles International and Comparative Law Review</td>
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<td>McGill L. J.</td>
<td>McGill Law Journal</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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<tr>
<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><em>Nordic Journal of International Law</em></td>
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<td>Ocean &amp; Coastal L. J.</td>
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<td>ODILA</td>
<td><em>Ocean Development and International Law</em></td>
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<td>OJEC</td>
<td><em>Official Journal of the European Communities</em></td>
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<td>Pace Int’l Law Rev.</td>
<td><em>Pace International Law Review</em></td>
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<tr>
<td>PCIJ</td>
<td><em>Permanent Court of International Justice</em></td>
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<td>Pol. Sci.</td>
<td><em>Political Science</em></td>
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<td>RADIC</td>
<td><em>Revue Africaine de Droit International et Comparé</em></td>
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<td>RBDI</td>
<td><em>Revue Belge de Droit International</em></td>
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<td>RdC</td>
<td><em>Recueil des Cours de l’Académie de Droit International</em></td>
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<td>RDI</td>
<td><em>Revue de Droit International, de Sciences Diplomatiques et Politiques</em></td>
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<td>RECIEL</td>
<td><em>Review of European Community and International Environmental Law</em></td>
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<td>REDI</td>
<td><em>Revista Española de Derecho Internacional</em></td>
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<td>Rev. Dr. Mil. Dr. Guerre</td>
<td><em>Revue de Droit Militaire et de Droit de la Guerre</em></td>
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<td>Rev. ICR</td>
<td><em>International Review of the Red Cross</em></td>
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<td>RGDIP</td>
<td><em>Revue Générale de Droit International Public</em></td>
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<td>RIAA</td>
<td><em>Reports of International Arbitral Awards</em></td>
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<td>Riv. Dir. Int.</td>
<td><em>Rivista di Diritto Internazionale</em></td>
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<tr>
<td>RTDE</td>
<td><em>Revue Trimestrielle de Droit Européen</em></td>
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<tr>
<td>RUDH</td>
<td><em>Revue Universelle des Droits de L’homme</em></td>
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Abbreviations

San Diego L. Rev.  San Diego Law Review
Santa Clara L. Rev.  Santa Clara Law Review
Stanford J. Int’l L.  Stanford Journal of International Law
Stanford L. Rev.  Stanford Law Review
SZIER/ RSDIE  Schweizerische Zeitschrift für internationales und europäisches Recht/ Revue Suisse de Droit International et de Droit Européen
Tex. L. Rev.  Texas Law Review
Transnat’l L. & Contemp. Probs  Transnational Law and Contemporary Problems
Tul. Envtl L. J.  Tulane Environmental Law Journal
Tul. J. Int’l & Comp. L.  Tulane Journal of International and Comparative Law
U. Chi. L. R.  University of Chicago Law Review
UCDL Rev.  University of California Davis Law Review
UCLA J. Envtl & Pol’y  University of California Los Angeles Journal of Environmental Law and Policy
UNCIO  United Nations Conference on International Organization
UNCITRAL  United Nations Commission on International Trade Law
UNCTAD  United Nations Conference on Trade and Development
UNDP  United Nations Development Programme
<table>
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<tr>
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<tr>
<td>UNEP</td>
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<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organization</td>
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<tr>
<td>UNFPA</td>
<td>United Nations Population Fund</td>
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<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
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<td>UNICEF</td>
<td>United Nations Children's Fund</td>
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<td>UNIDO</td>
<td>United Nations Industrial Development Organization</td>
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<td>UNITAR</td>
<td>United Nations Institute for Training and Research</td>
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<td>UNJYB</td>
<td>United Nations Juridical Yearbook</td>
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<tr>
<td>UNRWA</td>
<td>United Nations Relief and Works Agency for Palestine Refugees in the Near East</td>
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<td>UNTS</td>
<td>United Nations Treaty Series</td>
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<td>UNU</td>
<td>United Nations University</td>
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<td>UNYB</td>
<td>Yearbook of the United Nations</td>
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<td>UPU</td>
<td>Universal Postal Union</td>
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<td>Vanderbilt Journal of Transnational Law</td>
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<td>Vol.</td>
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<td>VÜ</td>
<td>Verfassung und Recht in Übersee</td>
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<td>VVDStRL</td>
<td>Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer</td>
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<td>Washington Law Review</td>
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<td>WFP</td>
<td>World Food Programme</td>
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<td>World Intellectual Property Organization</td>
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<td>WMO</td>
<td>World Meteorological Organization</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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<td>Yale L. J.</td>
<td>Yale Law Journal</td>
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<td>ZaöRV/ HJIL</td>
<td>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/ Heidelberg Journal of International Law</td>
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<td>ZEuS</td>
<td>Zeitschrift für europarechtliche Studien</td>
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<td>Zeitschrift für Rechtspolitik</td>
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</table>
Legal Order in a Global World


Ulrich Sieber*

A. von Bogdandy and R. Wolfrum, (eds.),
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I. Changes in Subjects of Regulation
   1. Societal Changes in a Global World
   2. Transnationalization and Globalization of Subjects of Regulation
   3. Core Legal Issues of Transnational and Global Subjects of Regulation
      a. Transnational Applicability and Enforceability of Law
      b. Regulation of Global Challenges
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      b. Denationalization of Law and New Actors
      c. Plurality of Regulations and Fragmentation
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      b. Fundamental Concepts of Legitimacy and Control
      c. Further Development of the Principles of Legitimation for International and Private Regulation
III. International Models for Regulation
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   2. National Cooperation Models
   3. Supranational Models
   4. Private Rule-Making
   5. Hybrid Forms of Rule-Making
   6. Order in the System as a Whole
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   1. Research Subject
   2. Research Goal, Research Fields, and Research Questions
      a. Research Goal
      b. Research Fields and Special Questions
   3. Research Methods
   4. Research Gains

Globalization affects the law in fundamental ways. As a consequence, the legal order in the global world has become an important interdisciplinary research focus of the Human Sciences Institutes of the Max Planck Society. This article presents an overview of the ensuing challenges, changes, and perspectives as well as of future research questions: the first part analyzes changes in the regulated subject matter and the resulting legal questions specific to globalization. The second part describes the fundamental changes in legal and societal control systems. On this basis, the third part examines possible models and concepts that could be implemented to meet the transnational and global challenges. The final part identifies the most important questions and the perspectives of future research.

I. Changes in Subjects of Regulation

1. Societal Changes in a Global World

The emergence of a “global society” is not a phenomenon unique to the 20th and 21st centuries. Ancient empires already established vast territories of communication and domination that reached far beyond national borders. With the colonization of other continents in the early modern era, Europe also developed a worldwide perspective. The numerous technical, social, economic, cultural, and political developments of the last several decades, however, have significantly accelerated and intensified these exchange processes.

These changes – especially the technical progress in the transportation of people, goods, and data – bring the inhabitants of the “global risk society” together ever more quickly and intimately. This sets the stage for economic and cultural progress in many areas but also leads to global problems in such areas as climate, health, financial markets, and international security. Today, the Internet and the global cyberspace symbolize the new quality of worldwide interaction in the modern global information society; at the same time, computer viruses and Web attacks – the flip side of the Internet – exemplify the ensuing global risks and illustrate the interdependence of all human beings. The cur-
rent financial crisis also demonstrates the potential consequences of the interconnectedness of the global society.

2. Transnationalization and Globalization of Subjects of Regulation

The development of the “global society” – also referred to as “globalization”¹ – brings about fundamental changes not only in the economy, in society, and in politics but also in the law. These changes affect the areas subject to legal regulation. The technologies of communication and travel, the expanded economic areas, and the political opening of states lead to increases in cross-national communication, international dispersion of production systems, transnational trade, global markets, mobility of people and businesses, and offshore investment. These processes have both desirable, socially advantageous effects as well as effects that are damaging to society. The dissemination of newspapers is simplified as is the dissemination of hate speech; trade with legal goods profits as does trade with illegal goods; mobility of tourists and workers is facilitated as is that of unwanted persons. All of these processes are subjects of laws that are designed to create a framework conducive to international exchange and at the same time to minimize risks.

Due to the increasing transnationalization of activities subject to legal regulation, legal questions that transcend borders arise more and more frequently. This is true of all three major branches of law. In the private law context, parties in different countries sign contracts of sale, multinational enterprises form competition-limiting cartels that affect the world market, and – through the dissemination of files in the Internet – copyright violations occur in a multitude of states simultaneously. Similarly, public law is confronted by cross-border cases when emissions damaging to the domestic environment are released from foreign territory, foreign suppliers offer gambling via the Internet, multinational concerns divert profits to subsidiaries located in offshore tax ha-

vens, and financial supervisory authorities control the sale of foreign financial products. In criminal law, corresponding challenges arise when, in the prosecution of transnational terrorism and global organized crime, cross-border investigations must be coordinated and access to persons or evidence abroad obtained. In the area of international criminal law, too, new problems arise when armed groups attack foreign territories rather than their own country. It is a seamless transition from cross-border activities, which take place in the territories of two or more countries, to activities of global magnitude, whose effects are felt all around the world and which can only be solved by the joint efforts of the world community of states. As a result of this increasing need for cross-border regulation, the traditional law of the nation-state is confronted more and more frequently with “transnational” activities that affect several states, engender legal decisions that must be enforced in foreign territory, and raise issues that can only be solved on a global level.

3. Core Legal Issues of Transnational and Global Subjects of Regulation

At first glance, the legal problems caused by transnational activities in the three branches of law appear to be heterogeneous and difficult to categorize. If the crux of the legally relevant changes is analyzed, however, in terms of activities that affect several states, engender legal decisions that must be enforced in foreign territory, or raise issues that can only be solved on a global level, two fundamental problems become clear. In all three major branches of law, the issue is, on the one hand, the transnational applicability of law and enforceability of law in foreign territory (see below I. 3. a.) and, on the other hand, the need to cope with new global challenges that overwhelm the regulatory capabilities of individual nation states (see below I. 3. b.).

a. Transnational Applicability and Enforceability of Law

Transnational Applicability of Law

The issue of the applicability of a national legal system to activities that exhibit transnational attributes arises in all three major branches of law. In criminal law, the issues are whether substantive criminal offense definitions encompass activities with a foreign nexus (e.g., does German
criminal law apply to a German company that bribes an official outside of Germany?) and whether German criminal law is applicable abroad (so-called extraterritorial applicability of national criminal law); here, with very few exceptions, German law enforcement authorities can only apply their own national criminal law. However, the mere fact that German law is applicable does not mean that other legal systems are perforce inapplicable; the parallel applicability of another legal system (or systems) may be avoided, in certain cases, by the principle\textit{ ne bis in idem}. In private law, additional conflicts-of-law questions are raised, as international private law requires courts, under certain circumstances, to apply foreign law. According to general rules of international law, states have the authority to prescribe law with respect both to conduct that takes place partially or entirely within its territory (territoriality principle) as well as to conduct that – emanating from the territory of another state – has effect within its territory (effects principle).\textsuperscript{3} Due to the numerous globally-applicable systems, it is often the case – in all three major branches of law – that more than one legal system may be applicable to one and the same activity so that not only are provisions regarding the applicability of law necessary but also rules governing conflicts of law, namely, rules that establish the priority of a particular legal system or that eliminate conflicting norms or values.

As legal systems often differ from one another considerably, the choice of applicable law can lead to\textit{ significant advantages and/or disadvantages} for the affected parties. In practice, these differences are exploited – in private law – to avoid consumer or creditor protection provisions (by means of the appropriate choice of law by the contractual parties) and – in criminal law – to evade domestic criminal norms by shifting activities abroad. Examples of this kind of forum shopping include the use by domestic companies of foreign forms of corporate structure (such as the British “Limited”), the offering in the Internet of


gambling opportunities based in Gibraltar, the disposal of environmental contaminants in countries with minimal environmental protection standards, and the announcement by financial institutions of their “move” to another country if they are subject to more stringent regulation in their current domicile. Forum shopping is tempting not only for citizens and businesses but also for the state. A recent example of forum shopping by states can be seen in the ships deployed by NATO to combat piracy in the Gulf of Aden that are outfitted with so-called shipriders from adjoining African countries. The presence of shipriders allows for the transfer of suspected pirates to the judicial system of the shipriders’ home countries without an evaluation of the difficult human rights issues posed by such “hand-offs.” Thus, clear jurisdictional and conflict-of-laws rules for the various legal systems are necessary, both to insure the continued viability of legal security as well as to prevent abuses of law and forum shopping.

Transnational Enforcement of Law

If it is clear that a particular national law is applicable to a particular activity, the effectiveness of the respective regulations in a global world often depends, additionally, on the concrete enforcement of national norms and especially of criminal judgments in foreign territory. For in criminal law, national criminal justice authorities can, as a rule, only enforce their decisions – such as arrest warrants, search warrants, and judgments – within their own territory. The same is true of decisions of civil courts and administrative agencies. The enforcement of national coercive measures abroad thus requires special legal regulations and implementation procedures.

If the applicability and enforceability of national law in foreign territory is not assured, activity that is criminal in one country may be rendered unpunishable or difficult to prosecute due to the existence of so-called crime havens, consumers may lose the protection of their national law, and workers may be harmed as a result of social dumping. In this situation, the regulatory authority of the nation state is reduced to a race to the bottom. Thus, an important task of the law in the global

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world is to guarantee that, where necessary, regulations are not only nationally but also transnationally applicable and enforceable.

b. Regulation of Global Challenges

A second core task of law in a global world involves dealing with large-scale challenges in which the issue at hand is no longer merely one of enforcing the interests of individuals from one territory in another territory but rather the issue to be solved implicates the interests of several states. Such issues include protecting security in the face of terrorism and protecting the climate, the arctic, financial markets, international competition, intellectual property in the Internet, as well as the new international institutions and values (whose very existence is a result of globalization), such as the common European currency, the financial interests of the European Union, and the functionality of international tribunals.5 Thus, the question arises in all three major branches of law as to the cases for which these kinds of common solutions are necessary and the models and structures with which the solutions can be achieved.

c. Consequences for the Legal Order

For activities with transnational connections, globalization thus requires that the scope of application of national law be defined, that the cross-border enforcement of law be facilitated, and, for the challenges that can only be solved globally, that an effective regulatory system be created. Due to the acceleration and intensification of the globalization process, these demands have become more and more important for the global economy and society. In the meantime, the – partial – realization of these demands has brought about fundamental changes in the law of the world society that have not only led to new legal regulations but – as will be shown in the following – have also led to fundamental changes in the legal control systems, changes that, in turn, raise pivotal questions.

II. Changes in Normative Control Systems

Normative control systems change in the course of globalization, primarily because, in fulfilling the aforementioned demands, traditional national law reaches its territorial limits (1.). As a result, it is increasingly overlaid with international and supranational regulations (2.) and with non-state control mechanisms (3.). Viewed from a historical perspective, the modification these developments have caused to legal control systems can be seen as a paradigm change (4.). These changes force law and the social sciences to confront pivotal questions as to the legitimacy and control of the legal order in the global society (5.).

1. Limits on Enforceability of National Law

The technical, economic, social, and political changes described above cause the boundaries of cultural and economic interactions to conform less and less to the territorial borders of nation-states established in the 19th century. Thus, the regulatory authority of nation-states and especially the lawmaking monopoly of national legislatures dwindles. The solution of resulting problems by means of a direct extraterritorial enforcement of national law on foreign territory enjoys only limited success and is often of dubious legality. An example is the pressure exerted by the United States in 2009 on the Swiss Bank UBS to disclose client account information: in response to the threat of the United States to prosecute UBS for tax evasion, which could have jeopardized the bank’s very existence, Swiss banking authorities released the sought-after information; subsequently, however, the Swiss Federal Administrative Court held that the disclosure was illegal. Similar legal difficulties associated with extraterritorial investigations arose in the course of the transnational corruption investigation conducted by the American Securities and Exchange Commission (SEC) against the Siemens company in the course of which attorneys from an American law firm – paid by Siemens – served in Germany as private investigators with a public mandate for an American agency. In criminal law, these difficulties are not resolved by the principle of universality or by other international criminal law principles that go beyond the principle of territoriality. These principles merely expand the area of applicability of national criminal law to foreign territory; they do not permit the direct enforcement of coercive measures of criminal procedure in foreign nations. The covert penetration by investigative authorities of foreign
computer systems violates international law just as does the kidnapping of terror suspects abroad. In addition, one-sided extraterritorial enforcement of law runs into practical enforcement problems. The fact that attempts to engage in this kind of extraterritorial enforcement are becoming more frequent indicates the need for legally regulated forms of cooperation.

2. Expansion of International and Supranational Law

To overcome the limits of the national approach to regulation in the context of transnational activities, the classical solution is to supplement national regulations and the enforcement of national law with international forms of cooperation. These are manifested not only in relevant national legal provisions but most importantly in the cross-border cooperation of national agencies as well in the creation of international and supranational institutions.

Interstate cooperation often takes place by means of informal transnational networks. At this level, there is direct cooperation between national ministries and special agencies, and expert groups and committees are created. This kind of governmental-technocratic cooperation outside the bounds of formal legal rules can be seen, for example, in the meetings of the G-8 countries and their experts, which – as in the case of law enforcement activities in the cybercrime context – influence subsequently created legal regulations. Informal international cooperation in the development of common regulations and procedures can be found not only in the cooperation of police and intelligence agencies but also in many areas subject to the oversight of economic control agencies. One example is the assembly of national securities regulation agencies in the International Organization of Securities Commissions (IOSCO), an organization that develops minimum standards that are referred to as "non-binding" but whose broad implementation is agreed to by the members. The same is true of the Basel Committee on Banking Supervision that, with the (confidentially negotiated) Basel I Framework and the (publically developed) Basel II Framework, created


a uniform structure in the form of informal agreements of bank regulators for assessing the capital adequacy of banks in over 100 states. These successes make clear that the cooperation of peers in technocratic networks can exert a great deal of “soft power” on the unification and export of legal regulations whose content – as a result – are no longer molded by national administrative agencies and parliaments but rather are significantly influenced by the international networks instead.\(^8\) Cooperation involving national experts in networks, however, is not very transparent and is difficult to control. As a consequence, the evolution of informal (transnational) networks is the subject of controversy. While cooperation in transnational regulatory networks is considered by some in the American political science literature to be the optimal form of cooperation in the modern information society and a “blueprint for the international architecture of the 21st century,” others consider it only a limited supplement to treaty-based cooperation among international institutions.\(^9\) On the basis of traditional international treaties, these networks often develop into international institutions whose existing structures and procedural provisions offer better conditions for the development of norms than does purely informal cooperation.

Today, international and supranational institutions thus play a central role in the interstate coordination and development of norms. Examples of these kinds of international regulatory forms include recommendations, treaties, resolutions, and other measures of the United Nations, the OECD, the WTO, the World Bank, and the Council of Europe as well as of numerous other – in some instances less well-known – institutions such as IMF, ILO, ICAO, IMO, the International Seabed Authority (ISA), the international fisheries organizations, the International Telecommunication Union (ITU), WIPO, the International Competition Network (ICN), the Codex Alimentarius Commission, as well as the International Criminal Court (ICC) and other international criminal tribunals. Numerous human rights treaties have also led to comprehensive international regulations and institutions, as human rights protection, in particular, requires supranational law and


\(^9\) See A.M. Slaughter, “The Real New World Order”, Foreign Aff. 76 (1997), 183 et seq. (quotation in text found on page 197); A.M. Slaughter, A New World Order, 2004; for another opinion, see Raustiala, see note 8, 5, 91; P.H. Verdier, “Transnational Regulatory Networks and Their Limits”, Yale L. J. 34 (2009), 113 et seq. (113).
cannot be left up to the disposition of individual states. The same is true of international criminal law and environmental protection. As a result of this development, numerous people depend on the decisions and norms of international organizations. The legislative and executive decisions of the International Seabed Authority, for example, directly affect the pecuniary interests of states, businesses, and individuals. Similarly, the credit decisions of the World Bank concerning programs to fight illness and the decisions of the WTO regarding agrarian support can have serious effects on the lives and economic existence of people in numerous countries.

Although many international organizations are active only in limited areas, the development of broader government-like structures in the context of globalization is becoming more and more common. This can be seen not only in the expansion of their areas of activity but also in the fact that they are taking over additional executive, legislative, and judicial functions and expanding their spheres of influence. This expansion of the areas of activity of international organizations takes place, on the one hand, by means of new and extended mandates that are necessary for the solution of current global problems. On the other hand, international organizations themselves expand – extensively and in a flexible manner – their areas of activity. The imposition by the United Nations Security Council, operating on the basis of a broad conception of peacekeeping, of criminal law-like sanctions not only on states but also on terrorist organizations and individuals is an example. An expanded mandate for the creation of previously unforeseen enforcement measures exists when, in the context of money-laundering prevention and anti-corruption activities, the OECD and the Council of Europe develop peer-review proceedings and processes of naming and shaming in the course of which representatives of Member States engage in mutual evaluations regarding compliance with certain standards and, at the same time, exert significant pressure by means of public shaming in cases of deficient implementation.

The assumption by international organizations of legislative activities takes place not only via the mandates of the institutions discussed

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above, it also happens – de facto – when, by engaging in the legal evaluation of activities, human rights and other expert committees, monitoring commissions, courts, arbitration tribunals, and arbitration committees end up simultaneously creating new law. Judicial functions are carried out by international organizations primarily in the area of human rights protection (e.g., the European Court of Human Rights), by the various international criminal tribunals, and by the increasingly popular arbitration courts in international trade law. A clear example of a more far-reaching, “multi-functional” shift of activities previously carried out by nation states to the United Nations Security Council is apparent when, with its new “smart sanctions,” the Security Council simultaneously exercises legislative, judicial, and executive functions in the fight against terrorism by creating new systems of sanctions and – by means of a list – itself imposing the new sanctions against persons suspected of terrorist activity. This example also illustrates the expanded scope of addressees of international regulations, in that these regulations increasingly affect not only states but also businesses and individuals as can be seen clearly in the right of individuals to sue under the Convention on the Settlement of Investment Disputes. The more far-reaching, government-like structures of international institutions – created in this way – interfere significantly with the traditional spheres of activity of nation-states. As a result, in certain areas nation-states have become, in practice, the mere implementing organs of the international organizations.

The European Union, with its broad, government-like structure, is a particularly strong supranational organization with executive, legislative, and judicial powers. In the meantime, many of the norms currently applicable in Europe are the result of Union regulations and directives. In December 2009 alone, for example, the Union promulgated 97 regulations and 17 directives in its official journal. According to statistics kept by the administration of the German Parliament (Bundestag), in 2009 some 31 per cent of all laws it passed in the previous legislative pe-

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12 On this point, see also under note 36, below.
13 For a summary, see R. Wolfrum, “Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations”, in: R. Wolfrum/V. Röben (eds), Legitimacy in International Law, 2008, 1 et seq. (10–19).
period were prompted by the EU. Indeed, EU regulations affect – to a greater or lesser extent – all important policy areas: the internal market, free movement of goods, agriculture and fisheries, free movement of persons, security, transport, competition, intellectual property, economic and monetary policy, employment, social policy, education, culture, health, consumer protection, trans-European networks, research, environment, energy, tourism, civil protection, administrative cooperation, and external action. In the attempt to insure an area of freedom, security, and justice, the criminal law, too, long considered part of the sovereign domain of nation-states, has been involved to a significant degree. EU regulations are directly applicable in the Member States; directives are also binding, as far as the results to be achieved are concerned, but they leave to the national authorities the choice of form and methods. This EU legislation – like domestic norms – works in tandem with a far-reaching system of legal protection that is responsible for important decisions in Europe and that, in some respects, replaces the jurisdiction of national courts.

This shift of legal activities from the national to the international and supranational levels can also be seen from an institutional perspective in the increase in the number of large, multinational law firms, firms that reflect the transnationalization of their areas of specialty and of the three major branches of law. These firms focus on business law; in response to the beefing-up of European law enforcement agencies, however, calls for a European network for criminal defense attorneys are also becoming louder.

3. Growth in Private Regulation

The development of international and supranational regulations often proceeds slowly due to both the lack of willingness of nation-states to give up sovereignty and to the lack of consensus among the states. As a result, private actors are creating more and more new, non-governmen-

15 <http://www.faz.net/s/Rub0E9EEF84AC1E4A389A8DC6C23161FE44/Doc-ECE53A3E51DAD46E3AAFC3E6424FC1099C-ATp-Ecommon-Sc ontent.htmlFAZ.net>.

16 See the empirical study conducted by G. Morgan/ S. Quack, “Institutional Legacies and Firm Dynamics: The Growth and Internationalization of British and German Law Firms”, Organization Studies 26 (2005), 1765 et seq.
tal control instruments that are not part of national, international, and supranational law. In fact, these kinds of private, autonomous self-regulation – e.g., the *lex mercatoris* of merchants – have existed for generations. Today, however, they are developed more for global activities, the international or supranational regulation of which cannot be achieved politically or whose complexity and dynamics prevent them from being dealt with appropriately by means of state regulation. As these private systems are not subject to territorial limitations, they are more effective internationally than are governmental systems.

The related “denationalization” of normative control can already be seen in the substantive *effect on the preliminary stages of international and supranational law*. Particularly in the area of private law, academics and private organizations are creating new soft-law instruments, such as the “Principles of European Contract Law,” the “Principles of European Tort Law,” model codes, and corporate governance codices, some of which have been adopted (to one degree or another) by national and/or international lawmakers.17 In the area of criminal law, too, there have long been calls for international model codes in order to overcome the stagnating process of legal harmonization as conducted by national and international institutions.18 In the area of private business law, *international law firms* have taken on a leading role in the development of standards and model contracts as sources that can be used to support the development of transnational law.19

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In this process, the creation of additional, independent, normative regulations by non-state actors are particularly important. Examples include the “home-made law” of professional associations and interest groups, arbitration agreements and tribunals in the business context, operating agreements, codes of conduct established by research institutions, self-regulatory activities of businesses and business associations, internationally applicable ethics and behavioral guidelines, general terms of business of multinational corporations, regulatory instruments of international sporting associations, international rules of standard (e.g., the ISO), standardized contracts, and the administration of domain names and Internet addresses by ICANN (Internet Corporation for Assigned Names and Numbers). “Responsible Care,” the voluntary initiative of the chemical industry whose code of conduct containing regulatory standards for the areas of environment, health, and security has been embraced and implemented – to a greater or lesser extent – by national industry associations all over the world, is an example of business norms of this kind. In cyberspace, denationalization, dematerialization, and ubiquity together with the difficulty of enforcing national law hasten the development – primarily by technical and electronic associations – of additional non-state regulations in virtual worlds and electronic market places, where affiliation to a particular nation-state is replaced by membership in a “community.” In many cases, these new forms of private regulation lead to a blurring of the traditional distinc-

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20 With respect, for example, to standard license agreements for the expansion of options of copyright holders regarding the dissemination of digital media, see L. Dobusch/ S. Quack, “Internationale und nichtstaatliche Organisationen im Wettbewerb um Regulierung: Schauplatz Urheberrecht”, in: K. Dingwerth/ D. Kerwer/ A. Nölke (eds), Die Organisierte Welt – Internationale Beziehungen und Organisationsforschung, 2009, 235 et seq.

21 On this point, see H. Keller, “Codes of Conduct and their Implementation: the Question of Legitimacy”, in: Wolfrum/ Röben, see note 13, 219 et seq. (251).

tions between public and private law and between the creation of norms and the drawing up of contracts.23

Even in the field of public security, which for a long time was considered a domain of the public sector, the growing importance of private security companies (especially guard and investigation companies) is now leading to new codes of conduct. With the creation of company disciplinary rules and articles of association that address athletic misconduct (and enforce internationally sanctions such as professional bans in cases of doping), private actors have even developed functional equivalents to the state-based criminal law protection of legal interests. Together with additional factors unrelated to globalization (such as the increasing importance afforded the perspective of crime victims), this development forces the criminal law to address the issue of whether the time has come to reconsider – and perhaps to undo to some extent – the deprivatization of law enforcement that dates to the Middle Ages. In the public law context, too, traditional areas of state-based administration are being supplemented by new forms of private governance that are geared to the common welfare of the international community. In international law, the growing influence of private actors is accelerating the move away from traditional, state-based international law.

The broad autonomy of and the significant role played by private, subject-matter-specific regulations are particularly apparent in cases in which norms are not only created by quasi-legislative institutions but are also enforced by means of institutionalized arbitration processes (especially arbitration tribunals). Some academics argue that, to some extent, the applicability of these norms can no longer be derived from other fundamental norms but rather from a self-organizing process of global contracts that themselves create their own, non-contractual legitimacy.24

Generally speaking, the state approves of the participation of non-state actors in the sovereign legislative process and approves of private


regulation; monitors this development to some extent for abuse; expressly recognizes it, in some cases; supports it by offering privileges (e.g., reduced liability); transforms it into state law; and even compels it in specific areas by means of new forms of co-regulation (as in the regulation of content on the Internet that is inappropriate for minors) or by requiring the participation of the private sector in the provision of public security (as in the prevention of money-laundering, insider trading, and fraudulent invoicing by physicians). New hybrid forms of state-private cooperation, described as “governance at a distance,” are particularly evident in the Swiss anti-money laundering law and its “self-regulating bodies.”

International and supranational institutions also play a role in the privatization process when, for example, they act on private initiatives or delegate their own responsibilities to non-state actors. The European Union supports this development by providing for the delegation of the decision-making authority of the European Commission not only to committees made up of representatives of Member States (so-called comitology procedure) or to broadly independent regulatory agencies with their own legal personality but also to private or public-private agencies that, as “offices for technical assistance” or profit-oriented businesses, administer – for example – European subsidy programs worth billions of Euros. Similarly, the European Union can delegate public responsibilities to technical committees and independent standards bodies that, with their regulations, substantiate – for example – guidelines. Herewith, state, international, and private regulation blur.

Non-state norms are additionally supplemented by internationally applicable political, social, and economic control mechanisms. Emerging political regulatory mechanisms designed to influence state conduct include, for example, international systems of comparison, such as the OECD’s PISA policy with its national policy assessment studies. In the area of public security, security businesses in the private sector, public-

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27 Lübbe-Wolff, see note 6, 267–273.
private partnerships, and new security alliances are becoming more and more important. Increasingly, markets are taking on supervisory functions. The number and type of these kinds of control systems continue to increase and state regulation continues to decrease.

In addition, the movement of refugees and poverty-induced migration lead to the existence of a variety of different groups within nation states that do not assimilate but, in some cases, purposely remain – ethnically and religiously – segregated and import their own normative constructs. Religious communities that give priority to religious law over secular law represent a challenge to the legal orders of secular western nations. The regulations of regional cultures and religious communities must be considered in addition to the norms of individual groups, communities, and social networks. They add to the paucity of identity and legitimacy as well as to the tension between the various national, international, and private institutions. “Honor killings” in immigrant families, fatwas, and attacks on the author of the Mohammed cartoons that originally appeared in the Danish press illustrate the great potential for conflict deriving from these – actually existing or unfairly assumed – ethnic and religious norms, which overlap and compete with national law and which add to the diversity of private norm systems.

4. Historical Changes and Outlook for the Future

a. The Changing Face of Statehood

The change seen in legal control mechanisms is not a coincidental phenomenon. The causes of change are deeply rooted and go hand in hand with fundamental changes in the social and state order: the increasing amount of interaction between similarly situated parties located within different territorial entities as well as the increasing number of problems of a global nature contribute to the gradual dissolution of the congruence between the territorial control potential of the traditional nation-state and “its” citizens. This leads to a weakening of the hegemony of the state, which is legitimated through democratic election by a territorially-organized citizenry and therefore protected against any outside interference by the principle of sovereignty as recognized in interna-

\[28\] For examples of regulations of this kind, see the study on the social structure of the favelas in Brazil carried out by de Sousa Santos, see note 1, 99–162.
tional law. The “internal” diversity of different groups within the state (due in part to the movement of refugees and to economic migration) further erodes the prevailing 19th century ideal of a unified national culture as well as the related concept of a national people and continues to challenge the role of the nation-state in the creation of a central regulatory framework. In this process, the traditional “pyramidal” relationship of the state and its legal subjects – the basis of traditional parliamentary accountability and political legitimation for the exercise of governmental power by means of law – is dissolved.

This development leads to a “denationalization” of law (b. below) and to a plurality of co-existing regulatory systems (c.). Historical changes in the law result (d.) that, in turn, are associated with fundamental challenges – especially with regard to legal policy.

b. Denationalization of Law and New Actors

The changes in normative control systems outlined above have already showed that a “denationalization” of law is taking place on two levels: in the area of traditional sovereign regulation, regional or global regulations outside the nation-states are developing due to the political governance exerted by international and supranational institutions. This “denationalization” of public and common welfare-oriented regulations is being supplemented in the domestic and foreign relations of nation-states by the growing body of norms established by private actors, who are creating their own transnationally applicable regulations in numerous fragmented areas. In contrast to the norms of international institutions, however, these private regulations do not develop through political processes involving political management “from above,” but rather through social processes “from below”; they are no longer based on the sovereign legislation of a territorially-organized, constituent people but on the individual membership in associations, on the contractual acceptance of standardized regulations, and on processes of negotiation. This leads to the blurring of the traditional separation of private and public law as well as to seamless transitions between law and other normative systems.

Unlike state law, the international, supranational, and non-state regulations are often not dominated by parliaments but rather by other

30 On this distinction, see also part II. 3. and part II. 4. a., above.
actors: in the case of law-making by the political management of international and supranational institutions, representatives of national governments (primarily from economically strong states) and bureaucrats from international institutions are becoming more and more important. This is true even in cases in which highly intrusive regulations must be implemented later on by national parliaments, since at the time of these parliamentary decisions regarding internationally-negotiated agreements, there is often no room left for maneuvering. Representatives of business as well as – especially in cases it treats as scandals – the press, international non-governmental organizations, and other elements of the civil society also influence these processes. Similarly, scientists and other experts consulted by international institutions acquire more influence.\(^{31}\) This can be especially problematic if experts from the business sector who are engaged by international organizations pursue their own interests. In order to avoid such losses of power, many international organizations such as the UN and the Council of Europe have reserved important final decisions – such as the passage of resolutions – to intergovernmental organs. Despite such mechanisms, the establishment of expert committees and the strengthening of secretariats within international organizations lead to a decrease in the influence of the national governments that created these organizations. The main losers of power, however, are the national parliaments, whose functions of legitimation and control are considerably reduced or even lost entirely.

In contrast, if global, private norms are established in fragmented areas by the civil society “from below,” the representatives of large, internationally-oriented (mostly American and British) law firms gain influence over de facto processes of standardization: they create new specimen contracts that become standard contracts and later influence norms promulgated by other actors. Lawyers’ associations and private arbitration tribunals support this development. The setting of norms “from below” is also influenced to some degree by international institutions that adopt standard contracts and other instruments of soft law and integrate them into their own regulations. Thus, both developments – the spontaneous case-by-case creation of law by private actors “from below” and the more strategic, political creation of law by international organizations “from above” – merge in some areas. The sum of the effects of these mechanisms contributes to the displacement of the nation-state.\(^{32}\)

\(^{31}\) Sieber, see note 7, 175–185; Sieber, see note 11, 414 et seq.

\(^{32}\) Quack, “Legal Professionals ...”, see note 19, 648–652.
c. Plurality of Regulations and Fragmentation

The development described above leads to a *plurality of – state and non-state – regulatory systems*. The overlapping and the influence the various systems have on each other is apparent, for example, in the fact that anti-money laundering norms exist simultaneously in national law, European law, in the requirements and peer-review processes of the OECD and the United Nations, as well as in the private compliance-regimes of financial institutions and their associations. An additional example of regulatory pluralism can be seen in the attempt to deal with the genocide in Rwanda by means of the parallel activities of an international tribunal (on the basis of international criminal law), national courts (on the basis of Rwanda’s post-colonial national criminal law), and the village Gacaca courts (on the basis of modified African tribal law). A complex regulatory pluralism of private norms can be seen in the numerous sporting associations that are organized functionally and territorially. In this area, sovereign and private regulations often apply simultaneously.\(^{33}\) Thus, on the international level, there is competition not only among goods and services but also among political control mechanisms, each with its own framework.\(^{34}\)

These co-existing norm systems lead to many-layered regulatory systems (so-called *multi-level systems*) and a *fragmentation of the law*. Among the various national, international, and private legal systems, there is neither a hierarchical order nor is there legal unity but rather a situation characterized by conflicts of laws and values. The lack of hierarchy in the new global order is apparent, for example, when the International Criminal Tribunal for the former Yugoslavia recognizes the ICJ as the “principal judicial organ of the United Nations” (Charter of the UN, Article 92) but at the same time refers to itself as an autonomous judicial body that may come to conclusions that differ from those of the ICJ.\(^ {35}\) A clear, normative contradiction between the law of the

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\(^{33}\) On this point, see part III. 5. and 6., below.


European Union and the law of the United Nations (as well as, possibly, conflicts between various norms of UN law) can be seen when, on the basis of lists of terror suspects, the United Nations Security Council in a – from the perspective of the rule of law – questionable administrative procedure orders the imposition of smart sanctions such as the freezing of financial assets and travel limitations in contravention of European Union human rights standards.\(^{36}\)

In the global world, the result is a very much stronger dissonance between authority and regulation than in the past. This shows clearly that legal order and social control in the modern global society have become very much more complex than they were in the days of the traditional relationship between the citizen and the nation-state.\(^{37}\)

d. Fundamental Developments and Perspectives

From a historical perspective, the law in today’s global world displays characteristics similar to those found in the law of the Middle Ages and the early modern era: the lack of unity between state power and legal order; the greater importance accorded to negotiated processes than to institutionalized force exercised by authorities; the lack of a clear separation between public and private law; the seamless transition between law and other norms; and the diversity of law due to the participation of various actors.\(^{38}\) Already in the Middle Ages, the resulting limited influence of the state on the normative system encouraged the development of law applicable across borders. The Roman law of the Middle Ages was not promulgated by the state; rather, its beginnings were in the university lecture halls, from there it was adopted by practitioners, and ultimately it developed into an academically-based private law of transnational scope.

From the perspective of the legal historian, one of the more interesting questions posed by this development is whether the era of the sov-

\(^{36}\) ECJ C-402-05 and C-415-05 of 3 September 2008, No. 158–376 (Kadi/Al Barakaat). On the treatment of conflicting norms, see part III. 6., below.

\(^{37}\) On this point and for more detail on the treatment of conflicting norms and values, see part III. 6., below.


\(^{39}\) M. Stolleis, “Vormodernes und postmodernes Recht”, *Quaderni Fiorentini per la storia del pensiero giuridico moderno* 37 (2008), 543 et seq. (546).
ereign nation-state has turned out to be a comparatively short historical epoch of western history and one that has served its time.\textsuperscript{40} As far as sovereign regulation is concerned, this question – at least for Europe – has a clear answer: in this context, regulation has clearly shifted from the nation-state to international and supranational institutions that, over time and with their secretariats and organs, have emancipated themselves more and more from their nation-state creators. The European Union shows that, under certain circumstances, democratically legitimated sovereign authority can be exercised not only by the nation-state but also by other forms of European democracy.\textsuperscript{41}

As far as the relationship between sovereign and private exercise of authority is concerned, the answer to the question of the future of the nation-state is more differentiated and partially still open: in the area of business, the “denationalization” of law and the self-regulation of business and society is increasing worldwide. In other areas, however, nation-states in cooperation with international institutions are also actors and beneficiaries of globalization,\textsuperscript{42} such as when they – as has been the case recently in the context of anti-terrorism powers – win back or create for themselves additional worldwide (regulatory and enforcement) power by means of self-created international structures.

In connection with these shifts, an additional question addresses how the future transnational world legal order – influenced by international organizations and actors of civil society – will be constructed and dominated: will the new world law be based on the politically and strategically-oriented management of various regional blocs and the international and supranational organizations they have created, perhaps with the decisive participation of the United Nations? Or will civil society – at a distance from politics – increasingly develop its own “living” norms “on the periphery of law” in numerous fragmented, indi-

\begin{itemize}
\item \textsuperscript{40} M. Stolleis, “Was kommt nach dem souveränen Nationalstaat? Und was kann die Rechtsgeschichte dazu sagen?”, in: A. Héritier/ M. Stolleis/ F. Scharpf (eds), \textit{European and International Regulation after the Nation State}, 2004, 17 et seq.
\item \textsuperscript{41} See also Stolleis, see note 40, 26–30; U. Sieber, “Die Zukunft des Europäischen Strafrechts – Ein neuer Ansatz zu den Zielen und Modellen des europäischen Strafrechtssystems”, \textit{Zeitschrift für die gesamte Strafrechts-wissenschaft} 121 (2009), 1 et seq. (17–22, 28–43).
\end{itemize}
vidual areas, as Eugen Ehrlich predicted in 1913 in far-off Bukovina of the Austrian Empire? The complexity of the problems to be regulated as well as the lack of consensus among the national political actors could argue for the dominance of decentralized (especially private) actors; this dominance would not, however, be made up solely of either the ideal type of a universal legal system or a “lex Bukovina” but rather would lead to the development of numerous mixed forms and combinations of substantive and procedural co-regulation as well as flexible transnational networks.

As state power has been perforated by and overlaid with other international and private powers, the nation-state has lost comprehensive, territorially-based legal sovereignty over its citizens. Thus, while the nation-state will remain powerful in the future (especially as far as the maintenance of public security is concerned), by ceding powers to larger organizational units, it will undergo significant changes.

5. Central Challenge: Legitimacy and Control beyond the Nation-State

The historical changes taking place in the legal systems categorically challenge both the structures of legal control mechanisms as well as the central accomplishments of law since the Enlightenment: the broad denationalization of law leads to a loss of important protective functions that must be fundamentally reconceptualized for the new international and private regulations.

a. Loss of the Protective State

With the shifting of traditional activities of the nation-state to the international and private arena, the law leaves the protective framework of the legitimate state power monopoly further and further behind. For the further one distances oneself from this accomplishment of modernity, the more the law of the economically or politically stronger applies. Thus, the mechanisms of democratic legitimacy, the separation of pow-

43 Teubner, see note 24, 255–290; likewise Quack, “Legal Professionals …”, see note 19, 648.
44 Stolleis, see note 39, 546.
45 V. Boehme-Neßler, Unschafes Recht, 2008, 140 et seq. (172).
46 Stolleis, see note 39, 546.
ers, human rights, and legal protections developed by the parliamentary nation-state to tame the “Leviathan” have retained only a limited effect within international and private norm-setting.

A clear example of what this shift can mean for the affected citizens are the so-called smart sanctions of the United Nations – an institution not subject to judicial review – for use against suspected terrorists.47 The same problems of legitimacy and control of international institutions can also be seen with regard to nation-states when, in the negotiation of international agreements, economically powerful actors dominate, developing countries are not represented at all, and representatives of business and other interest groups exert disproportional and uncontrolled influence. Examples include complaints raised with regard to expansions in the international protection of intellectual property and the resulting difficulties in gaining access to essential medications, seeds, or publications relevant to education and research.48 The conduct of certain multi-national corporations in Africa as well as that of private security firms in Iraq, where abuse of power has been exercised with impunity, make clear that the effects of denationalization on the control of private economic and military power can be very much more serious. Thus, legitimacy and control of non-state regulations and institutions are central issues to be addressed in the context of the new forms of control in the global world.

b. Fundamental Concepts of Legitimacy and Control

As far as the central, key question concerning the legitimacy49 and control of non-state institutions and regulations is concerned, it is necessary to differentiate between sociological and normative concepts. Sociological concepts of legitimacy treat the acceptance of the regulations as a prerequisite for a stable social order. In the context at issue here, they show that the legitimacy of the new international, supranational, and

47 See note 36.
48 On the creation of an international law of antitrust that also serves the interests of developing countries, see, J. Drexl, “International Competition Policy after Cancún: Placing a Singapore Issue on the WTO Development Agenda”, World Competition 73 (2004), 419 et seq.
49 In German, a distinction is sometimes made between the term Legitimation and the term Legitimität. For a discussion of terminology, see the references at note 52, below, and Bachmann, see note 23, 159 (where the terms are used synonymously). For a discussion of the relationship between “legitimacy” and “legality,” see note 52.
hybrid forms of regulation depends on inclusiveness of participation, expertise-based effectiveness, and procedural fairness.\textsuperscript{50} These criteria of input, throughput, and output legitimacy are important – also from the perspective of legal policy – in order to evaluate and enhance the effectiveness of the relevant regulations.

In contrast, as far as the \textit{normative concepts of legitimacy} are concerned, the issue is not one of the description and stabilization of social order by means of the acceptance of norms but rather of the \textit{justification} of norms.\textsuperscript{51} In the context of law-making by new – international and private – actors, legal scholars do not address the acceptance of or the confidence in legitimate regulations; rather, they examine the \textit{justification for the exercise of authority to set and enforce binding rules}.\textsuperscript{52}

\begin{footnotesize}
\begin{enumerate}
\item On the criteria of Input-Legitimation, Output-Legitimation, and Throughput-Legitimation, see Quack, see note 34, 3–16; a critical approach is taken by von Bogdandy, see note 29, 854–56. On this point, see also F. Scharpf, \textit{Regieren in Europa}, 1999, 16–28.
\item On the function and rationale of the legitimacy issue, see the papers and the final discussion published in the conference proceedings Wolfrum/ Röben, see note 13, 381–403.
\end{enumerate}
\end{footnotesize}
The bases of this legitimacy can be categorized in various ways: one approach – similar to that taken in the social sciences – distinguishes between source-based, process-based, and output-based legitimation factors. Other legal scholars trace these dimensions of input, throughput, and output legitimacy in the context of the authority to make law back to two main concepts: justification based on the consent of the affected (dominant in private law) and justification based on the common welfare (dominant in public law).

In practice, these two concepts are usually combined and modified: the democratic legitimacy of all parliamentary law (based on the principle of the sovereignty of the people) relies on the consent of a majority of the voting public, i.e., legitimacy based on participation and procedure; as far as the defeated minority is concerned, public law can also rely on the claim that the required majority decision serves the common welfare. In contrast, private law (based on the ethical principle of self-determination) earns its legitimacy in many cases also through the consent of its addressees; it is, however, as is especially apparent in the area of consumer protection, frequently corrected on the basis of the common welfare. In international treaty law, the consent of states with regard to relations with the outside world and their authority with regard to domestic relations provide a two-fold legitimacy, which, however, due to the pervasiveness of comprehensive government-like structures, the partially undefined authorization norms, as well as the increasing direct effect of international law on individuals, is under considerable pressure to justify itself.

c. Further Development of the Principles of Legitimation for International and Private Regulation

The normative factors input, throughput, and output legitimacy as well as “consent” and “common welfare” also serve as the general criteria for the evaluation of international and private regulations in a global world. The distinction between private law, public law, and interna-

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53 See Quack, “Law, Expertise ...”, see note 34, 6–9; Wolfrum, see note 13, 6–21; Wolfrum, see note 52, 918–924. See also T. Würtzberger, “Legitimität und Gesetz”, in: B. Rüthers/ K. Stern (eds), Freiheit und Verantwortung im Verfassungsstaat, 1984, 533 et seq.
54 Bachmann, see note 23, 159–226.
55 On the relevance of internal deficits to foreign relations, see arts 27, 46 Vienna Convention on the Law of Treaties.
tional law shows, however, that – even in the context of the state – there is no one, single way of establishing the legitimacy of the exercise of law-making authority. It follows that the simple application of the democratic nation-state model or of the private law consensus model of legitimacy cannot do justice to the diverse regulatory forms of international governance, in which private and public law meld, the degree of interference experienced by affected parties varies widely, and many different kinds of cooperations and organizations – regional and global – are affected.

As a result, in order to evaluate the legitimacy of the diverse norms in place to create order in a global world, it is necessary to take a more differentiated approach. In addressing the legitimacy question, international public law rightly examines all actions that limit the freedom of activity of other subjects.\(^56\) What is required for a regulation to be considered legitimate depends, however, on whether the addressees of the regulation are other states or are individuals, on the extent to which the regulation interferes with individual rights, and on whether the authority exercised by the international institution regulates only a narrow sector of life or establishes a comprehensive system of international governance.\(^57\) For the more international organizations exercise authority over individuals in a way similar in scope and intensity to that exercised by the nation-state, the greater the need to develop principles of legitimacy and protective mechanisms equivalent to those in place for state authority. Thus, for example, it is also relevant to the question of legitimacy whether the control exercised by an international organization takes place by means of binding rules, non-binding recommendations, or by means of the simple publication of information.

International norms thus require a higher degree of legitimacy when they affect the liberty rights of individuals (as with sanctions such as UN smart sanctions) than when they influence the education systems of their Member States through the publication of comparative information from the PISA study. Using criminal sanctions as an example, this kind of differentiation with regard to what is required to establish legitimacy becomes clear on the basis of the principle *nullum crimen sine lege parlamentaria*, which for the legality of criminal law – at least in its

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57 Bodansky, see note 52, 316.
core area and in democratic states – requires a parliamentary law. This principle is derived not only from the principle of democracy but also from the principle of the separation of powers, from additional principles specific to the criminal law, and from a long history of the political abuse of the criminal law. If competences for creating criminal law are transferred by states to international organizations, the principle of the parliamentary legitimation of criminal norms (constitutionally guaranteed in Germany) must also be guaranteed and upheld – at least by means of functional equivalents – when an international organization makes criminal law. Thus, the transfer of legitimacy for the creation of criminal law from the nation-states to an international organization that is dominated by the executive and that lacks a separation of powers is not acceptable for the creation of supranational core criminal law.\(^{58}\) In addition, problems with legitimacy transferred by the nation states to the international level can also arise in the case of coercive powers of international organizations if their authority is not defined in a concrete and static manner but rather is defined generally and dynamically (i.e., expanded over the course of time by the institutions).\(^ {59}\)

For the most part, the consent of the Member States suffices in international law as a basis for legitimacy, if this provides an effective legitimacy chain for which the national law often requires parliamentary consent.\(^ {60}\) Supplementing and expanding this picture, alternative and more flexible concepts of legitimacy can also be considered that combine the various factors and, for example, make the international insti-

\(^{58}\) For a general discussion of the legitimacy of criminal law measures promulgated by international and supranational organizations, see Sieber, see note 41, 50–63; for a discussion of the regulations of the United Nations Security Council, see J. Macke, *UN-Sicherheitsrat und Strafrecht – Legitimierung und Grenzen einer internationalen Strafgesetzgebung*, 2010, 264 et seq.


\(^{60}\) On the relevance of internal deficits to foreign relations, see note 55.
tutions more dependent on the consent of the states, require judicial control of international institutions, place more weight on procedural rules guaranteeing fairness for the affected parties, and involve neutral expert commissions in the decision-making process.\footnote{On this point, see Wolfrum, see note 13, 21–24, and – using the example of the International Seabed Authority – Wolfrum, see note 52, 923–924. On the combination of the various aspects of legitimacy and how they support one another, see Sieber, see note 41, 50–60 and part III. 3.–5., below.} In cases of more coercive, broader government-like structures, these aspects of throughput legitimacy are also necessary in order to develop the functional equivalents to traditional protective mechanisms in the area of state power demanded above.

In contrast, as far as private regulation and hybrid control models – to be discussed in more detail below – are concerned, other concepts of legitimacy are relevant, concepts that are based primarily on the consent of the affected parties and in which control of the consent of the affected parties is central for common welfare reasons. Specifically, however, it is necessary to distinguish between the various private rules. Standard business conditions are legitimized primarily on the basis of consent. Similarly, the legitimacy of codes of conduct can – as for example in labor law – derive from a corresponding consent of the affected. In other constellations, input, throughput, and output legitimacy can also be of importance if the regulations are recognized for the high degree of authority of their creators, a participatory and fair developmental process, as well as the general acceptance of their standards and values.\footnote{See Keller, see note 52, 261–279.} If norms are not binding and thus not legally enforceable, the question of legitimacy plays a lesser role than it does in the context of norms promulgated by the sovereign. These area-by-area distinctions confirm yet again the finding discussed above that the complex questions concerning global governance by international organizations and the private regulation of many single areas and conglomerate areas cannot be solved solely in accordance with parliamentary nation-state models but rather demand much more complex solutions. Thus, while the constitutions of democratic nation-states can serve – especially for broader government-like structures of international institutions – as “lodestars of a global order,”\footnote{So the terminology of von Bogdandy, see note 29, 871. For a summary, see Wolfrum, see note 13, 21–24.} they do not offer a generally applicable blueprint for the development of international models of legitimacy.
This discussion confirms the fact that the factors of legitimacy and control are central questions for the development of the future order in a global world. Thus, they must also play a decisive role when, in the following, the possible models and approaches to the challenges posed by transnationalization and globalization are analyzed and evaluated.

III. International Models for Regulation

The question as to which control systems, models, and solutions can be used to ensure not only effectiveness but also legitimacy and control can be analyzed on the basis of the transnational subjects of regulation and their legal questions, the changing control systems, and the corresponding legitimacy issues discussed here. The mechanisms employed in practice hint at the systems and models to be considered. Based on legal harmonization and comparative law (1. below), they range from the cooperative national, the supranational, and the private models to the hybrid models (2.-5.). The future order of the global world depends, however, not just on the individual subsystems used but also on their coordination (6.).

1. Importance of Legal Harmonization and Comparative Law

Given the existing palette of options, problems of international applicability and enforceability of law as well as common global questions can best be solved on the basis of legal harmonization. For the enforceability of foreign law (e.g., in the context of mutual legal assistance), the agreement on a new, supranational law (e.g., in the framework of the EU), and the development of transnationally applicable private norms (e.g., from corporations) are more easily achieved when the relevant regulations are similar to one's own law. In many areas, jurisprudence and politics have already achieved a broad approximation of law, such as in the harmonization of intellectual property law and international criminal law. In contrast, in other areas of law, harmonization is progressing slowly as a result of the differing interests of the nation-states. This is the case in many areas of the criminal law, which is viewed as an expression of the sovereign power of the state and therefore often postulates reservations in the context of international legal assistance.

Thus, one of the important functions of legal research is to analyze the driving forces, methods, and conditions necessary for the success of
Successful approximation of law is not solely a result of comparable fundamental legal values. Rather, the interests behind legal harmonization, the political power of the actors representing these interests, and the available implementing instruments play an important role. Among the latter are “soft” non-binding methods (such as recommendations of international organizations, model codes, and simple information) as well as “hard” binding mechanisms (such as the directives of the European Union, which have been responsible for a surge in the approximation of European law). Implementation studies conducted by academics, peer-review procedures in practice, as well as the related processes of naming and shaming have also proven to be important instruments in the achievement and evaluation of success. Relevant research on the approximation of European law and the mutual enhancement of national legal orders also includes studies on the reception of foreign law and the ways in which legal transplants are changed by the receiving legal order.

Comparative law, which can highlight differences and commonalities among (national and international) legal orders and identify best practices, is an essential prerequisite for successful legal harmonization. Comparative research aimed at the approximation of law or at better regulation has a strong tradition in the three major branches of law. Private law, for example, proves this with its International Congress for Comparative Law, organized in Paris in 1900, whose guiding principle was a “droit commun de l’humanité civilisée.” Of current importance are the comparative activities of the International Institute for the Unification of Private Law (UNIDROIT) in the area of civil law, the United Nations Commission on International Trade Law (UNCITRAL), the American Law Institute, and the Principles and Common Frames of Reference developed by means of comparative law for the unification of European contract law, commercial law, law on sales, consumer protection, and for other areas of European civil law. Calls for the unification of private law were made by the European Parliament already in 1989 and 1994. A corresponding example in the area

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65 See note 11.
66 The significance of comparative civil law for these reform processes is discussed in Zimmermann, “The Present ...”, see note 17, 479–512; for a comparison of denationalized law, see M. Reimann, “Die Entstaatlichung des Rechts und die Rechtsvergleichung”, in: R. Zimmermann (ed.), *Globali-
of criminal law is the “Corpus Juris” for the protection of European financial interests, requested by the European Parliament and authored by criminal law scholars on the basis of comparative legal studies, which is slated for further development in 2010 and 2011 as part of the establishment of a European prosecutor.

The significance of comparative law has increased considerably due to the development of the EU, especially in the creation of the European single market and the European area of freedom, security and justice. As a result, comparative legal projects and implementation studies have developed into a politically influential area of (often commissioned) research. Although the growing acquis communautaire of law is also greatly influenced by future-oriented legal policy decisions, it cannot be formulated, however, even in the future, on an intellectual tabula rasa, that is, without a conceptual, doctrinal, and substantive review of the acquis commun. Thus, in the future, comparative law and legal harmonization will continue to be important prerequisites for both traditional nation-state cooperation as well as for the development of supranational solutions.

2. National Cooperation Models

In practice, both fundamental challenges to the transnational applicability and enforceability of law and global legal problems are solved today all over the world with the help of a cooperation model that defines the scope of applicability of national laws and that makes the decisions of one legal system effective within the area of jurisdiction of another legal system. This transformative function of the traditional cooperation model can be seen, for example, in national regulations regarding the...
recognition of foreign agency decisions as well as decisions of foreign civil, criminal, and administrative courts by means of administrative and legal cooperation. If the legal regulations and the political decisions of nation-states are designed with the same goals in mind, then new global challenges, too, can be overcome with the help of a cooperation model.

This coordination of national decisions and their transformation in another legal system are usually unproblematic if the two legal systems share the same values and have similar legal regulations. In contrast, the extension of the application of administrative and judicial decisions runs into difficulties if the decision of the requesting state could not have been taken in the same way in the requested state. It is particularly difficult if the decision of one state violates the ordre public or any other fundamental values of the other state. The law of cooperation is thus characterized to some extent by reservations and exceptions. This can be seen in criminal law in the context of traditional administrative and legal assistance with its restrictions regarding the fields of military and financial offenses, legal systems with the death penalty, and offenses committed by a country’s own citizens.

The controversy surrounding the principle of mutual recognition of judicial decisions in the context of the European arrest warrant, too, shows that an effective law of cooperation, according to which the judicial decisions of one state are recognized in another, is possible only on the basis of legal harmonization and mutual trust. The discussion of the principle of mutual recognition of judicial decisions in civil and criminal cases – a goal of the European Union – illustrates the innovative capacity of European law in the development of new forms of interstate cooperation. This is also true of the creation of the new hybrid institutions designed to improve cooperation between national agencies (e.g., the agency Eurojust, which supports offices of the prosecutor, and the police agency Europol).

Recent studies of criminal law-related cooperation in the European Union show that the traditional nation-state cooperative model enables the transnational enforcement of law by means of a combination of the following three elements: harmonization of law, an effective law of cooperation (containing rules regarding competences and conflicts of law as well as rules of transformation), and special institutions created to support the cooperation. The coordination of the 27 different legal systems in the European Union clearly shows, however, that nation-state systems of cooperation can cause significant problems and losses of efficiency even if they function within the context of an economic community that has at its disposal effective instruments of legal harmoniza-
tion (by means of directives) and the ability to create a law of cooperation (e.g., by means of directly applicable regulations).

If there is a commonly defined policy, international cooperation models are also well situated to contribute to the solution of global problems. Their regulations can also easily be *legitimated* by national parliaments. In addition, cooperation models have the fundamental advantage of maintaining, to a great extent, the national *sovereignty* of the participating states and in so doing supporting the *principle of subsidiarity*. Despite these advantages, difficulties are frequently encountered in cases in which there is a lack of harmonization and unity, including the aforementioned reservations regarding the transnational implementation of national decisions as well as problems that arise due to the lack of agreement or to the difficulty of coming to agreement with regard to global solutions. Thus, cooperation models are regularly associated with a *loss of efficiency*.70

3. Supranational Models

The difficulties cooperation models encounter in the coordination of different national legal orders make *unified international or supranational solutions* an intriguing alternative. The supranational model with its harmonized supranational law is (as an alternative to the nation-state oriented cooperation model) characterized by a single regulatory framework created for a large territorial area encompassing several nations and by the fact that ensuing decisions (of national or supranational courts) are valid *a priori* in the entire territory. This kind of solution can be found, for example, in the uniform protection of human rights provided by the European Human Rights Convention and, for the regulation of numerous additional issues, in European Union law (e.g., antitrust law). In the EU, these supranational solutions are typically based on regulations (as in European antitrust law) that apply to the entire territory of the Union uniformly and directly. In this way, the standardized supranational law created by international institutions can be effectively implemented in a large area. It is especially suited to regulatory areas in which territorial boundaries become blurred – such as in

70 On the advantages and disadvantages of various models in criminal law, see Sieber, see note 41, 17–53.
the Internet – and a solution to the problem by means of conventional law becomes “fuzzy.”

The supranational model is problematic, however, with regard to the legitimacy of supranational law, especially if the regulations promulgated by international institutions are developed by government representatives. The European Union has solved this problem with the Treaty of Lisbon, which requires the increased involvement of the European Parliament – in addition to qualified majority decisions in the Council. In this way, the European Union transfers the national (and especially the federal) parliamentary model of legitimacy – in modified form – to the supranational level. As a result, the legitimacy of European legislation today derives primarily from the affirmative vote of the European Parliament and the consent of the elected national governments in the European Council to each individual piece of European legislation as well as from the formal approval of the national parliaments to the competences in European primary legislation. Furthermore, the directives of the European Union follow the approach – as do regulations of other international institutions (e.g., recommendations of the Council of Europe) – of strengthening the legitimacy of the developed norms – in much the same way as the cooperation model – via the parliamentary legislation of nation-states. This illustrates that the replacement of the monocentric “demos” by the polycentric “multiple demoi” leads in the transition from democracy to “demoïcracy” to complex questions of constitutional law and political philosophy.

In other international institutions, the legitimacy of international law remains questionable in some instances: this is the case, for example, when for highly intrusive measures (such as the aforementioned UN Security Council blacklists) and for more comprehensive dynamic government structures there is neither (international) parliamentary legitimation of the supranational institutions and rules nor parliamentary implementation of the provisions by the nation-states. Thus, for most international organizations, the limited manifestation of the principles of democracy and the separation of powers in the interna-

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71 See Boehme-Nessler, see note 45.
72 For more details, see Sieber, see note 41, 17–22, 28–43.
74 See note 36.
The national arena is insufficient to establish a degree of legitimacy comparable to that associated with traditional parliamentary law-making.75 If, however, regulation by international or supranational organizations does not involve extensive governance but rather entails only static or less invasive measures, the consent of the Member States, discussed above, can still establish an effective chain of legitimacy. The abovementioned alternative concepts of legitimacy should be taken into consideration in this process.76

Due to the state’s monopoly on the use of force and the limited authority of international organizations to employ coercive measures, supranational models are confronted with the additional challenge of how they can be enforced coercively in the still-existing, sovereign-protected territories of nation-states. Supranational systems (such as international criminal law and, to some degree, European law) often draw on the enforcement mechanisms of nation-states. This is the case, for instance, when arrest warrants issued by international courts are enforced by nation-states and when the European antitrust authority must file its search warrants with national courts. It is not the case, however, when the European anti-fraud office OLAF itself examines witnesses. Nonetheless, international organizations are also increasingly evolving independent enforcement and sanctioning systems, such as the abovementioned process of “naming and shaming.”

Thus, supranational models can be considerably more effective than transnational cooperation models. The political dilemma associated with supranational models, however, which goes beyond the question of legitimacy, is that nation-states must essentially give up their sovereign rights. Thus, supranational models can well be employed by closely connected communities legitimated by parliament within the framework of the subsidiarity principle to address supraregional problems that cannot be resolved at the national level. They are also indispensable as a peacekeeping tool at the level of the United Nations – whereby this level is in serious need of reform. In the future, supranational models – primarily in the form of hybrid cooperative and supranational systems – will become increasingly important in practice as traditional cooperation systems based on the subsidiarity principle are augmented with (only) those supranational elements of the justice sys-

75 See Graser, see note 73, 80–96.
76 See part II. 5 and see note 61.
tem that are necessary to overcome specific and empirically-proven co-operation problems.\(^{77}\)

### 4. Private Rule-Making

In contrast to the sovereign forms of rule-making, the private control mechanism discussed above has the advantage that it affords the civil society the freedom necessary for regulations that are narrowly tailored, flexible, quickly realizable, and not limited by the boundaries of nation-states.\(^ {78}\) Issues of legitimacy, the fair balancing of interests, justice, and the enforceability of decisions are more complicated, however, in the context of private regulations than they are in the context of intergovernmental or supranationally-created sovereign legal rules.

As a result, the autonomous self-regulation of groups as well as regulation by markets raise not only the question of legitimacy\(^ {79}\) but also – even in the case of purely national, private rule-making – the question of whether there are legal and extra-legal control mechanisms to guarantee the adequate protection of affected persons, businesses, as well as other interests (e.g., the environment). Thus, in the interest of the common welfare, systems of technical, economic, social, and scientific self-regulation must be coupled with control mechanisms and mechanisms to ensure their legitimacy similar to the measures developed by private law in the control of general business conditions.\(^ {80}\) The necessary legitimacy and control of private regulations can be established either by the private regulatory systems themselves (e.g., with a fair election of decision-makers by the affected parties or by means of their contractual agreement) or externally by means of state law (e.g., with control and recognition procedures of the nation-states). In many cases, a combination of these two legitimating techniques is adopted, using elements of consent and common welfare. This kind of combined protective concept can result from a consensual procedure of the affected parties under the supervision of the state or other institutions. Other possibilities include procedures in which the state has a say or in

\(^{77}\) | On this concept, see Sieber, see note 41, 45–49.  
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\(^{78}\) | Sieber, see note 22, 324–326; Sieber, “Compliance …”, see note 25, 474–476.  
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\(^{79}\) | See part II. 5.  
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which the state subsequently recognizes a privately developed norm. In this way, new forms of self- and co-regulation emerge in which autopoietic private systems are combined with state law.\textsuperscript{81}

An additional question arises on the transnational level, namely, who should take over the functions fulfilled by the state on the national level with respect to the issues of legitimacy and control (for example in the creation of a transnational, non-state labor law). While in a global world non-governmental organizations have taken on important complementary functions, they are hardly in a position to provide broadly for the public welfare.\textsuperscript{82} Individual nation-states and especially hegemonic powers are also not ideal guards of the common global welfare. International organizations themselves, especially those outside the European Union, suffer from deficits in their legitimacy. The principles of democracy, separation of powers, rule of law, legal protection, and civil rights, whose loss of influence parallels the retreat of the nation-state, do not automatically reappear on the international level. Thus, they must be guaranteed by means of other mechanisms.\textsuperscript{83}

5. Hybrid Forms of Rule-Making

Due to the problems discussed above, none of the aforementioned ideal types of international rule-making can be considered the only viable contender. Depending on the region and problem at issue, tailor-made solutions as well as hybrid and combined forms of the models discussed above can be found in practice. This is true of the blending of international and national systems, of cooperation models and supranational models, as well as of state and private regulatory systems. There are numerous relevant examples: international criminal law, for example, has developed hybrid tribunals (most recently in Cambodia) that combine international elements with the significant participation of the national justice system exercising territorial jurisdiction. The European Union is based on a cooperation model, which over time has been enriched with more and more supranational subsystems. The United Nations and the International Committee of the Red Cross are currently negotiating with private military and security agencies with regard to the governance of international private military operations. In the

\textsuperscript{81} Sieber, “Compliance ...”, see note 25, 460–463, 481–483.

\textsuperscript{82} Tomuschat, see note 10, 46–52.

\textsuperscript{83} Tomuschat, see note 10, 36–44.
criminal law context, economic crime is prosecuted in the European Union by national criminal justice systems, which, thanks to supranational requirements and hybrid institutions (such as Eurojust), are coordinated and in certain areas supplemented by supranational subsystems. Both the United States and Italy combine in highly innovative ways involving co-regulation the state's criminal justice system with private compliance regimes: a company that has implemented a compliance regime will receive a lighter sentence if at some point crimes are committed.\textsuperscript{84} The aforementioned international governance of banks by the Basel Committee on Banking Supervision is also based on a public-private partnership. As far as the private compliance of businesses is concerned, the private law provides for advantages if certain measures of self-regulation are fulfilled. These kinds of hybrid forms of governance can take advantage of certain aspects of one regulatory system and avoid other less appealing aspects of the system by selecting elements of another model.\textsuperscript{85}

Specific problems also accompany the legitimation and constitutional control of these hybrid control systems. Not only does the question arise as to the extent to which protective mechanisms of the national constitutional law – developed for activities carried out by the state – are applicable to private organizations and hybrid state-private organizations on its own territory, the problem of the application of these kinds of national control mechanisms to activities conducted by private foreign organizations must also be addressed.\textsuperscript{86} Thus, the need for research in the areas of legitimacy, enforceability, and control of transnationally-effective non-state regulations is great.

The combination and blending of the various forms of rule-making as seen in the hybrid models are used in practice to shape much-needed solutions to concrete problems. In any case, legal and social control based on the simple pyramidal model of the relationship of nation-state and citizen is no longer possible in the global world but rather requires a complex network of various regulatory orders and instruments.\textsuperscript{87}

\footnotesize{\textsuperscript{84} For general remarks on this point, see Sieber, see note 25, “Compliance ... ”, 461–496.}
\footnotesize{\textsuperscript{85} On the combination of international models, see Sieber, see note 41, 28–63.}
\footnotesize{\textsuperscript{87} On this point, see F. Ost/ M. van de Kerchove, \textit{De la pyramide au réseau?}, 2002.}
6. Order in the System as a Whole

The normative order in the global world consists of a large number of subsystems that are structured and legitimated in different ways. Due to this fragmentation of subsystems, the legal order in a global world requires contemplation not only of the conception of sectorial legal regimes but also of the normative order of the system as a whole. Clarification is necessary, both with regard to competition among the various legal sub-orders as well as with regard to the principles employed to prevent conflicts of norms and values.

These questions are relevant not only in the context of inter-national conflicts but also in the context of inter-systematic conflicts between various types of regulation. This is because national, international, and supranational norms, transnational private regimes, indigenous norms of regional cultures, as well as differing social conventions from various backgrounds collide in the global world. Centrifugal as well as centripetal forces play a role in the development of and competition among these system: whereas national legal systems are becoming more and more alike under the influence of international law, at the same time in the system of worldwide norms as a whole, new functional distinctions are developing that are overlaying the traditional national differences in law and leading to new conflicts in a polycentric world.

These conflicts between differing – national and functional – legal regimes are inherent to a pluralistic global order. This is apparent already in the case of separate – and prone to conflict from the get-go – regimes of economic protection and environmental protection rules, of (national or international) human rights guarantees and humanitarian law (law of war), as well as in the context of the universal law of the sea and regional laws of fisheries. Conflicts also develop when global Internet ICANN regulations clash with traditional national rules of civil law and when international intellectual property law and decentralized customary law for the protection of local knowledge conflict. The conflict between state law and religious and cultural norms has already been illustrated on the basis of “honor killings” and the fatwa imposed on the occasion of the Mohammad cartoons. A conflict of values between religious and secular law could also be seen, in the Christian world, when the law of the state sought to punish the sexual abuse of children by means of the criminal law and the – globally applicable – law of the Catholic Church was more disposed to secrecy. These conflicts are of-

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88 Teubner/Korth, see note 24, 137–168.
ten manifested both on the level of substantive law as well as on the institutional level (especially the courts). Given the variety and the sheer number of quasi-autonomous systems, legal unity, homogeneity, and a hierarchy of norms are no longer possible; this situation can be contrasted to the situation as it was in the national law context. Legal uniformity can even be seen as a threat to a pluralistic legal culture.

The Vienna Convention on the Law of Treaties and the canon of the traditional rules of priority as expressed by the Latin maxims *lex specialis*, *lex posterior*, and *lex superior*, taken alone, are equally unable to prevent inconsistencies in norms and values in a global world. Additional collision rules that take into consideration the nature of the regulations, their place in society as a whole, and their legitimacy are necessary. Corresponding principles can only be mentioned briefly here: the nature of the regulation, for example, is important with regard to social norms whose status as law is debatable so that the very existence of a conflict with state law is questionable. The place of norms in society as a whole is relevant, for example, when national legal provisions take priority over specialized transnational regimes because the former are based on a comprehensive balancing of interests within the framework of a position within an entire society whereas specialized, self-contained regimes often suffer from tunnel vision, i.e., they regulate only a narrow section of social life and do not take competing interests into consideration. The perceived lack of legitimacy of private regulations can lead to their non-observance; this may be the case, for example, if they were established without input from affected parties and thus do not become part of common usage.

While transnational private regimes and indigenous norms can collide with state and international norms, they can also be integrated by them – e.g., via blanket clauses – leading to the emergence of new substantive norms. Parallel norm systems with differing backgrounds can thus join and permeate one another in many ways without growing into a uniform “regional” or “world” law. The worldwide enforceability of ICANN policies as a global *lex digitalis* and as part of national legal systems is an example of this kind of interweaving. In practice, how-

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89 On this point, see the example at note 35.
91 See Teubner/ Korth, see note 24, 137–168.
92 On this point, see Teubner/ Korth, see note 24, 137–168.
ever, not only legal questions but also economic interests, political problems, and claims to power are at issue in many cases.

Pluralism and the fragmentation of law need not necessarily be disadvantageous for the system as a whole but rather may present an opportunity – just as the existing plurality of state legal systems has done. If the legitimacy of the fragmented systems is guaranteed and appropriate collision rules are developed, the fragmentation of the various subregimes can also lead to a new separation of power in the emerging complex, multi-level system of world law, a situation preferable to a despotic world federation.\textsuperscript{93}

A prerequisite for the positive evaluation of such a system as a whole is, however, not only the successful integration of the various orders at least in individual cases; rather, the compatibility of the central value decisions of their constituent subsystems is essential for an integration of the various regimes – just as in the case of cooperation among national legal systems. This is especially true for questions of human rights protections and the aforementioned question of legitimacy and control; thus, these issues must be central to future interdisciplinary and comparative legal research.\textsuperscript{94}

\textbf{IV. Challenges to Basic Research}

The discussion above shows that current research on the legal order in a global world can present not only a clear picture of the changed subjects of regulation, the legal questions, and the control systems but can also offer theory-driven and praxis-oriented models for future regulation. Up to now, research findings indicate clearly that more in-depth results could be achieved on the basis of fundamental research that is interdisciplinary, international, and comparative. These future research needs will be specified in the following with regard to subject matter, goals, methods, and potential gains.

\begin{footnotesize}
\textsuperscript{93} On this point, see von Bogdandy, see note 29, 872.
\textsuperscript{94} On this point, see E. de Wet, “The International Constitutional Order”, \textit{ICLQ} 55 (2006), 51 et seq.; Wolfrum/ Röben, see note 13.
\end{footnotesize}
1. Research Subject

The many and varied problems of the legal order in a global world can be divided for future research purposes into separate areas: the activities subject to regulation, the relevant legal questions, the normative control systems, and the development of new problem-solving models.

Two types of problems, identifiable by the catchwords “transnational” (or, if states are involved, “international”) and “global,” can be distinguished in each of these areas: first, transnational or international activities, legal questions, regulations, and cooperations arise on a cross-border level. These have to do primarily with relationships among individual states or their territories. These transnational problem areas have existed in law for some time but have grown significantly in quantity in the global society. The quantitative changes in cross-border or transnational problems turn into qualitative changes when problems encountered on the – second – global level immediately affect a supranational area or can only be solved with the assistance of globally effective – state or non-state – control systems.

This is not the place to discuss in detail the fact that in many cases these levels are blurring – just as are many other categories of the global world. The question can also be left aside whether the changes on the two levels can both be characterized by the concept of the globalization of law or whether – as here – a distinction should be made between the terms “transnationalization (or “internationalization”) and “globalization.” Another issue that cannot be discussed is the extent to which transnationalization (or internationalization) and globalization in comparison to a (to be defined!) point in history are “new” or whether the issue here is only a quantitative development. For future research, it is more important that transnational and global changes pose similar challenges to the legal order in the world society so that these processes, in light of their actual changes, their legal questions, their control systems, and, above all, the development of new global solutions, must be exam-


96 On this point, see Héritier/ Stolleis/ Scharpf, see note 40, 9. Instructive on this point, P. Häberle, Verfassungsvergleichung in europa- und weltbürgerlicher Absicht, 2009, 262.
2. Research Goal, Research Fields, and Research Questions

a. Research Goal

In light of the complexity of the research subject, future basic research on the legal order in a global world must synthesize numerous findings on individual aspects into a comprehensive theory. Only this kind of synopsis of many isolated questions and isolated answers offers the possibility of providing answers to the “big” challenges and the so-called “questions of the century.” By employing a systematic approach, fundamental knowledge can be gained and the solution of concrete social problems achieved, for example by posing the following question that brings together the questions discussed above:

How do transnationalization and globalization change the subjects of regulation, the legal problems, and the normative control systems, and with what systems, models, and solutions can social order be established, legitimated, and controlled under these circumstances?

b. Research Fields and Special Questions

The following research fields and special research questions derive from the question posed above:

a) The first research field addresses changes in the legally regulated subject matter and the resulting contextual problems of law. In this research field, the following questions arise for all three major branches of law: which factual changes that have taken place are decisive for the new transnational and global challenges to law? What are the new legal problems posed by transnationalization and globalization? To what extent are these questions the same in the three major branches of law and how do they differ?

b) The second research field encompasses the changes transnationalization and globalization cause to the normative control systems. Relevant problems here include the following: what national, international, supranational, and private regulatory systems have developed? Who are the actors and what are the interests behind these changes? To what ex-
tent have there been norm and value conflicts among the various regulatory systems? Which norms should be accorded the moniker “law” and the ensuing ability to create conflicts of law? How do institutions that engage in cross-border activities develop? Are the new control systems in fact influenced not only by the transnationalization of the subject matter and legal systems but also by other agendas such as the expansion of hegemonic power claims, for example, with a “government through crime” (as could be the case in the efforts to protect intellectual property, in the European-American exchange of SWIFT bank data, in international anti-corruption and anti-money laundering efforts, and in the establishment of international criminal tribunals and fact-finding commissions by the United Nations)? Why do the harmonization of law and the coordination of various legal orders succeed in some areas and not in others?

c) The third research field – central for legal policy – involves the analysis, evaluation, and optimization of the newly developed control systems with a view to a legitimate, just, and effective regulation of transnational and global activities. Questions such as the following can be posed in all three major branches of law and in the social sciences: which models and concepts can solve these new challenges? What are the requirements for application and what are the advantages and disadvantages of the various national, international, supranational, and private control systems, models, and concrete proposals? Do these systems have common requirements? Which of the various state and non-state systems are appropriate for which regulatory issues? How can these subsystems be synthesized into an effective, comprehensive system? What kinds of national and “post-national” constitutions, “constitutionalizations,” and other forms of “(inter)national governance” can be used to develop or stabilize the European Union, other regional conglomerates, and disintegrating states (e.g., those in the territory of the former Yugoslavia or in Africa)? To what extent do the new international and private control instruments consider the interests of participants, to what extent are they sufficiently legitimated, and to what extent do they achieve just solutions? How do the various regulatory systems affect one another? How can the norm and value conflicts that are the result of the fragmentation of law into global multi-level systems be solved? What problems can no longer be solved on a national but only on an international level, and what mechanisms and models are there for this kind of solution? How does globalization affect the existing realization of the principle of democracy? How can the various normative systems be legitimated outside the nation-state? How are human rights,
consumers, common welfare interests, and the rights of local minorities protected in international systems? To what extent must the decision-making structures and the law in the European Union be unified in order to enable the Union to compete with other regional powers? Should the necessary European harmonization processes be implemented or promoted by means of regulations, directives, and other “hard” instruments or by means of the simple exchange of information, model codes, and other “soft law” instruments? Which cooperation systems and international mechanisms can be recommended for the resolution of concrete problems, such as the prevention of the dangers posed by international terrorism, the new asymmetric wars, and failed or failing states?

3. Research Methods

The above examples show that the fundamental questions posed are of great practical relevance to numerous concrete regulatory problems. The practical consequences of the fundamental questions regarding the legal order in a global world reach from the future development of the European Union, the creation of a European Civil Code, and international peacekeeping to the international regulation of banks, private military operations, and biological research to international regulation of climate protection. These questions affect all national and international legal systems. They encompass private law, public law, criminal law, and private and hybrid regulations equally.

An answer to these practical questions is possible only on the basis of comprehensive basic research. In light of the blurring of the borders between the three traditional branches of law, between state and non-state, as well as between legal and social approaches, research must be conducted in interdisciplinary cooperation involving the three branches of law, their major subject areas, as well as the social, political, and economic sciences. In contrast, purely legal research conducted without the insight of the social sciences could establish normative models but could make no broader scientific statements about social cause-effect relationships between problems and solutions in law. Thus, a decisive added-value of legitimacy, acceptance, and effectiveness of law in the global world emerges only in that normative findings – based on the comparison and evaluation of systems of law – and social-scientific interrelationships – studied empirically – are brought together.

In addition, international cooperation is necessary. This interdisciplinary and international scientific reflection on research questions is
complicated by the fact that various disciplines of the human sciences, various disciplines of law, national approaches, and scientific traditions converge and perhaps clash with one another. Continental European (legal) science is based on a systematic and rational approach. Anglo-American legal tradition, in contrast, is more pragmatic and – perhaps as a result of its more limited doctrinal design – very innovative. Thus, the differing traditions and the specific questions of the various subdisciplines must be brought together.

4. Research Gains

Finally, future research should develop a theory of the legal order in a global world. Not only can such a theory shed new light on the fundamental issues of our time, it can also provide new answers to pressing social questions of the present and future.

In view of the expected theoretical and practical gains, three areas of basic research appear especially promising: further analysis of legitimacy, control, and acceptance of non-state (international and private) norms can supply an important contribution to a more just order in a global world and serve as the basis for better models of international and supranational governance.97 The in-depth comparative study of the various models for the creation of transnationally effective regulations promises more effective regulation by the various national and international institutions.98 The increased inclusion of non-state (especially private) rule-making and the possible connex of non-state and state regulation in the form of co-regulation may well lead to the unburdening of the legal system and may bring forth forms of control that are much more effective than the purely law-based control systems that have been in use up to now.99

Thus, new insights regarding the complex questions of the legal order in a global world will be generated less in the core areas of traditional disciplines and more in the interdisciplinary boundary areas of the various subdisciplines of law (private law, public law, and criminal law), sociology, legal anthropology, and criminology as well as in comparative international research.

97 On this point, see the references in notes 45–80.
98 See the reference in note 70.
99 On the link between national economic criminal law and private compliance measures, see the reference at note 25.
Joint Criminal Enterprise in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and the Prosecution of Senior Political and Military Leaders: The *Krajišnik* Case

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I. Introduction

The Joint Criminal Enterprise (JCE) doctrine as a mode of personal criminal liability\(^1\) has emerged in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) since the Tadić Appeal Judgement in 1999\(^2\) and has been subsequently relied upon also by other international criminal courts and tribunals.\(^3\) Since then, there

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3 Based on article 6 of their respective Statutes, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone have incorporated the JCE doctrine into their jurisprudence. On this particular issue see A.M. Danner/ J.S. Martinez, “Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law”, *Cal. L. Rev.* 93 (2005), 75 et seq. (154 et seq.). The doctrine has been relied upon also by the Extraordinary Chambers in the Courts of Cambodia (ECCC). In this regard, see ECCC, in the Matter of the Co-
have been many occasions for the ICTY to pronounce on JCE, which can now be considered as a consolidated concept of international criminal law, capable of providing a legal framework to incriminate perpetrators of mass crimes whose particular structure and magnitude are a direct consequence of their international nature. In fact, international crimes such as war crimes, crimes against humanity and genocide are mainly committed against a large group of victims and are often extended across wide geographical areas. One basic characteristic of those crimes (which distinguishes them from the domestic criminal offenses) is that behind their commission there is usually a collective plan or policy implemented by individuals acting at different levels and in different capacities, each of them giving different contributions to the achievement of the final goal. The person concretely committing the crime can often be regarded as a mere participant in a broader criminal venture planned and organised by senior political or military leaders. Under these circumstances, the exclusion or the underestimation of the latter’s criminal liability would disregard their crucial role in the commission of the offence as well as the “moral gravity” of their behaviours.

The Yugoslav Tribunal relies on JCE as the best theory to address the issues deriving from, on the one hand, the general main features of many international crimes and, on the other, the evident inadequacy of the modes of criminal liability expressly envisaged in the ICTY Statute to cover the various intensities of culpability of the participants in a common criminal purpose. Thus, since Tadić, the ICTY has been satis-

Prosecutors’ Appeal of the Closing Order against Kaing Guek Eav “Duch”, 001/18-07-2007-ECCC/OCIJ (PTC 02), Pre-Trial Chamber, Amicus Curiae Brief Submitted by the Centre for Human Rights and Legal Pluralism, McGill University, Montreal (Québec) Canada, 8 August 2008; in the same case, Amicus Curiae Brief the Matter of the Co-Prosecutors’ Appeal of the Closing Order against Kaing Guek Eav “Duch” submitted by Professor Kai Ambos, 8 August 2008; Amicus Curiae Brief of Professor Antonio Cassese and Members of the Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine, 27 October 2008, regarding the question whether JCE can be applied by the International Criminal Court, see below.

A. Nollkaemper, “Introduction”, in: A. Nollkaemper/ H. van der Wilt (eds), System Criminality in International Law, 2009, 1 et seq., where “system criminality” is defined as “a situation where collective entities order or encourage international crimes to be committed, or permit or tolerate the committing of international crimes”, (16).
fied that in cases of collective criminality every member of the joint endeavour may be held equally responsible as a co-perpetrator, even if materially and causally remote from the actual commission of the crimes. In its subsequent jurisprudence, the Tribunal has mainly used the JCE notion to frame the criminal responsibility of political and military individuals who had contributed to the perpetration of the criminal offences in a wider context.

In this regard, the recent Krajinić Trial and Appeal Judgements confirm some of the rulings already delivered in previous “leadership” pronouncements and introduce a new key concept for the application of the doctrine under consideration. Being the first Judgements delivered by the ICTY in a “large leadership case” basing on JCE, their relevance for the analysis of its application to high-ranking political and military leaders becomes evident. In fact, the importance of the common purpose doctrine to these situations has been highlighted by the Trial Chamber itself, which described it as the “most appropriate” mode of liability due to the very nature of the case.

II. The Origins of JCE in the ICTY Jurisprudence

In the Delalić Trial Judgement, the ICTY explicitly referred for the first time to the so-called “common-purpose’ doctrine”, meaning the knowing “participation in a criminal venture with others”, as a mode of individual criminal liability. The Chamber seemed, however, not to clearly distinguish this theory from other forms of individual liability such as “aiding and abetting”. An unambiguous and definite statement in this regard was made by another Trial Chamber some weeks later in the Furundžija case, where it was expressly stated that “two separate categories of liability for criminal participation appear to have crystallized in international law – co-perpetrators who participate in a joint criminal enterprise, on the one hand, and aiders and abettors, on the other.”


6 ICTY, Prosecutor v. Anto Furundžija, IT-95-17-T, Trial Chamber, Judgement, 10 December 1998, para. 216.
As already mentioned, JCE has been subsequently spelled out in detail in the Tadić Appeal Judgement of 1999.\textsuperscript{7} The issue had been raised by the Prosecutor, who – in his second ground of cross-appeal – had maintained that the appellant could be held criminally liable for the killing of five men by the armed group which he himself belonged to, even though there was no evidence that he had personally perpetrated any of the crimes charged. The Appeals Chamber approached the Prosecution’s submission by firstly underlying that both in national legal systems as well as at the international level “the foundation of criminal responsibility is the principle of personal culpability”, which requires that nobody may be accountable for criminal offences in which he has not personally engaged or participated. The concept of \textit{nulla poena sine culpa} was considered to be provided for in article 7 (1) of the ICTY Statute, which stipulates that,

“\textit{A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime.}” (emphasis added)

By interpreting the provision in the light of the Statute’s object and purpose, the Appeals Chamber affirmed that the Tribunal’s jurisdiction was meant to extend over all those persons responsible for serious violations of international humanitarian law: namely, not only over those who materially perform the crimes, but also over those who contribute to their commission by a group or by some members of the group in execution of a common criminal purpose. This conclusion was supported by the express wording of the Report of the Secretary-General on the establishment of the ICTY, which states that “\textit{all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations.”} (emphasis added)

In the light of these considerations, the compatibility between the notion of individual culpability enshrined in the Statute and that of common purpose suggested by the Prosecution was then examined under the following main aspects,

“(i) whether the acts of one person can give rise to the criminal culpability of another where both participate in the execution of a

\textsuperscript{7} Tadić Appeal Judgement, see note 2, paras 172 et seq.
common criminal plan; and (ii) what degree of mens rea is required in such a case.”

The meaning and content of both elements was derived by the Appeals Chamber from general international law. Despite the fact that the Tribunal’s Statute does not make any explicit reference to JCE, it was held that the notion of collective criminality under consideration is “firmly established in customary international law” and that it is implicitly upheld in the ICTY Statute. According to the Appeals Chamber, a detailed perusal of the World War II case-law showed that the JCE had been applied in three distinct situations and that it may be divided into three different categories: basic, systematic and extended.

With regard to the actus reus, the Appeals Chamber stated that all forms of JCE share the same material elements, namely a plurality of persons participating in the criminal plan, the existence of a common purpose which amounts to or involves the commission of a crime, and, finally, the accused’s participation in the common design.

The basic form of JCE concerns cases where “all participants to the criminal enterprise possess the same criminal intention to commit a crime (and one or more of them actually perpetrate the crime, with intent).” Voluntary participation in the criminal plan is also required. The second category of JCE, which was defined as a “variant” of the basic form, differs from the latter in that it refers to the so-called “concentration-camps”, namely cases where the crimes are committed due to the existence of an organised system of ill-treatment. As to the requisite mens rea, the Prosecution shall prove the accused knowledge of the criminal concerted system, his awareness of its nature and his voluntary and active participation in its enforcement.

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9 Tadić Appeal Judgement, see note 2, para. 185.
11 Tadić Appeal Judgement, see note 2, para. 220.
12 Ibid., para. 227.
cases involving the commission of an act which, even if falling outside the common plan or purpose, was nevertheless a natural and foreseeable consequence of the execution of the criminal design itself. The individual responsibility of the participants in the common purpose for the commission of the crimes which were not agreed upon arises only if it is established that “(i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk.”

In the light of these considerations, and especially of the acknowledged customary nature of JCE, the Appeals Chamber concluded for the theory’s compatibility with the principle of individual criminal culpability. It was then determined that responsibility under that doctrine falls under article 7 (1) of the ICTY Statute and in particular within the scope of “committing” a crime; the immediate consequence of this finding is that all participants in the JCE may be regarded as co-perpetrators of the criminal act(s) performed by the actual perpetrator and bear the same individual liability.

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15 Tadić Appeal Judgement, see note 2, para. 228.

16 Ibid., para. 190: “[T]he Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution. The Statute does not stop there. It does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions.” See also ICTY, *Prosecutor v. Milomir Stakić*, IT-97-24-T, Trial Chamber, Judgement, 31 July 2003, para. 438.

17 Pursuant to article 24 (2) of the Statute, “[I]n imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.” Thus, the varying degrees of culpability, mainly dependant on the different role played by each member in the implementation of the criminal plan, may be taken into account for the purposes of sentencing and result in the imposi-
The Appeals Chamber further stressed that JCE must be clearly distinguished from aiding and abetting, due to some general differences between these two forms of criminal responsibility. In this regard, the Judges clarified that the aider and abettor is always an accessory to a crime perpetrated by another person and that there is no need to prove the existence of a common plan or purpose, since the principal perpetrator may not even be aware of the other’s contribution. Moreover, it was emphasised that the aider and abettor willingly gives practical assistance, encourages or lends moral support to the author of the crime and that this contribution has a substantial effect upon its perpetration. On the contrary, the most recent ICTY pronouncements state that such a high (substantial) involvement referred to the performance of the criminal act is not required under JCE, as it is sufficient that the member of the enterprise merely furthers the common plan or purpose giving a significant contribution thereto.\textsuperscript{18} As far as the subjective element is concerned, the Appeals Chamber explained that, in the case of aiding and abetting, the accessory perpetrator is aware that his acts assist the principal in the commission of the crime; in this aspect resides another divergence from the JCE, since in this latter case a higher degree of mental attitude (namely, the different forms of intent envisaged above) is required.\textsuperscript{19}

\textsuperscript{18} See below, Part III.
\textsuperscript{19} Tadić Appeal Judgement, see note 2, para. 229. The differentiation between committing and aiding and abetting a crime is not without importance, but may play a role at the sentencing stage. In fact, aiding and abetting generally involves a lesser degree of culpability than the commission of the criminal act.
III. The Application of the JCE Theory before the ICTY after the Tadić Appeal Judgement

In its successive case-law, the ICTY has further specified the content of JCE’s material and mental elements. Various controversial issues, common to each of the three categories, emerged from the concrete application of the doctrine. These included, among others, the level of the accused’s contribution to the performance of the criminal design in order to show his participation in the common endeavour, the need of an “express agreement” between the actual perpetrator and the other members of the group and, lastly, the strength of the link among the JCE affiliates. These jurisprudential debates demonstrate not only the impreciseness of the doctrine initially articulated by the Tadić Appeal Judgement, but also some attempts of ICTY Judges at avoiding creative legal theories by not extending the accused’s liability beyond the limits of individual criminal culpability. In fact, after the Tadić case, JCE has been frequently utilised by the Prosecution as a better way to assign liability than the other forms specifically provided for in the Statute, since it allows an acceptance of the same level of responsibility for every member of the common design, even if not physically involved in the actual commission of the crime.

20 For an overview of the issues which have been clarified by the subsequent ICTY jurisprudence see A. Bogdan, “Individual Criminal Responsibility in the Execution of a Joint criminal Enterprise in the Jurisprudence of the ad hoc International Tribunal for the Former Yugoslavia”, *International Criminal Law Review* 1 (2006), 63 et seq.

21 On this particular trend, see N. Piacente, “Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Policy”, *Journal of International Criminal Justice* 2 (2004), 446 et seq.; S. Powles, “Joint Criminal Enterprise. Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?”, *Journal of International Criminal Justice* 2 (2004), 606 et seq. As noted by Danner/ Martinez, see note 3, 108, the possibility for the Prosecution to rely on JCE has been significantly increased since the Krstić Trial Judgement (ICTY, *Prosecutor v. Radislav Krstić*, IT-98-33-T, Trial Chamber, Judgement, 2 August 2001, para. 602), where it was ruled out that the accused could be convicted on the basis of JCE even if the Indictment did not explicitly refer to it. In the subsequent Simić Trial Judgement (*Prosecutor v. Blagoje Simić, Miroslav Tadić, Simo Zarić*, IT-95-9-T, Trial Chamber, Judgement, 17 October 2003), it was then argued that “[v]arious labels have been used by the Appeals Chamber and Trial Chambers of the Tribunal to refer to a theory of criminal liability based on the participation
The doctrine’s attitude towards being extensively resorted to and creating a potentially immeasurable class of (equally responsible) co-perpetrators explains the Tribunal’s efforts to identify the proper limits of this mode of individual criminal responsibility and to define its scope of application in the light of the general principles on individual criminal culpability enshrined in the Statute. In this regard, the ICTY jurisprudence tends however to fluctuate from a broad to a narrow approach of the JCE concept. In some cases, the Tribunal seems in fact to highlight the importance of JCE and its invaluable ability to “capture multifarious criminal conduct of high-ranking political and military individuals dispersed across vast geographical regions and temporal frameworks”; while, in others, the fears of possible dangers deriving from an expansive and liberal interpretation and application of the doctrine prevail in the Judges’ final considerations regarding the propriety of its use. An overall examination of the ICTY’s jurisprudence seems, of more than one person in the execution of a common criminal plan. ‘Joint criminal enterprise’, however, appears to have been preferred […]. ‘Acting in concert together’ plainly means acting jointly, and on the face of it in a criminal context, would refer to co-perpetratorship. It is commonly accepted that a reference to ‘acting in concert together’ means acting pursuant to a joint criminal enterprise” (para. 149). It follows from these findings that any use of the mentioned wordings in the Indictments would be considered as an implicit reference to JCE and would thus allow the Chambers to resort to this doctrine even if not expressly pleaded in the initial prosecutorial act.

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22 See ICTY, Prosecutor v. Milorad Krnojelac, IT-97-25-A, Appeals Chamber, Judgement, 17 September 2003, para. 116: “The Appeals Chamber holds that using the concept of joint criminal enterprise to define an individual’s responsibility for crimes physically committed by others requires a strict definition of common purpose. That principle applies irrespective of the category of joint criminal enterprise alleged. The principal perpetrators of the crimes constituting the common purpose […] or constituting a foreseeable consequence of it should also be identified as precisely as possible.”


24 In his Separate and Partly Dissenting Opinion to the Simić Trial Judgement, see note 21, Judge Lindholm even dissociated himself from the application of the JCE concept to the case at hand as well as generally.
however, to show that the first tendency is mainly preferred. An analysis of some leading cases may clarify these considerations.

The Krstić Trial Judgement26 found the accused to be a member of two distinct but related JCEs having the aim to “forcibly ‘cleanse’ the Srebrenica enclave of its Muslim population and to ensure that they left the territory otherwise occupied by the Serbian forces”27 and to “guarantee that the Bosnian Muslim population would be permanently eradicated from Srebrenica.”28 These crimes were considered to amount to, respectively, inhumane acts and persecution as crimes against humanity, and genocide. During the relevant indictment period, the accused had been appointed as VRS29 Drina Corps Commander, a military formation whose involvement in the furtherance of the entire Srebrenica operation had been of utmost importance. According to this leading position, the doctrine of common purpose was considered to be the most appropriate concept to frame the accused’s criminal liability. In this regard, the Trial Chamber characterised Krstić’s assistance as “tangible and substantial”, his technical support as “unavoidable”,30 the control exercised over the troops as “effective”31 and his participation in the common design as “clearly indispensable.”32 It finally concluded that, given the key position held by the accused at the leadership level, he could be considered as a co-perpetrator to the crimes committed in furtherance of the criminal endeavour.

The findings about Krstić’s participation in the genocidal JCE were subsequently dismissed on appeal because of insufficient proof of his asserted intent to commit genocide. He was therefore convicted as aider and abettor to genocide and not as a principal perpetrator. However, the re-evaluation of the evidentiary material raised no doubt about the existence of a criminal design concerning persons other than the defendant. Nor did it lead to different conclusions regarding the main aspects of the JCE doctrine as defined in the Trial Judgement, including the high

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25 In this regard, see Barthé, see note 1, 101 et seq.
26 Krstić Trial Judgement, see note 21.
27 Ibid., para. 610.
28 Ibid., para. 619.
29 The VRS was the military force of the self-proclaimed Republika Srpska and its leader was General Ratko Mladić.
30 Krstić Trial Judgement, see note 21, para. 624.
31 Ibid., para. 631.
32 Ibid., para. 644.
threshold of the accused’s involvement giving rise to his responsibility under JCE.

The level of contribution to the implementation of the common plan required by the Tribunal’s relevant case-law tends however to be somewhat lower. In fact, the Kvočka Trial Judgement stated that “the participation in the enterprise must be significant,” meaning that the conduct under consideration shall make the common design “efficient or effective.” On appeal, the Tribunal pronounced itself again on the issue and asserted that the accused participation needs not to be a *sine qua non* one “without which the crimes could or would not have been committed.” Consequently, it was concluded that “in general, there is no specific legal requirement that the accused make a *substantial* contribution to the joint criminal enterprise.”

These findings echo and contextually further extend a previous statement made by the same Chamber in the Vasiljević case with regard to the threshold of participation required: there, it had been ruled out that “it is sufficient for a participant in a joint criminal enterprise to perform acts that *in some way* are directed to the furtherance of the common design” (emphasis added). As explained by commentators, JCE’s broad scope of application defined in the Kvočka 2005 Appeal Judgement is in line with the essence of the liability theory under discussion, because “it is the state of mind with which the contribution is made, and not the significance of the contribution, that marks the distinction between principals and accessories to the crimes.”

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33 ICTY, *Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić, Dragoljub Prcać*, IT-98-30/1-T, Trial Chamber, Judgement, 2 November 2001, para. 309, which deals in particular with the second category of JCE relating to prison camp cases.


35 Ibid., para. 97.


37 Olásolo, see note 1, 163, where the author relies on ICTY, *Prosecutor v. Milan Milatović, Nikola Sainović, Dragoljub Ojdanić*, IT-99-37-AR72, Appeals Chamber, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003, para. 20, which states that “*insofar as* a participant shares the purpose of the joint criminal enterprise (as he or she must do) as opposed to merely knowing about it,
As anticipated, the doctrine’s application to concrete situations gave rise to some problematic issues also with regard to the level of connection among the members of the common endeavour and the actual perpetrator of the criminal acts. In other words, it was questioned whether the person who physically commits the criminal act must necessarily be a participant to the common design. The Brdanin Trial and Appeal Judgements suggested two differing solutions in this regard, which reflect the Tribunal’s different approaches to the use of JCE.

The Brdanin Trial Chamber\(^{38}\) dismissed the Prosecution’s allegations regarding the accused’s participation in a vast criminal endeavour to forcibly remove Bosnian-Muslims and Bosnian-Croats from Bosnian-Serb held territory and did not consider JCE to be the correct concept for the case at issue. This conclusion was reached despite the fact that the accused had been a leading political figure and had held key positions at the municipal, regional and republic levels during the indictment period. With special regard to the first and the third category of JCE, it was stated that this form of liability could arise only if it could be proven beyond reasonable doubt that the accused had “an understanding or entered into an agreement” with the principal perpetrators.\(^{39}\) Although the mutual arrangement requirement had not been expressed in the Tadić Appeal Judgement, it was nevertheless justified by the consideration that that Appeals Chamber, in defining JCE, “had in mind a somewhat smaller enterprise than the one that is invoked in the present case.” Additionally, “given the extraordinary broad nature” of the criminal endeavour the defendant was involved in and the fact that he was “structurally remote” from the crimes charged, JCE could not be regarded as an appropriate mode to describe his responsibility.\(^{40}\) In this regard, the Trial Chamber seemed not to be aware of the doctrine’s unique value, especially in so-called “leadership cases” where the politi-


\(^{39}\) Ibid., para. 347. It has to be noted that this statement did not consider a former Appeals Chamber’s Judgement, where (referring to the second category of JCE) it had been stated that “it is less important to prove that there was a more or less formal agreement between all the participants than to prove their involvement in the system” (*Krnojelac* Appeal Judgement, see note 22, para. 96).

\(^{40}\) Ibid., para. 355.

The stringent approach described above was, however, reversed in the subsequent 2007 Appeal Judgement, where JCE’s notion and scope of application were broadened again. This might be due to the fact that the Trial Chamber’s assertions expressly contradicted some previous interlocutory appeal decisions where a different view had already been expressed. In fact, with special regard to the nature and dimension of JCE falling under the Tribunal’s jurisdiction as provided for by customary international law, the Appeal Judges had stated that the JCE doctrine can apply to a massive criminal campaign and that there is no geographical limitation on it.\footnote{ICTR, \textit{Prosecutor v. Édouard Karemera, Mathieu Ngirumapaye, Joseph Nzirorera}, ICTR-98-44-AR72.5, ICTR-98-44-AR72.6, Appeals Chamber, Decision on Jurisdictional Appeal: Joint Criminal Enterprise, 12 April 2006.} Moreover, it had also been established that “liability for participation in a criminal plan is as wide as the plan itself, even if the plan amounts to a nation-wide government-organized system of cruelty and injustice.” In other words, the accused’s liability arising via the concept under consideration “may be as narrow or as broad as the plan in which he willingly participated. The fact that certain prosecutions [in the post-World-War II framework] charged participation in small-scale plans involving few victims or in the operation of specific concentration camps does not suggest that customary international law forbade punishment for genocide [nor for other international crimes] committed through plans formulated and executed on a nationwide scale.”\footnote{ICTR, \textit{Prosecutor v. André Rwamakuba}, ICTR-98-44-AR72.4, Appeals Chamber, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004, para. 25.}

Relying on the post-World War II case-law as well as on former ICTY jurisprudence, the \textit{Brđanin} Appeals Chamber accepted the Prosecution’s submissions that JCE may even consist only of members who do not materially commit the crimes agreed upon, but who use or otherwise instrumentalise other individuals to have the crimes carried
out. Consequently, the actual perpetrator shall not necessarily be a member of the common criminal design. As to the asserted requirement of the existence of an understanding between the JCE participants and the outside principal perpetrators to commit the particular offences charged, the Appeal Judges, again basing on the Tribunal's former decisions, stated that JCE responsibility arises for all its members even if no agreement is demonstrated. Indeed, what matters is that the perpetrated crimes form part of the common purpose and that one of its members, when using the principal perpetrator as "tool" to execute it, acted in furtherance of the common plan. According to the Appeals Chamber, the existence of such a link shall be assessed on a case-by-case basis.

In this pronouncement, the Tribunal seemed to re-discover JCE's essential rationale as the most effective means to attach individual criminal responsibility to the leaders of criminal activities, and did not share the concerns about possible risks deriving from an unrestrained use of the doctrine. In this regard, it was stated that a correct interpretation of the theory may not exclude large-scale cases from its scope of application, nor, at the same time, turn it into an "open-ended concept that permits convictions based on guilt by association." On the contrary, the Appeals Chamber emphasised that the requirement of the accused's participation, if accompanied by the requisite mens rea, rigorously delimits JCE's scope of application by distinguishing it from guilt based on mere membership in a criminal organisation. The latter consideration was apparently directed at expressly confronting the concerns that

45 Brdanin Appeal Judgement, see note 44, paras 416 et seq.
46 Ibid., para. 428.
47 Ibid., para. 431: "Where all these requirements for JCE liability are met beyond reasonable doubt, the accused has done far more than merely associate with criminal persons. He has the intent to commit a crime, he has joined with others to achieve this goal, and he has made a significant contribution to the crime's commission."
a broad reading of JCE may be equivalent to liability by association, which is not compatible with the principle of individual culpability encompassed in the Statute.

IV. The Krajinić Trial and Appeal Judgements: The Consolidation of JCE’s Application to “Leadership Cases”

As anticipated, the Krajinić Judgements constitute an important moment in the ICTY’s jurisprudence, as they have imposed the first conviction in a large “leadership case” applying JCE.48 While both the Brdanin Trial and Appeals Chambers had (partly) dismissed the application of the common purpose doctrine and opted for other modes of individual criminal liability, in the case under consideration JCE was found to be the best way to describe the accused’s responsibility due to the particular nature of his involvement in the commission of the crimes charged. Equally, the application of the theory to high-ranking political and military leaders appears problematic; the structural and geographical remoteness from the crime scene may constitute an apparent obstacle to the continuity of the link between the actual (usually, low-level) perpetrators and the orchestrators of the collective criminal design.

From October 1991 until November 1995 the accused had performed the official role of the President of the Bosnian-Serb Assembly, which was vested by the Constitution of the self-proclaimed Republika Srpska with constitutional and legislative authority. In this capacity, in May 1992 Krajinić had been included in the so-called Expanded Presidency, which also comprised the three original members of the Republic Presidency and the Prime Minister.49 Additionally, he was a close friend of the President of the Bosnian-Serb Republic, Radovan

48 In the Indictments against Slobodan Milošević (ICTY, Prosecutor v. Slobodan Milošević, IT-02-54), it had been alleged that the then President of the Federal Republic of Yugoslavia had participated, together with other individuals, in a joint criminal enterprise extending to three different countries (Kosovo, Croatia and Bosnia and Herzegovina) and comprising a multitude of criminal offences. However, Milošević’s death on 11 March 2006 determined the termination of the proceedings against him before any Judgement could be rendered.

49 The Expanded Presidency’s members were thus Radovan Karadžić, Biljana Plavšić, Nikola Koljević, Branko Đerić and the accused.
Karadžić, and one of the closest associates of the VRS Main Staff commander, General Ratko Mladić. These positions and associations conferred Krajišnik not only a formal authority but also a de facto control over the Bosnian-Serb political and governmental organs and its armed forces. Basing on these contentions, the indictment had alleged that the accused had participated with other prominent political figures in a JCE whose objective was the permanent removal, by force or other means, of Bosnian Muslims and Bosnian Croats from large parts of Bosnia-Herzegovina through the commission of the crimes encompassed in the Statute. In particular, the Tribunal found that there was a JCE whose members were situated throughout the territories of the Bosnian-Serb Republic and that there was a centrally-based core component of the group, which included – among others – the accused. The JCE rank and file was found to consist of local politicians, military and police commanders and paramilitary leaders, who were based in the regions and municipalities and maintained close links with the leadership. The factual situation the Trial Chamber was faced with was thus extremely complex, especially given the participation of a multitude of persons having different ranks and positions.

The Trial Chamber established the defendant’s responsibility by firstly focusing on his (and, more generally, the Bosnian-Serb leadership’s) knowledge and support of the various operations and activities carried out at different levels in furtherance of the JCE’s objective. In this regard, it was established that there was no one else who could be better informed about the criminal events taking place in the contested territories than the Assembly President who was, de jure and de facto, one of the most important figures in the political and military establishment during the indictment period. Additionally, given the “central

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50 ICTY, Prosecutor v. Momčilo Krajišnik, IT-00-39-T, Trial Chamber, Judgement, 27 September 2006, Parts I., II., III.
51 ICTY, Prosecutor v. Momčilo Krajišnik and Biljana Plavsić, Amended Consolidated Indictment, 7 March 2002. The accused was charged with genocide, persecutions on political, racial and religious grounds, extermination, murder, deportation and inhumane acts as crimes against humanity, and murder as violation of the laws and customs of war.
52 The extreme complexity of the JCE structure was specifically stressed by the Trial Chamber, which stated that: “The Chamber does not find it possible on the evidence to specify fully the membership of the JCE; and even if it were possible, it is neither desirable nor necessary to do so” (Krajišnik Trial Judgement, see note 50, para. 1086).
53 Ibid., Part VI.
position” Krajišnik had held in the JCE, it was argued that he had “not only participated in the implementation of the common objective but [had been] one of the driving forces behind it.”

From these circumstances the Trial Judges inferred the accused's intent to commit the crimes in furtherance of the common endeavour.

Against this backdrop, the Chamber analysed and further specified the meaning of the three essential JCE elements defined in the Tadić Appeal Judgement – namely, plurality of persons, common objective and contribution. As far as the first aspect is concerned, the Trial Chamber basically focused its attention on the existence of “links forged in pursuit of a common objective” between individuals which “transform” them into members of a joint criminal plan. In this regard, it accepted the Prosecutor’s submissions relating to the difference between the perpetrators of crimes acting as part of a JCE and the persons not part of it and nevertheless committing similar offences. Among the so-called “distinguishing factors” some indicia – such as the explicit or implicit ratification of the perpetrator’s acts or the consistency of the perpetrated crimes with the pattern of similar acts committed by JCE members against similar kinds of victims – were enumerated by the Prosecution in a non-exhaustive list and considered by the Trial Chamber to be important aspects capable of proving the real connections and relationships among persons acting together in furtherance of a common design. In fact, “a person not in the JCE may share the general objective of the group but not be linked with the operations of the group” itself. On the other hand, JCE affiliates “rely on each other’s contributions, as well as on acts of persons who are not members of the JCE but who have been procured to commit crimes, to achieve criminal objectives on a scale which they could not have attained alone.”

As a consequence of the “large and indefinite group of persons” forming the JCE which the accused was involved in and the impossibility to determine its detailed membership, it was held that the decisive element was the defendant’s sufficient connection and concern with “persons who committed crimes pursuant to the common objective in various capacities, or who procured other persons to do so.”

As to the common objective, the Tribunal characterised it as “fluid in its criminal means,” i.e. comprising the possibility of an expansion

54 Ibid., para. 1119.
55 Ibid., para. 1082.
56 Ibid., para. 1086.
57 Ibid., para. 1098.
of the criminal acts aimed at its implementation. This may occur, according to the Trial Chamber, when new types of crimes are committed and JCE members accept the common design to be carried out also through the perpetration of different criminal offences and to be no longer limited to the original ones. In this regard, (discriminatory) deportation and forced transfer were considered to be the “original crimes”, while other offences like persecution, murder and extermination were added at a later stage; the inclusion of new criminal acts among the means through which the joint objective was meant to be achieved came to redefine and enlarge the range of crimes necessary to the latter’s realisation. Basing on the above-mentioned findings regarding Krajišnik’s overall information about the events occurring in the contended territories, the Trial Chamber drew the conclusion that he had accepted the greater set of acts and that he had nevertheless persisted in the furtherance of the criminal plan. According to the Trial Judges, this indicated the accused’s intention to pursue the criminal design even through the new means.

Regarding the last aspect, the Tribunal based its findings on the premise that Krajišnik’s role in the realisation of the criminal plan was to help establish the party and state structures that were “instrumental” to the commission of the crimes. The accused’s involvement was then measured by analysing each of the modes of contribution alleged by the Prosecution (such as his promotion and encouragement of the Bosnian Serb governmental policies intended to develop JCE’s objectives); the appraisal of the evidentiary material confirmed Krajišnik’s overall role in the implementation of the criminal endeavour. The accused’s contribution was held to have been so manifestly decisive, his position and authority in the political and military institutions so high, that the Trial Chamber was satisfied that his participation was significant enough to demonstrate his membership in the JCE.

It has to be noted that the above-mentioned findings on Krajišnik’s responsibility are to be read in the light of a general introductive statement, which points out the Tribunal’s idea about JCE’s fundamental es-

58 Ibid., para. 1118. It has to be noted that the present Judgment based its reasoning on the basic form of JCE, and particularly on the distinction between the “original” and the “added” crimes as means of furthering the JCE’s objective, both of which are intended by the members of the common design.

59 Krajišnik Trial Judgement, see note 50, paras 1120-1121.
sense. Referring to the first two aspects (plurality of participants and common objective), it was argued that,

“It is the common objective that begins to transform a plurality of persons into a group or enterprise, as this plurality has in common the particular objective. It is evident, however, that a common objective alone is not always sufficient to determine a group, as different and independent groups may happen to share identical objectives. Rather, it is the interaction or cooperation among persons – their joint action – in addition to their common objective, that makes those persons a group. The persons in a criminal enterprise must be shown to act together, or in concert with each other, in the implementation of a common objective, if they are to share responsibility for the crimes committed through the JCE.”  

This declaration was expressly directed at overruling the different approach taken in the Brđanin Trial Judgement, where proof of an understanding or agreement to commit the crimes at issue had been required. In fact, the mentioned passage concludes as follows,

“A concern expressed by the Trial Chamber in Brđanin about the issue of alleged JCE participants acting independently of each other, is sufficiently addressed by the requirement that joint action among members of a criminal enterprise is proven.”

Thus, this pronouncement introduced a key concept in the interpretation of the JCE: namely, the so-called “joint action” between a plurality of individuals, which constitutes the connection making them a group capable of acting jointly and in reciprocal coordination. The requirement of an organised action stresses the substantial connections among JCE affiliates and does not focus on formal and more rigorous aspects such as evidence of an agreement or understanding. In fact, the Trial Judgement is principally aimed at assessing whether Krajišnik acted in line with the common criminal plan. Once satisfied about the existence of such an involvement and coordinated work, the Chamber concluded that the accused committed the crimes charged as a member of the JCE.

On appeal, Krajišnik was authorised to represent himself and to retain the services of two counsels on the special subject of JCE. Addi-

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60 Ibid., para. 884.
61 As mentioned above, the Trial Chamber’s decision on this issue was subsequently reversed by the Appeals Chamber.
62 Krajišnik Trial Judgement, see note 50, para. 884.
tionally, the Appeals Chamber invited the participation of an *amicus curiae* to assist it by arguing in favour of the appellant’s interests. Large parts of the Judgement were dedicated to the review of the trial findings on the common purpose doctrine. This determined a new analysis of some main aspects of the concept as specified therein. Following the Tribunal’s jurisprudential trend, the higher Chamber seemed to opt for a narrower reading and application and, in this context, a more precise assessment of the evidentiary material at its disposal.

In his third ground of appeal, *amicus curiae* had argued that the Trial Chamber had erred in failing to give an exhaustive list of the participants to the JCE and in referring to generic groups without identifying the single individuals. In fact, the Trial Judgement expressly stated that it was “neither desirable nor necessary” to fully specify the JCE membership: the identification of the alleged participants in the common criminal plan was accordingly voluntarily unspecific. Basing on the *Limaj* Appeal Judgement, the Appeals Chamber in the present case held that a precise indication by name was not necessary and that the required establishment of the identity of the alleged persons sharing a common plan could be satisfied even by referring to “categories and groups of persons.” However, notwithstanding this rather low standard of proof, it was found that the Trial Chamber had erred in this respect and that its identification of the JCE affiliates was “impermissibly vague.” The inclusion of persons in the common endeavour merely by their classification in its rank and file and the broad definition of the enterprise’s geographical scope by simply referring to “regions and municipalities of the Bosnian-Serb Republic” were finally considered ambiguous and erroneous. This sub-ground was thus granted.

The Appeals Chamber’s control over the correct application of JCE and its rather restrictive approach in this respect become evident if one looks at its analysis of the distinction between the “original” and the “expanded” crimes put forward in the Trial Judgement. In particular, it

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63 Ibid., para. 1086.
66 Ibid., para. 157.
was conceded that the “criminal means of realising the common objective of the JCE can evolve over time” and that “a JCE can come to embrace expanded criminal means, as long as the evidence shows that the JCE members agreed on this expansion of means.”

Nevertheless, despite the general endorsement of this particular reading of JCE’s basic form, the Trial Chamber was found to have committed a legal error in failing to indicate at which specific point in time the additional criminal acts had become part of the criminal design and whether the group members had any intent in this respect. In other words, it was for the Trial Judges not sufficient to merely state that the common objective was “fluid”, as they were required – according to the higher Chamber – to “precisely find how and when the scope of the common objective broadened in order to impute individual criminal responsibility to Krajišnik for those crimes that were not included in the original plan.”

The accused could thus not be held liable for the “expanded crimes” that fell outside the original common objective and the conviction for those acts was consequently quashed.

Subsequently, the Appeals Judges focused on the level of Krajišnik’s overall contribution to the criminal design with special regard to his political authority and activities and mainly confirmed the lower Chamber’s findings. It was firstly underlined that the participation of an accused in a JCE need not involve the commission of a crime, as it may only take the form of assistance in or contribution to the execution of the common purpose entailing the perpetration of criminal acts. In the light of these contentions, it was found that in the present case the accused’s central position in the establishment and furtherance of the criminal design had been rightly inferred by the Trial Chamber from various factual elements, such as his extreme and aggressive statements during the parliamentary sessions as well as his promotion and encouragement of the commission of crimes aimed at furthering the common plan. The Judgement therefore confirmed that Krajišnik’s contribution to the criminal design had been significant and that he had participated in its implementation in “various wide-ranging ways.”

In this respect, the appellant had asserted that the Trial Chamber had erred in fact and in law in finding him liable as a JCE member, as during the Indictment period he had merely carried out his political tasks within the lawful competences established by the Bosnian-Serb Constitution. In other

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67 Ibid., para. 163.
68 Ibid., para. 176.
69 Ibid., para. 217.
words, to convict him only because of his political activity would amount, according to Krajinišnik, to an erroneous erasure of the differences between “criminal conduct and legitimate political activity.”\textsuperscript{70} He thus argued that his actions could not be legally classified as any of the crimes sanctionable by the ICTY Statute. However, contrary to these allegations, the Appeals Chamber stated that,

“the Trial Chamber did not find that the political activities of Krajinišnik formed the \textit{actus reus} of any of the crimes against humanity of which he was convicted. Instead, Krajinišnik was convicted for crimes for which he was found criminally responsible under the mode of liability of JCE, which requires that the defendant ‘has made a significant contribution to the crime’s commission.’ The Tribunal’s jurisprudence does not require such contribution to be criminal \textit{per se}.”\textsuperscript{71}

As to the necessary link between the JCE members and the actual perpetrators of the crimes, who did not belong to the entourage of the senior political and military hierarchy, the Appeals Chamber recalled its findings in the Brdanin and Martić Judgements that “all JCE members are responsible for a crime committed by a non-JCE member if it is shown that the crime can be imputed to at least one JCE member, and that this JCE member – when using the non-JCE member – acted in accordance with the common objective.”\textsuperscript{72}

In the light of these conclusions, Krajinišnik’s contentions about JCE’s illegitimacy, its vulnerability to political influence and unsuitability to large-scale criminal ventures such as the one in the present case were also dismissed by the Appeals Chamber. The appellant was finally convicted to 20 years’ imprisonment.

\textsuperscript{70} Ibid., para. 688.
\textsuperscript{71} Ibid., para. 695. The Judgement then recalled that: “Moreover, the Appeals Chamber has repeatedly found that contribution to a JCE ‘may take the form of assistance in, or contribution to, the execution of the common purpose’ and that it is not required that the accused physically committed or participated in the \textit{actus reus} of the perpetrated crime. It is sufficient that the accused ‘perform acts that in some way are directed to the furthering’ of the JCE in the sense that he significantly contributes to the commission of the crimes involved in the JCE. For these reasons, the Appeals Chamber holds that the contribution to a JCE need not, in and of itself, be criminal. JCE counsel’s claim to the contrary is dismissed.”

\textsuperscript{72} Ibid., para. 235, citing the Brdanin Appeal Judgement, see note 44, paras 413, 430 and the Martić Appeals Judgement, see note 10, para. 68.
V. Does the Most Recent Case-Law on JCE establish the Leaders’ Responsibility in a Proper Way?

After the Tadić Appeal Judgement, the majority of ICTY cases to which the JCE doctrine has been applied involved the criminal responsibility of high-ranking political and military individuals. As a consequence of their leading positions, the accused had usually not personally participated in the perpetration of the crimes at issue and had only indirectly contributed thereto. Lacking a direct link, their involvement in the commission of the criminal acts was maintained through the broadening of the context taken into consideration and the acceptance that criminal liability may be incurred also for crimes carried out by persons not belonging to the enterprise but used or otherwise instrumentalised by its members in order to further the common criminal design. These conclusions are based on the assumptions that the customary notion of JCE is not limited to small enterprises and the Tribunal’s jurisdiction may thus embrace wide criminal endeavours.\(^{73}\)

The doctrine under consideration, and especially its particular interpretation and application to high-ranking individuals, in fact bypass the controversial issue regarding the attribution of individual criminal responsibility for crimes which have not been directly committed by the accused and to which he has contributed through his participation in a joint criminal design. The reasons for the Tribunal’s large use of JCE are twofold. From a material point of view, this concept does not require a direct link to the criminal acts the accused is charged with, as it postulates a “collective” perpetration of the crime. The fact that the accused joined and in some way furthered the common criminal plan suffices to hold him ultimately liable for the actions performed by other individuals acting in accordance with the criminal design itself. Additionally, ac-

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\(^{73}\) Part III., above. With regard to the Tribunal’s case law on JCE as applied to “leadership cases”, see Olásolo, see note 1, 202-231, where the author defines the notion of “joint criminal enterprise at the leadership level” in the following terms: “This approach reduces the number of participants in enterprises, which aim at committing international crimes in a broad territory over an extended period of time. Furthermore, all participants in the enterprise are members of the political and military leadership and the relationship among them is more of a horizontal than of a hierarchical or vertical nature” (at 206). See also E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, 2003, 351-360.
cording to the findings in the Brdanin and Martić Appeal Judgements, the actual perpetrator shall not necessarily be affiliated to the joint enterprise and does not even have to share its common purpose. As to the subjective element, intent to pursue the common plan is needed, while this is not the case with regard to each single crime falling under the scope of the JCE. The broad reading and use of the concept, as resulted in the Tribunal’s jurisprudence after Tadić, are facilitated by the fact that JCE “lacks clear definitions meticulously determining the scope of individual criminal responsibility.” The initial definition spelled out in Tadić could therefore be “adapted” in order to cover also the individual criminal responsibility of leading high-ranking individuals.

Despite the continuity of the ICTY’s case-law on this issue, the enunciation of the concept under consideration and especially its application to political and military leaders has been severely criticised by some scholars. Among the recurring concerns and disapprovals, it has more recently been argued that the Yugoslav Tribunal lacked comprehension regarding the limitations inherent to JCE and that “the way some Chambers interpret JCE seems to fall outside the scope of the Statute.” On the other hand, less critical approaches hold that the Tribunal’s jurisprudence “has addressed the problems posed by the application of the traditional notion of joint criminal enterprise to senior po-

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74 The findings of these Judgements appear to reflect the majority of current opinion emerged among the Appeals Chamber Judges as to how JCE should be interpreted as a mode of individual responsibility (see, in this regard, ECCC, in the Matter of the Co-Prosecutors’ Appeal of the Closing Order against Kaing Guek Eav “Duch” citing Pre-Trial Chamber, Amicus Curiae Brief Submitted by the Centre for Human Rights and Legal Pluralism, see note 3, para. 47).

75 For an analysis of the advantages of the JCE doctrine see Haan, see note 2, 174 et seq.

76 Limaj Appeal Judgement, see note 64, Partially Dissenting and Separate Opinion and Declaration of Judge Schomburg, para. 15. According to Judge Schomburg, this can give rise to two possible consequences: “On the one hand, the theory of joint criminal enterprise is too expansive as it de facto allows individuals to be punished solely for membership in a criminal organization, however vaguely defined that membership may be. On the other hand, it might be employed in too a limited way.”

77 Farhang, see note 23, 163.

78 Haan, see note 2, 168.
political and military leaders in a rather ‘creative’ manner” and express concerns regarding the dangers deriving from “overstretching the limits of criminal responsibility.” According to Professor Cassese, the application of JCE to senior leaders by extending “criminal liability to instances where there was no agreement or common plan between the perpetrators and those who participated in the common plan would seem to excessively broaden the notion, which is always premised on the sharing of a criminal intent by all those who take part in the common enterprise.”

Bearing in mind the above-mentioned considerations, one can interpret the Krajišnik Trial Judgement and especially the subsequent findings made on appeal as an accurate effort to understand the essential rationale of JCE and to apply its first category to “leadership cases” in conformity with the general principle of personal culpability. In this regard, the Trial Chamber in that case highlighted the importance of the “joint action” requirement for a proper reading of the notion under discussion. The Judgement’s reasoning appears to be entirely based on this particular aspect. As President of the Bosnian-Serb Assembly, Krajišnik was found to have not acted alone, but to be necessarily involved in the implementation of the Bosnian-Serb political design, whose ultimate goal was to maintain control over the conquered territories and to finally ethnically recompose them. Indeed, his political work was considered to be co-ordinated and concerted with the other members of the Bosnian-Serb leadership. Great emphasis was given to the accused’s knowledge and active support of the armed activities, the take-over operations and the crimes related to the attacks.

Also his journeys through the contended territories as well as his frequent meetings with the various municipal authorities to discuss the strategic situation and cooperation in logistical matters were considered to be indicative of his overall participation and contribution to the enactment of the mentioned joint endeavour. Moreover, the Trial Chamber affirmed that the accused’s style of leadership showed the existence

79 Olásolo, see note 1, 202.
80 H. van der Wilt, “Joint Criminal Enterprise and Functional Perpetration”, in: Nollkaemper/ van der Wilt, see note 4, 158 et seq. (163).
82 Krajišnik Trial Judgement, see note 50, paras 925-986.
83 Ibid., paras 987-1059.
of concrete and strong connections between the high-ranking individuals (such as Krajišnik himself, Karadžić and Mladić) and the low-level principal perpetrators. Far from being isolated and remote from the actual commission of the crimes forming part of the JCE, Krajišnik and his associates “intervened and exerted direct influence at all levels of Bosnian-Serb affairs, including military operations.”84 With regard to the actual policy of the Bosnian-Serbs, it was held that the decisive aspect “was the feedback loop of coordination and support that existed between the […] forces on the ground and the central leadership.”85

While the legal findings of the Krajišnik Trial Judgement have been appreciated by some commentators,86 it has also been argued that they are not supported by the evidentiary material at the Chamber’s disposal.87 A closer look at the factual statements would, accordingly, rather lead to the conclusion that the accused’s aggressive speeches had in fact created the “political climate in which violent crimes could prosper”, but that he was nevertheless only indirectly involved in those crimes.88 Hence, Krajišnik should not incur criminal responsibility under the JCE, given the doctrine’s inadequacy to “sustain the criminal responsibility of all persons who are somehow involved in a vast enterprise that engages in system criminality.”89

As pointed out above, the findings made by the lower Chamber were deeply reviewed on appeal and some conclusions as to the accused’s criminal liability under the JCE were dismissed. In fact, the Appeals Chamber’s central concern appears to have been the strict and careful application of that doctrine to the case at issue. To this end, the correctness of the Trial Judgement’s statements was tested with regard to the settled jurisprudence of the Tribunal. The Appeals Judges mainly based their reasoning on their previous pronouncements in Brđanin, relying on the notion of JCE proposed there and highlighting that “JCE member’s liability for crimes committed by a non-member of the JCE who is used by the former in accordance with the common objective, was within ‘the contours of joint criminal enterprise liability in custom-

84 Ibid., para. 987.
85 Ibid., para. 996.
86 Zahar/ Sluiter, see note 1, 254 et seq., where the authors argue that “the doctrine was given a new lease of life, in the Krajišnik case”; van der Wilt, see note 80, 175.
87 Ibid., 175.
88 Ibid.
89 Ibid., 181.
ary international law." The main aspects of Brdanin’s reading of the theory recalled by the Krajišnik Appeals Chamber concerned the required precise identification of the JCE affiliates, the level of material contribution to the furtherance of the common purpose by the accused, and the use of principal low-level perpetrators as “tools” by any member of the common plan. In the light of the defendant’s leading and hierarchically high-ranking position, the establishment of the last mentioned requirement seemed, again, to be the most controversial and problematic issue. There was in fact no direct link which proved Krajišnik’s involvement in the commission of the crimes and no direct connection between the Bosnian-Serb leadership on the one hand and the actual perpetrators on the other. In this regard, the Appeals Judges established that,

“[T]he Trial Chamber did not explicitly state that JCE members procured or used principal perpetrators to commit specific crimes in furtherance of the common purpose. The Appeals Chamber finds that, while the Trial Chamber should have made such a finding, this omission, in the circumstances of this case, does not as such invalidate the Trial Judgement, because the Trial Chamber otherwise established a link between JCE members and principal perpetrators of crimes forming part of the common objective.”

Against this background, in the analysis of the trial findings regarding this “otherwise established” link, special attention was given to the relationship between the centrally-based leadership and the different organs of the Republika Srpska’s apparatus as well as to any finding relating to the established connection between each JCE member and the principal perpetrators.

As to the first issue, the Appeals Chamber accepted the Trial Chamber’s implicit holding that an enterprise can embrace numerous participants acting at different levels and in reciprocal cooperation. In other

90 Krajišnik Appeal Judgement, see note 65, para. 290.
91 Ibid., paras 154-157.
92 Ibid., paras 209-219.
93 Ibid., paras 220-248.
94 Ibid., para. 237.
95 The Krajišnik Trial Judgement, see note 50, had in fact affirmed that “[i]t is clear that paragraph 7 of the Indictment alleges a JCE consisting of a large and indefinite group of persons” (para. 1086) and that “[t]he Chamber finds that the JCE of which the Accused was a member consisted of persons
words, the fact that the criminal plan had been considered to have been designed and implemented by the Bosnian-Serb leadership acting jointly with local political and military authorities was not viewed as an obstacle to the establishment of Krajinić’s liability. It was however necessary to verify that the joint action of JCE affiliates met the required level of cohesion and solidarity and that they could be therefore considered to have worked together for the achievement of the common goal.

Upon examination of the trial findings, the Appeals Chamber finally reached the conclusion that only the relations to the VRS, the war presidencies and the war commissions had been precisely ascertained, while the links to the crisis staffs and the paramilitary groups were found to be too weak. To this end, various factors were taken into account, such as the regular consultations with the Commander of the VRS Main Staff Ratko Mladić, the active supervisions of the Bosnian-Serb forces’ operations as well as the issuance of instructions for the organisation and work of the different war presidencies and commissions, which were supposed to *inter alia* “establish governmental power.” On the other hand, the specific connections to the actual executors were further examined in detail and the convictions regarding crimes which had not been committed by JCE members by way of using principal perpetrators in furtherance of the common purpose were quashed. The necessary premise to the mentioned findings on Krajinić’s criminal liability under JCE was the establishment of his hierarchical high-ranking position as well as his extensive power and authority.

Finally, also the findings relating to the accused’s “shared intent” were analysed. Not persuaded by the arguments raised by *amicus curiae*, the Appeals Chamber stated that the Trial Chamber had correctly identified the required *mens rea* for the first category of JCE. In this respect, its statements were found to have been correct and the appraisal of the evidence cautious and accurate.

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*situated throughout the territories of the Bosnian-Serb Republic*” (emphasis added) (para. 1087).

Krajinić Appeal Judgement, see note 65, paras 238-248. The consequence of this finding was that the crimes committed by the crisis staffs and the paramilitary formations could not be attributed to the JCE members.

Ibid., para. 244.

Ibid., paras 249-283.

Ibid., paras 336-360.

Ibid., paras 195-208.
In the light of the above, it can be argued that the Krajišnik Judge-
m ents applied the (first category of) JCE to a “leadership case” relying
on the notion that had been expressly endorsed by the Brdanin Appeals
Chamber. Both the characteristic features of this particular reading of
the concept are in fact present. On the one hand, the criminal context
taken into account appears to be very broad, as the crimes at issue had
been committed throughout the territories of the Bosnian-Serb Repub-
lic. On the other, it was expressly conceded that criminal liability could
be incurred by each JCE member despite the fact that the offences had
been perpetrated by agents not affiliated to the common venture. Due
to the distinct positions of the two accused in the Bosnian-Serb state
apparatus, there is, however, a fund-
amental difference between the JCE
notion referred to in Brdanin and the one considered in the present
case. Indeed, during the indictment period Radoslav Brdanin had been
a leading political figure in one of Republika Srpska’s autonomous re-
regions, while Momčilo Krajišnik had been a member of the state leader-
ship and one of the most influential authorities in terms of political as
well as of (de facto) military power.101 Consequently, the common plan
in which Krajišnik had participated and which he had contributed to
implement was wider and involved a higher number of members acting
at different levels and in different capacities.

Conscious of the risk inherent to the mentioned approach and basically deriving from the acceptance of a decreasing “level of solidar-
ity”102 among JCE participants, the Krajišnik Judges tried to face this
issue by emphasising the importance of the “joint action” requirement.
First conceived and broadly understood at trial, this concept has then
been more rigorously relied upon by the Appeals Chamber. According
to the pronouncements under consideration, if this notion is used cor-
rectly, it might work as the crucial instrument for testing the essential
link that binds JCE affiliates reciprocally. The common purpose doc-
trine may consequently be applicable also to high-ranking leaders, even
if structurally remote from the crime. At any rate, this seems to be the
prevailing approach suggested by the latest ICTY jurisprudence on
JCE.

101 See above, Part III.
102 Oláso, see note 1, 227. According to E. van Sliedregt, “System Criminal-
ity at the ICTY”, in: Nollkaemper/ van der Wilt, see note 4, 183 et seq.,
(195), the so-called “delinking” had already been accepted by the ICTY ju-
risprudence in the Brdanin Appeals Judgement “through the acceptance of
non-membership of the actual perpetrator”.
VI. Concluding Remarks

While not explicitly provided for in the Statute’s provisions on individual criminal responsibility, the Yugoslav Tribunal considered JCE to be part of customary international law and widely relied upon it in its case-law after the Tadić Appeals Judgement. Indeed, as a doctrine pos-tulating the collective perpetration of the criminal offences, JCE’s po-tential has been acknowledged by the ICTY quite soon in its jurisprud-ence. This notion was found to be one of the most suitable concepts for establishing individual criminal responsibility and, at the same time, capturing the salient and distinctive characteristics of international crimes. The ICTY’s jurisdiction in fact mainly extends over crimes committed by low-level perpetrators during a decentralised war throughout the territories of the former Yugoslavia, orchestrated by high-ranking political or military individuals by virtue of their power and authority.

An examination of the most recent pronouncements seems to show the ICTY’s tendency to interpret the concept broadly and to apply it to “leadership cases” involving a vast criminal enterprise. This approach demonstrates the Judges’ awareness that JCE may prove useful for the purposes of criminal justice in general and the aims and policies of the Tribunal in particular. Against this background, the recent Krajisnik Judgements on the one hand confirmed the Tribunal’s large use of JCE as an effective means to link the JCE affiliates to the actual perpetrators of the crimes and to the crimes themselves. On the other hand, they also introduced some necessary adjustments in the doctrine’s interpreta-tion by requiring concerted and coordinated activities between the members of the common design. From an evidentiary perspective, the last mentioned notion appears to be quite flexible and mainly focuses on substantial aspects of the participants’ conduct. The Tribunal’s Judges are therefore required to apply JCE in a balanced and proper way, ensuring that the accused’s actual contribution to the furtherance of the joint endeavour be substantial. Such an approach seems to have been followed by the Krajisnik Judgements, where, in the present au-thor’s opinion, neither misapprehensions nor abuses of the doctrine have occurred.

One could finally verify whether the International Criminal Court (ICC) can rely upon JCE to establish individual criminal responsibility. In this regard, article 25 (3)(d) provides that,

“In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: […] (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime.” (emphasis added)

While at first sight one may argue that this provision can be traced back to the case-law of the Yugoslav Tribunal on JCE and that it clearly authorises the ICC to apply the doctrine under discussion, the first pronouncements of the Court itself seem to go in another direction.

In its decision on the confirmation of the charges in the Lubanga case, the ICC Pre-Trial Chamber I explicitly affirmed its autonomy from the ICTY jurisprudence. Indeed, it underlined the differing approaches regarding the distinguishing criterion between principals and accessories to a crime where a criminal offence is committed by a plurality of persons. In this respect, the concept of co-perpetration based


106 See H. Olásolo, “Developments in the Distinction between Principal and Accessorial Liability in the Light of the First Case Law”, in: C. Stahn/ G.
on the notion of “joint control of the crime” was defined based on article 25 (3)(a), which covers principal liability.\footnote{Article 25 (3)(a) provides that: “In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible”. It has to be noted that the objective and subjective elements of the notion of “co-perpetration based on joint control over the crime” as defined by the Pre-Trial Chamber in the present case partly recall – without however referring to them – the aspects ruled out by the ICTY for the concept of joint criminal enterprise (such as the “agreement or common plan between two or more persons”, the “co-ordinated essential contribution” and the fulfilment of the “subjective elements of the crime in question”). (Emphasis added).}{107} Despite being considered as “closely akin to the concept of joint criminal enterprise or the common purpose doctrine adopted by the jurisprudence of the ICTY”,\footnote{Lubanga Pre-Trial Decision on the Confirmation of the Charges, see note 105, para. 335.}{108} liability under mentioned letter (d) was nevertheless defined as a “residual form of accessory liability”\footnote{Ibid., para. 338.}{109} as opposed to co-perpetration.

In considering the importance of these divergences it should be finally made clear that the interpretation and application of the Rome Statute should not be used as a means to verify the correctness and validity of the ICTY’s jurisprudence. In fact, the former does not necessarily reflect the status of customary international criminal law. On the contrary, it is often the result of compromised choices made by its drafters. The mentioned tendencies should therefore not be overestimated but be read as the mere effect of different approaches adopted by different international criminal tribunals on the basis of their constitutive instruments.\footnote{Again, Olásolo, see note 106, 358.}{110}

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Sluiter (eds), \textit{The Emerging Practice of the International Criminal Court}, 2009, 339 et seq.
World Wide Warfare – *Jus ad bellum* and the Use of Cyber Force

*Marco Roscini*

“So cyberspace is real. And so are the risks that come with it.”

Barack Obama

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* I am grateful to Barbara Sonczyk for her research assistance and to Matt Evans for explaining to me the intricacies of cyber technologies. All errors are of course mine. This article is based on developments as of June 2010.

I. Introduction: *hic sunt leones*

“Here be lions.” This is what ancient Roman and medieval cartographers used to write on maps over unexplored territories, implying that unknown dangers could lie there. If “cyberspace” were a real location appearing on geographical maps and not just a virtual domain, we would probably read that expression over it. Indeed, societies have be-

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2 “Cyberspace” is defined in the United States National Military Strategy for Cyberspace Operations as “a domain characterized by the use of electronics and the electromagnetic spectrum to store, modify, and exchange data via networked systems and associated physical infrastructures” (United States Department of Defense (DoD), *The National Military Strategy for Cyberspace Operations*, December 2006, 3 <www.dod.gov/pubs/loi/ojcs/07-F-2105doc1.pdf>). Cyberspace, then, goes beyond the Internet and includes all networked digital activities. The updated Doctrine for the Armed Forces of the United States contains a slightly different definition of cyber-space (“[a] global domain within the information environment consisting of the interdependent network of information technology infrastructures, including the Internet, telecommunications networks, computer systems, and embedded processors and controllers”, Armed Forces of the United States, *Doctrine for the Armed Forces of the United States*, Joint Publication
come increasingly dependent on computers and computer networks, with vital services now relying on the Internet. However, the more technologically advanced a state is, the more vulnerable to cyber attacks: if computer networks become the “nerve system” of civilian and military infrastructures, incapacitating them means paralyzing the country. The threat no longer comes exclusively from the proverbial teenage hacker, but also from ideologically motivated individuals (“hacktivists”), states and criminal and terrorist organizations. Geographical distance and frontiers are also irrelevant, as a target could be hit on the other side of the world in a matter of seconds. The problem is likely to acquire more and more importance in the upcoming years. If cyber attacks have had so far limited material consequences, there is general agreement among experts that such attacks will increase in the future, both in number and severity. As noted by the United States National Strategy to Secure Cyberspace, “the attack tools and methodologies are becoming widely available, and the technical capability and sophistication of users bent on causing havoc or disruption is improving.”

Cyber technologies and expertise are relatively easy and cheap to acquire, which allows weaker states and even non-state actors to cause considerable damage to countries with superior conventional military

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5 McAfee Report, In the Crossfire – Critical Infrastructure in the Age of Cyber War, 2010, 11 <http://resources.mcafee.com/content/NACIPReport>.

6 United States National Strategy to Secure Cyberspace, see note 3, 6.
power: a cyber attack could for instance disable power generators, cut off the military command, control and communication systems, cause trains to derail and airplanes to crash, nuclear reactors to melt down, pipelines to explode, weapons to malfunction.

It is therefore hardly surprising that cyber security has become a general concern of the international community, with the UN General Assembly adopting a series of resolutions on the issue emphasizing that “the dissemination and use of information technologies and means affect the interests of the entire international community,” that “the criminal misuse of information technologies may have a grave impact on all States” and that these technologies “can potentially be used for purposes that are inconsistent with the objectives of maintaining international stability and security.” The General Assembly also endorsed the holding of the World Summit on the Information Society, that took place, in two phases, in Geneva in 2003 and Tunis in 2005.

One of the perspectives from which an international lawyer can study the problem of cyber security is that of jus ad bellum, i.e. the rules that regulate the use of armed force by states in their international relations. In fact, although – as will be seen – identification is problematic, several states have been the target of cyber attacks of which other states were suspected. In certain cases, the cyber attacks were an end in themselves. The United States, for instance, has been the target

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10 For the documents adopted at the Summit, see <www.itu.int/wsis/index.html>.

11 Another perspective would be the applicability of jus in bello (i.e., international humanitarian law) to cyber warfare, which is however outside the scope of the present article. On this aspect, see M.N. Schmitt, “Wired Warfare: Computer Network Attack and jus in bello”, in: M.N. Schmitt/ B.T. O’Donnell (eds), Computer Network Attack and International Law, 2001, 187 et seq.
of several attacks, allegedly originating from China. Most famously, in April 2007 Estonia was the victim of a three week cyber attack that shut down government websites first and then extended to newspapers, TV stations, banks and other targets. Peacetime cyber attacks have also hit, among others, the United Kingdom, Taiwan, South Korea, Lithuania, Kyrgyzstan, Switzerland and Montenegro. In other

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12 See, for instance, the 2003 “Titan Rain” attack, that infiltrated governmental computer networks in the United States for four years through the installation of back door programs to steal information, S.J. Shackelford, “From Nuclear War to Net War: Analogizing Cyber Attacks in International Law”, Berkeley Journal of International Law 27 (2009), 192 et seq. (204).


20 A cyber attack forced the shut down of more than 150 websites, including the postal service and several banks’ websites in March 2010. The attack apparently originated in Kosovo <www.uspoliticsinfo.com/article/Cyber attack%20shut%20150%20Montenegrin%20websites/?k=j83s12y12h94is27k02>. 
cases, the cyber attacks preceded or were contextual to an armed conflict or operation. It appears, for instance, that immediately after the beginning of Operation Allied Force in 1999, hackers tried to disrupt NATO’s e-mail communication system by overloading it, while the United States considered penetrating into Yugoslavia’s computer networks to disrupt its military operations but eventually cancelled the plan because of doubts on its legality. The Russian Federation used cyber warfare in the second Chechen war against the insurgents’ websites in order to prevent them from delivering anti-Russian propaganda. The cyber attacks on Georgia in July-August 2008, that occurred immediately before and during the armed conflict with the Russian Federation, caused the governmental websites to go off line and slowed down Internet service. Furthermore, websites were defaced and their content replaced with Russian nationalistic propaganda. Cyber attacks also targeted several of Israel’s governmental websites during the 2008-2009 Operation Cast Lead in the Gaza Strip.

In spite of this increasing number of cases, there still does not seem to be enough research on how the existing rules on the use of force apply, if at all, to cyber attacks. Most of the few existing publications on jus ad bellum and cyber force are written by American scholars and practitioners, published in American journals and taking mainly United States documents into account, with a view to establishing whether the United States is entitled to react in self-defense in case of a cyber attack against it. The scope of this article is broader, as it expands the focus to include the practice of other technologically advanced states and also goes beyond the law of self-defense.

The analysis will be limited to the use of cyber force by a state against another state: cyber attacks conducted by non-state actors will be discussed only for the purpose of determining when they can be attributed to a state. Therefore, this article will deal neither with cyber crime, i.e. the offences against the confidentiality, integrity and availability of computer data and systems committed by individuals or private entities for personal gain (for instance, theft of money from bank accounts), which is mainly treated under domestic criminal laws, nor with cyber terrorism, which is the unlawful use of cyber technologies by terrorist organizations or individuals for ideological purposes.

Chapter II. will clarify the terminology and attempt to give some definitions. Issues of state responsibility in relation to the use of cyber force will then be discussed in Chapter III., with a view to establishing when the conduct of hackers can be imputed to a state. Chapter IV. will determine whether a cyber attack amounts to a use of force under Article 2 para. 4 of the UN Charter, while Section V. will discuss the remedies available to states being victims of cyber attacks. Finally, an attempt will be made to establish if any customary international law rules have already been developed with regard to the right to invoke self-defense against a cyber attack.

II. Definitions

Cyber attacks fall within the broader category of what are traditionally known as information operations. “Information operations” (of which “information warfare” is a subcategory undertaken in the context of an armed conflict) are the “integrated employment of the core capabilities of electronic warfare, computer network operations, psychological operations, military deception, and operations security in concert with specified supporting and related capabilities, to influence, disrupt, cor-

25 But see the 2001 Council of Europe’s Convention on Cyber Crime, which seeks to harmonize national laws, improve investigative techniques and increase cooperation among nations in the field. The Convention entered into force in 2004. An additional protocol adopted in 2002 and entered into force in 2006 requires the parties to criminalize the dissemination of racist and xenophobic material through computer systems, as well as of racist and xenophobic-motivated threats and insults.

rupt, or usurp adversarial human and automated decision making while protecting our own.”

According to the 2006 United States National Military Strategy for Cyberspace Operations, “computer network operations” (CNO) include computer network attacks (CNA), computer network defense (CND) and “related computer network exploitation enabling operations” (CNE).

Although they are often labeled in the press as “cyber attacks”, CNE operations are different as they focus on intelligence collection and observation rather than on network disruption and can be preliminary to an attack. They can aim at disseminating information for propaganda purposes, for instance through the defacement of websites. CNE operations could also aim at stealing sen-

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30 During the 2008 attacks on Georgia, for instance, the websites of Georgia’s President, Minister of Foreign Affairs and National Bank were defaced and replaced with a series of pictures of Mikhail Saakashvili and Adolf Hitler (CCDCOE Report, see note 22, 7-8). The use of the Internet for propaganda purposes is also well-known to terrorist organizations: see *Security for the Next Generation*, The National Security Strategy of the United
sitive information from computers. In this regard, “trap doors” and “sniffers” are particularly useful tools for cyber espionage: the former allow an external user to access software at any time without the computer’s owner being aware of it, while the latter are programs executed from a remote computer that intercept and record data passing over a network in order to steal user IDs and passwords. Espionage is, however, not prohibited by international law, although it is usually criminalized at the domestic level.31

This article will not deal with CNE operations, but only with CNA and CND, i.e. those computer network operations that go beyond mere exploitation and are accompanied by a hostile intent: such attacks aim at altering or destroying the information contained in the targeted computer or computer network with the purpose of incapacitating the adversary’s command, control and communication system and/or of causing damage extrinsic to the targeted computer/network. The most used methods to incapacitate a computer or computer network are, apart from its physical destruction, the corruption of its hardware (“chipping”)32 or software, or flooding it with so much information to cause its collapse (“denial of service” (DoS)). Popular software tools designed to interfere with the normal functioning of a computer are Trojan horses, logic bombs, viruses and worms, which can be installed in a computer through chipping, hacking, or by simply e-mailing them.33 A virus is a self-replicating program that usually attaches itself to a legitimate program on the target computer, modifying it and subsequently


affecting other programs and, if the computer is connected to a network, other computers as well. A worm replicates itself in its entirety into other computers but, unlike viruses, does not usually modify other programs: it captures the addresses of the target computer and resends messages throughout the system so to cause a general slowdown and potentially a crash. Viruses and worms can be hidden in Trojan horses, an apparently innocuous code fragment that actually conceals a harmful program or allows remote access to the computer by an external user. Time and logic bombs are a type of Trojan horse designed to execute at a specific time or by certain circumstances, respectively. As to DoS attacks, they aim at flooding a target’s network with requests in order to overload and incapacitate it. When the DoS attack is carried out by a large number of computers, it is referred to as a “distributed denial of service” (DDoS) attack. Estonia was the victim of a DDoS attack in 2007, when requests from more than a million computers based in over 100 countries hijacked and linked through the use of botnets34 flooded governmental and private websites and caused servers to crash.35 In January 2009, Kyrgyzstan was also the target of a DDoS attack allegedly originating from the Russian Federation, which took 80 per cent of the Internet traffic to the west offline.36

The most famous definition of CNA is probably that of the United States DoD, which describes them as “[o]perations to disrupt, deny, degrade, or destroy information resident in computers and computer networks, or the computers and networks themselves.”37 This often cited definition distinguishes between two types of CNA, those target-

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34 “Botnets” (short for “robot networks”), which are the source of most spam, are networks of infected computers hijacked from their unaware owners by external users; linked together, such networks can be used to mount massive DDoS attacks, McAfee Report, see note 5, 6. The Mariposa botnet, started in 2008 and recently dismantled, was one of the world’s biggest with up to 12.7 million computers controlled, C. Arthur, “Alleged controllers of ‘Mariposa’ botnet arrested in Spain”, The Guardian, 3 March 2010.

35 Hollis, see note 13, 1024 - 1025.

36 Bradbery, see note 18, 1.

37 United States National Military Strategy for Cyberspace Operations, see note 2, GL-1. This definition is criticized by Dinstein, who argues that “[h]ad [it] be legally binding – or had it factually mirrored the whole gamut of the technological capabilities of the computer – the likelihood of a CNA ever constituting a full-fledged armed attack would be scant”, Dinstein, see note 31, 102.
ing the computer or computer network and those targeting the information contained in the computer or computer network. It is unclear whether the DoD’s definition encompasses “the manipulation of a computer network to achieve an effect extrinsic to the network itself, as opposed to merely rendering the network ineffective.” 38 The recent Manual on International Law Applicable to Air and Missile Warfare, adopted by the Program on Humanitarian Policy and Conflict Research (HPCR) at Harvard University in 2009, reformulates the DoD’s definition of CNA to also cover operations that “manipulate” computer information and that aim “to gain control over the computer or computer network.” 39 The Commentary to the Manual specifies that the attack “can be directed against an individual computer, specific computers within a network, or an entire computer network” and that not all CNAs are attacks as defined by Rule 1 (e), i.e. “act of violence, whether in offence or in defence.” 40 Both the DoD and HPCR definitions, however, focus on the computer system as a target and therefore also include conventional attacks on computer network facilities. 41 The 2006 United States Joint Doctrine for Information Operations takes a narrower approach when it defines CNAs as “actions taken through the use of computer networks to disrupt, deny, degrade, or destroy information resident in computers and computer networks, or the computers and networks themselves,” 42 but does not mention attacks aimed at causing damage extrinsic to the computer or computer network.

This article will use the expressions “cyber force” and “cyber attacks” in order to be consistent with $jus\ ad\ bellum$ language. 43 

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38 Silver, see note 21, 76.
41 Kuehl, see note 27, 44 - 45.
42 Chairman of the Joint Chiefs of Staff, *Joint Doctrine for Information Operations*, see note 27, II-5 (emphasis added).
is also somehow misleading, as the target of the cyber operation could be not only computer networks, but also individual computers or certain computers within a network, as well as websites. In the context of this study, thus, “cyber attacks” are a hostile use of cyber force, which could be an isolated act, the first strike of an armed conflict, an attack in the context of an already initiated armed conflict, or a reaction against a previous conventional or cyber attack. By “cyber force”, the present author will refer to operations taken by a state against another state, in offense or in defense, through the use of information resident in individual computers, some computers within a network or entire computer networks, with the purpose of incapacitating the target computer, computer network or website and/or of producing damage extrinsic to the computer or network. This definition, which focuses on computers and computer networks as weapons and not as targets, does not cover - and therefore excludes from the scope of this article - kinetic attacks on computer facilities (as the operation must be carried out through computers or computer networks), cyber espionage and cyber propaganda (as the purpose of the operation must be either incapacitating the network and/or causing extrinsic physical damage).

III. Identification and Attribution Problems

Even before discussing attribution, when it comes to cyber force there is an identification problem. Anyone launching cyber attacks can disguise their origin thanks to tricks like IP spoofing or the use of botnets.\textsuperscript{45} Anonymity is in fact one of the greatest advantages of cyber warfare: even though the attacks might appear to originate from computers located in a certain country, this does not necessarily mean that that country, or even the owners of the computers involved, were behind such actions.\textsuperscript{46} The 2007 attack on Estonia, for instance, originated

\begin{itemize}
\item \textsuperscript{44} Bombing a communication facility through kinetic means would be an information operation, but not a cyber attack. Existing \textit{jus ad bellum} and \textit{jus in bello} rules apply without problems to the use of traditional weapons against a computer and computer networks.
\item \textsuperscript{45} D. Delibasis, \textit{The Right to National Self-Defence in Information Warfare Operations}, 2007, 303.
\item \textsuperscript{46} Brenner, see note 15, 424. The 2003 United States National Strategy to Secure Cyberspace emphasizes that “[t]he intelligence community, DoD, and the law enforcement agencies must improve the Nation’s ability to quickly
from countries such as the United States, Egypt, Peru and the Russian Federation, while the 1998 “Solar Sunrise” attack that broke into the United States DoD’s system was carried out by an Israeli teenager and Californian students through a computer based in the United Arab Emirates.47

It is, however, not impossible that the state responsible for the cyber attack is eventually identified. For instance, the cyber attack might be followed by a conventional attack that will reveal the author.48 Further developments in computer technology and Internet regulations might also make it easier to identify the source of the cyber attack.49 Assuming that the authors are identified, the problem arises as to whether the attack can be attributed to a state under the law of state responsibility so to trigger the application of the *jus ad bellum* rules. Indeed, unlike in traditional warfare, cyberspace attacks can easily be carried out not only by states, but also by groups and even individuals: all it takes is a computer, software and a connection to the Internet.50 According to the United States DoD, “state sponsorship may be convincingly inferred from such factors as the state of relationships between the two countries, the prior involvement of the suspect state in computer network attacks, the nature of the systems attacked, the nature and sophistication of the methods and equipment used, the effects of past attacks, and the damage which seems likely from future attacks.”51 This is, however, too vague. The answers should be searched for in the first part of the Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission (ILC) in 2001 and subsequently endorsed by the General Assembly.52

In this context several scenarios can be identified. The first and easiest one is the case of “uniformed” hackers. Although details of state military cyber capabilities are classified, it appears that several national armies have already established cyber units. China is for instance re-

47 Shackelford, see note 12, 204, 231.
48 Dinstein, see note 31, 112.
49 Ibid.
51 DoD, An Assessment, see note 27, 21-22.
ported to have formed cyberspace battalions and regiments and Israel also appears to have its own soldiers working in an “Internet warfare” team. The United States has recently established a military Cyber Command, to counter cyber attacks. Germany’s army has also its own cyber unit, the Department of Information and Computer Network Operations, while Italy is reported to be considering establishing one. It goes without saying that the uniformed hackers’ conduct would be imputable to the state of which they are de jure organs. This conclusion would not change if the hackers were civilian, and not military organs of a state. The United Kingdom, for instance, has established a Cyber Security Operations Centre that will monitor the Internet for threats to the United Kingdom and coordinate incident response. Australia and Brazil have done the same. It could also be that the hackers are members of government agencies or parastatal entities, like privatized corporations or independent contractors empowered by law to exercise some degree of governmental authority: in all

58 According to article 4 of the 2001 ILC Articles on State Responsibility, “[t]he 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.”
such cases, their conduct will be attributed to the state “provided the person or entity is acting in that capacity in the particular instance.”

The hackers could also be not de jure organs of a state, but rather individuals or corporations hired by states in order to conduct cyber attacks. A well-known example is the Russian Business Network (RBN), a cybercrime firm specializing in phishing, malicious code, botnet command-and-control, DoS attacks and identity theft, which is suspected of having executed the cyber attacks against Georgia. When can the conduct of such individuals and corporations be attributed to the state? Article 8 of the ILC Articles provides that, “[t]he 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.” In the Nicaragua case, the ICJ argued that, “United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself [...] for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua”. What has to be proven is that “that State had effective control of the military or paramilitary operation in the course of which the alleged violations were committed.”

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61 ILC Articles on State Responsibility, article 5, see note 52.
63 CCDCOE Report, see note 22, 11; Markoff, see note 23.
64 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), ICJ Reports 1986, 14 et seq. (64 para. 115). In the Genocide case, the ICJ returned to the point and clarified that “[i]t must [...] be shown that this ‘effective control’ was exercised, or that the State’s instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations” (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Merits, Judgment of 26 February 2007, <www.icj-cij.org>, para. 400).
for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful acts in question in the absence of a clearly expressed lex specialis," according to the International Criminal Tribunal for the former Yugoslavia (ICTY) “[t]he degree of control may [...] vary according to the factual circumstances of each case.” The ICTY then adopted a much less restrictive test to attribute the conduct of militarily organized armed groups to a foreign state. Under the ICTY “overall” control test, for the actions of such groups to be imputed to a state it is sufficient that the state “has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group [...] regardless of any specific instructions by the controlling State concerning the commission of each of those acts.”

A commentator has suggested that, due to the inherently clandestine nature of cyber activities and the technical difficulty of identifying the authors, the Tadić test should be preferred to the Nicaragua test when cyber attacks are concerned. This view cannot be shared: indeed, it is exactly because of the identification problems linked to cyber activities that the “effective control” test is preferable, as it would prevent states from being frivolously accused of cyber attacks (especially if the victim state claims a right to self-defense against them). Furthermore, the above mentioned view misses an important point: the ICTY applies the overall control test only to the case of an “organised and hierarchically structured group, such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels.” “[O]rganised and hierarchically structured” cyber insurgents do not seem to exist yet. For the case of

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65 Ibid., para. 401.
67 Ibid., para. 137. The ICJ noted that “the [ICTY] ‘overall control’ test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf”, ICJ Application of the Convention, see note 64, para. 406.
68 Shackelford, see note 12, 235.
69 Tadić, see note 66, para. 120.
70 It has however been suggested that certain armed groups, such as Hamas and Hezbollah, may have hired cyber criminals in order to conduct cyber operations, Lewis, see note 24, 8.
a “private individual who is engaged by a State to perform some specific illegal acts in the territory of another State (for instance, [...] carrying out acts of sabotage)” and of unorganized, non-military and non-hierarchical groups of individuals, such as RBN, the ICTY retains the effective control test, i.e. the need to prove the issue of specific instructions concerning the commission of the illegal act or the state’s public retroactive approval of the individual’s actions.\footnote{71} With specific regard to cyber attacks, then, there is no substantial practical discrepancy between the ICJ and the ICTY approaches, as both would probably lead in most cases to the application of the effective control test.

A third scenario is when the hackers are neither \textit{de jure} nor \textit{de facto} state organs, but their conduct has been incited by state agents, for instance in websites, chat rooms and e-mails. In 2001, for example, after a United States Navy spy plane collided with a Chinese jet fighter in the South China Sea, websites appeared offering instructions to hackers on how to incapacitate United States government computers.\footnote{72} Russian blogs, forums and websites also published instructions on how to ping flood Georgian government websites as well as a list of vulnerable Georgian websites.\footnote{73} There is no express regulation of incitement in the ILC Articles on State Responsibility.\footnote{74} Incitement would thus entail state responsibility for the incited actions only to the extent it amounts to direction and control (article 8).\footnote{75} After inciting the actions, however, state authorities might subsequently publicly endorse them: in the Hostages case, the ICJ held that, although the initial attack on the United States Embassy in Teheran was not attributable to Iran, the subsequent endorsement by the Iranian authorities and the decision to perpetuate the occupation transformed the occupation and detention of the hostages into acts of the state.\footnote{76} Article 11 of the ILC Articles on State Responsibility confirms that, “[c]onduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State

\footnotesize{\textsuperscript{71} Tadić, see note 66, para. 118.}\footnotesize{\textsuperscript{72} N. Weisbord, “Conceptualizing Aggression”, \textit{Duke J. Comp. & Int’l L.} 20 (2009), 1 et seq. (20).}\footnotesize{\textsuperscript{73} CCDCOE Report, see note 22, 9-10.}\footnotesize{\textsuperscript{74} When expressly provided, however, incitement can be an unlawful act \textit{per se}, see, e.g., article III of the 1948 Genocide Convention.}\footnotesize{\textsuperscript{75} See ILC, see note 52, 65.}\footnotesize{\textsuperscript{76} United States Diplomatic and Consular Staff in Teheran (United States v. Iran), ICJ Reports 1980, 3 et seq. (35 para. 74).}
acknowledges and adopts the conduct in question as its own.” Public acknowledgement of cyber attacks by state agents is however unlikely to occur: as already noted, cyber technologies are the perfect tool for covert operations.

Finally it could be that the cyber attacks originate from computers located in a certain state without any state involvement. In such case, the hackers’ conduct could not be imputed to that state, which might, however, be held responsible for not taking the necessary and reasonable measures to prevent or stop the attack (for instance, by disabling the Internet access of the perpetrators). The state’s wrongful act, however, would not be the cyber attack, but rather the breach of its obligation “not to allow knowingly its territory to be used for acts contrary to the rights of other States.”

It appears, for instance, that, even though no evidence was found of state organizations directing the attack, the Russian Federation at least tolerated the attacks against Estonia and Georgia originating from Russian hacker sites. The Russian Federation also did not cooperate with Estonia in tracking down the mastermind behind the botnets and a request for bilateral investigation under the Mutual Legal Assistance Treaty between the two countries was rejected by the Russian Supreme Procurature.

IV. Cyber Attacks and the Prohibition of the Threat and Use of Force in International Relations

When attributed to a state, a cyber attack is a violation of the customary principle of non-intervention “on matters in which each State is permit-

77 Corfu Channel (United Kingdom v. Albania), ICJ Reports 1949, 4 et seq. (22). A/RES/55/63 of 4 December 2000 recommends that states ensure “that their laws and practice eliminate safe havens for those who criminally misuse information technologies” (para. 1).

78 CCDCOE Report, see note 22, 13; Bradbery, see note 18, 1. Another report claims that the Russian Federation refused to intervene with regard to the hacker attacks against Georgia in 2008 (Project Grey Goose, Russia/Georgia Cyber War – Findings and Analysis, 17 October 2008, 8, <www.scribd.com/doc/6967393/Project-Grey-Goose-Phase-I-Report>). It has also been suggested that the May 2007 attacks on Estonia would have not been possible without the blessing of Russian authorities, J. Davis, “Hackers Take Down the Most Wired Country in Europe”, Wired Magazine, Issue 15.09, 21 August 2007.

79 Shackelford, see note 12, 258.
ted, by the principle of State sovereignty, to decide freely”, such as “the choice of a political, economic, social and cultural system, and the formulation of foreign policy.” Several of the situations described in the 1981 UN General Assembly Declaration on Non-intervention would perfectly cover cyber attacks. In particular, the Declaration recalls, “[t]he right of States and peoples to have free access to information and to develop fully, without interference, their system of information and mass media and to use their information media in order to promote their political, social, economic and cultural interests and aspirations, based, inter alia, on the relevant articles of the Universal Declaration of Human Rights and the principles of the new international information order” (op. para. I (c)). It is worth noting that not only cyber attacks, but also certain CNE operations could amount to an unlawful intervention, e.g. cyber propaganda through the defacement of websites aimed at fomenting civil strife in the target state or the sending of thousands of e-mails to voters in order to influence the outcome of political elections in another state.

It is more difficult to establish whether cyber attacks also amount to a use of force in international relations. It is common knowledge that Article 2 para. 4 of the UN Charter provides that, “[a]ll Members [of the United Nations] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” This provision, which is widely thought to reflect customary international law and, at least with regard to its core, also *jus cogens*, contains two prohibitions, that of

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80 ICJ Reports 1986, see note 64, 107 et seq. (para. 205). The principle of non-intervention has been incorporated in a plethora of agreements, but it is not expressly mentioned in the UN Charter. According to the ICJ, however, the principle is “part and parcel of customary international law” (ibid., 106, para. 202). See, in general, R. Sapienza, *Il principio del non intervento negli affari interni*, 1990.

81 A/RES/36/103 of 9 December 1981.

82 See para. II (j) of the Declaration on Non-Intervention.

83 The customary nature of Article 2 para. 4 has been recognized by the ICJ, ICJ Reports 1986, see note 64, 88 et seq. (paras 187-190). See also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2005, 136 et seq. (171 para. 87). Several authors have argued that the core prohibition contained in Article 2 para. 4, that of aggression, is now a peremptory norm of general international law, R. Ago, “Eighth Report on State Responsibility”, in: ILC (ed.), *Yearbook of the Int-*
threat and of the use of force. A “threat of force” under Article 2 para. 4 can be defined as an explicit or implicit promise, through statements or actions, of a future and unlawful use of armed force against one or more states, the realization of which depends on the threatener’s will.\(^8\) Two situations can be envisaged in the context of the present study. The first is the threat of a use of force with traditional weapons communicated through cyber means. Article 2 para. 4 does not specify the methods through which a threat should be carried out and thus “communicating a threat via the Internet would be on the same theoretical footing as communicating a threat by traditional methods.”\(^8\) The cyber threat could also warn of a possible cyber attack by the threatening state. Whether this is a threat under Article 2 para. 4 depends on whether the use of (cyber) force envisaged in the threat is unlawful. Indeed in its 1996 Advisory Opinion on the Legality of the Use of Nuclear Weapons, the ICJ linked the legality of threats to the legality of the use of force in the same circumstances.\(^8\)

The question to answer for both the threat and the use, then, is whether cyber force can be considered a type of “force” in the sense of Article 2 para. 4. The general criteria for the interpretation of treaties are spelt out in article 31 para. 1 of the 1969 Vienna Convention on the Law of Treaties.\(^8\) If one applies the contextual and literal criteria, the results are inconclusive. Indeed, according to the Black’s Law Dictionary, “force” means “[p]ower, violence, or pressure directed against a person or thing.”\(^8\) The ordinary meaning of “force” is thus broad

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\(^8\) Aldrich, see note 31, 237.

\(^8\) It is true that the UN Charter was adopted before the 1969 Vienna Convention on the Law of Treaties and that the Convention does not apply to treaties concluded before its entry into force, but the rules on interpretation contained therein are generally thought to be a codification of customary international law, G. Ress, “The Interpretation of the Charter”, in: B. Simma (ed.), The Charter of the United Nations: A Commentary, Vol. I, 2002, 18.

enough to cover not only traditional armed force but also other types of coercion. As far as the context is concerned, the expression “force” also appears in the Preamble of the Charter and in Arts 41 and 46 where it is preceded by the adjective “armed”, while in Article 44 it is clear that the reference is to military force only.\textsuperscript{89} This contextual argument has often been used by commentators to maintain that, as elsewhere in the Charter “force” means armed force, this must hold true for Article 2 para. 4 as well, even in the absence of any specification.\textsuperscript{90} The opposite argument could, however, also be made: when the drafters wanted to refer to “armed force”, they said so expressly and, as this was not done in Article 2 para. 4, they might have wanted to refer to a broader notion of force. A teleological interpretation of Article 2 para. 4 seems to support a narrow reading of the provision that limits it to armed force only: indeed, the overall purpose of the Charter is “to save succeeding generations from the scourge of war”,\textsuperscript{91} not to ban all forms of coercion. The \textit{travaux préparatoires} also reveal that the drafters did not intend to extend the prohibition to economic coercion and political pressures.\textsuperscript{92} A Brazilian amendment prohibiting also “the threat or use of economic measures in any manner inconsistent with the purposes of the UN” was rejected at the San Francisco Conference.\textsuperscript{93} Subsequent UN documents, such as the 1970 Declaration on Friendly Relations\textsuperscript{94}

\textsuperscript{89} Article 41 of the UN Charter includes the “complete or partial interruption of [...] telegraphic, radio, and other means of communication” in the list of measures “not involving the use of armed force”; this however is not helpful in the qualification of cyber force, as cyber blockades are only one example of cyber force and, in any case, the effects of cyber attacks on computerized societies can be far more drastic than those envisaged by the Charter’s drafters in relation to the interruption of communications, H.B. Robertson, Jr., “Self-Defense against Computer Network Attack under International Law”, in: Schmitt/ O’Donnell, see note 11, 138; Schmitt, see note 26, 912.

\textsuperscript{90} A. Randelzhofer, “Article 2 (4)”, in: Simma, see note 87, 118.

\textsuperscript{91} UN Charter, Preamble.

\textsuperscript{92} According to article 32 of the 1969 Vienna Convention on the Law of Treaties, the preparatory works of a treaty are a supplementary means of interpretation.


\textsuperscript{94} Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, A/RES/2625 (XXV) of 24 October 1970.
and the 1987 Declaration on the Non-Use of Force support the view that Article 2 para. 4 only refers to “armed force”, while the principle of non-intervention extends to other forms of coercion.

Even conceding that Article 2 para. 4 only prohibits “armed” force, the question is what “armed” means and if cyber attacks can be considered a use of “armed” force. According to Black’s Law Dictionary, “armed” means “[e]quipped with a weapon” or “[i]nvolving the use of a weapon.” A weapon is “[a]n instrument used or designed to be used to injure or kill someone.” Almost every object can be used as a weapon, if the intention of the holder is hostile. In its Advisory Opinion on the Legality of the Use of Nuclear Weapons, the ICJ made clear that Arts 2 para. 4, 51 and 42 of the UN Charter “do not refer to specific weapons. They apply to any use of force, regardless of the weapons employed.” There is then no reason why weapons should necessarily have explosive effects or be created for offensive purposes only. The use of certain dual-use non-kinetic weapons, such as biological or chemical agents, against a country would undoubtedly be treated by the victim state as a use of force under Article 2 para. 4. According to Brownlie, this is so because they are commonly referred to as forms of “warfare” and because they can be used to destroy life and property. Both arguments would suit cyber attacks as well. In particular, the criterion to establish whether a new technology has become a form of warfare is “whether the technique is associated with the armed forces of

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95 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, A/RES/42/22 of 18 November 1997.
96 Randelzhofer, see note 90, 118; Schmitt, see note 26, 906-908; M. Benatar, “The Use of Cyber Force: Need for Legal Justification?”, *Gottingen Journal of International Law* 1 (2009), 375 et seq. (384-385).
97 Garner, see note 88, 123.
98 Ibid., 1730.
99 ICJ Reports 1996, see note 86, 244 para. 39.
100 The ICJ implicitly recognized that the use of non-kinetic weapons can lead to a violation of Article 2 para. 4 when it qualified the arming and training of the contras by the United States as a threat or use of force against Nicaragua, ICJ Reports 1986, see note 64, 118 para. 228. Military or other hostile use of environmental modification techniques have also been considered a weapon: see the 1976 Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques.
the State that uses it,” and not only with, say, intelligence agencies.  

The fact that several states have included cyber technology in their military doctrines, refer to it as “cyber warfare” and have set up military units with specific cyber expertise supports the view that Trojan horses, worms, viruses and so on are indeed regarded as “just another weapons system, cheaper and faster than a missile, potentially more covert but also less damaging.” It is true that the indirect effects of cyber attacks are often more important than the direct effects, but that could well apply to many kinetic attacks as well. For instance, a series of unauthorized military incursions into the territory of another state that produce no material damage but have the indirect effect of destabilizing the country would still amount to a violation of Article 2 para. 4. Similarly, if the Stock Exchange or other financial institutions were to be bombed and the markets disrupted as a consequence, this would certainly be

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102 Silver, see note 21, 84.
considered a use of armed force, and not economic coercion, even though the economic consequences of the action would by far outweigh the physical damage to the buildings: one cannot see why the same conclusion should not apply when the Stock Exchange, instead of being bombed, is shut down by a cyber attack.104

An interpretation of Article 2 para. 4 that covers cyber force as defined above is also supported by article 31 para. 3 (b) of the Vienna Convention on the Law of Treaties, according to which a treaty has to be interpreted also taking into account “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.” Indeed, several states have expressed the view that cyber force is a type of armed force. The United States Joint Vision 2020 expressly refers to the employ of non-kinetic weapons in the area of information operations.105 The 2004 National Military Strategy of the United States of America refers to “weapons of mass effect”, which “rely more on disruptive impact than destructive kinetic effects” and gives the example of cyber attacks on United States commercial information systems or against transportation networks, which “may have a greater economic or psychological effect than a relatively small

104 See W.G. Sharp Sr., Cyberspace and the Use of Force, 1999, 90-91. For cyber attacks that do not directly cause physical damage or injury, Schmitt develops seven criteria to distinguish them from other forms of coercion not amounting to the use of force: severity, immediacy, directness, invasiveness, measurability, presumptive legitimacy and responsibility, Schmitt, see note 26, 914-915. These criteria, however, are not without problems. Indeed, certain forms of economic coercion, like an oil embargo, could cause much more severe damage than certain minor uses of armed force, such as cross-border incursions or skirmishes. Furthermore, there are uses of armed force that are not intended to cause any direct physical damage or human losses, for instance, interventions to protect nationals abroad or cross-border operations in “hot pursuit” of criminals. With regard to the immediacy criterion, the so-called logic or time bombs, designed to produce their effects only at a certain time or when certain circumstances occur, can cause damage well after the cyber intrusion has taken place. Finally, the presumptive legitimacy criterion (violence is presumptively illegal, while other forms of coercion, like economic and political, are presumptively legal) does not take into account the fact that many states have now enacted laws against cyber crime, Silver, see note 21, 90.

release of a lethal agent.”  

In his remarks on the new White House cyber security office, President Obama also qualified attacks on defense and military networks as a “weapon of mass disruption.” The Russian Federation has been supporting for many years the conclusion of a “disarmament” agreement banning the development, production and use of particularly dangerous information weapons. When submitting its views to the UN Secretary-General, in particular, the Russian Federation declared that “information weapons” can have “devastating consequences comparable to the effect of weapons of mass destruction.” Therefore, “the use of Information Warfare against the Russian Federation or its armed forces will categorically not be considered a non-military phase of a conflict whether there were casualties or not.” The United Kingdom Under-Secretary for security and counter-terrorism also declared that a cyber attack that took out a power station would be an act of war, and the Estonian Defense Minister equated cyber blockades to naval blockades on ports preventing a state’s access to the world.

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107 Remarks on securing the nation’s cyber infrastructure”, see note 1.


110 Quote from the speech of a senior Russian military officer, reported in: V.M. Antolin-Jenkins, “Defining the Parameters of Cyberwar Operations: Looking for Law in All the Wrong Places?”, Naval Law Review 51 (2005), 132 et seq. (166).


112 NATO Parliamentary Assembly, NATO and Cyber Defence, 173 DSCFC 09 E bis, 2009, para. 59 <www.nato-pa.int/default.asp?SHORTCUT=1782>. Blockades are one of the examples of aggression given in A/RES/3314 (XXIX) of 14 December 1974. Commentators have also noted that “[t]he effects of naval blockades and information warfare attacks can be similar. Naval blockades prevent the transport of people and products into the target country or area, and may paralyze an economy. In the past, where intercontinental communication was largely by ship, a blockade would keep out information as well. An information warfare attack may also make transport of people and products impossible, paralyzing an economy, and it too may block the spread of information (especially in an
V. Remedies Against Cyber Attacks

1. Resort to the UN Security Council

Assuming that the victim state is able to identify the origin of the cyber attack and attribute the conduct to a state, several remedies are at its disposal. First, it (or any other UN member)\(^\text{113}\) could refer the situation to the Security Council under Article 35 para. 1 of the UN Charter and the Council might recommend the appropriate methods to settle the dispute (Article 36 para. 1). If the Security Council also establishes that the situation amounts to a threat to the peace, breach of peace or act of aggression, it could also exercise its powers under Chapter VII.

Whether or not cyber attacks can be considered breaches of peace or acts of aggression,\(^\text{114}\) they, and even certain CNE operations, could well potentially amount to a “threat to the peace”. Even though, in the drafters’ idea, this notion was limited to the international use of conventional armed force,\(^\text{115}\) its scope has been progressively expanded and virtually anything can be (and has been) qualified as a threat to the peace by the Security Council.\(^\text{116}\) The assessment would obviously depend on the specific circumstances of each case. For instance, as the United States DoD emphasizes, the fact that “a computer network attack […] caused widespread damage, economic disruption, and loss of life could well precipitate action by the Security Council.”\(^\text{117}\) Furthermore, “any serious CNA conducted by contenders in long-standing global flash-points (e.g., India-Pakistan, Turkey-Greece) risks ignition. On the other hand, it is possible to envision computer attacks among

\(^{113}\) A non-member can “bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter”, Article 35 para. 2 UN Charter.

\(^{114}\) Certain situations envisaged in A/RES/3314 (XXIX) of 14 December 1974 containing the Definition of Aggression could well cover cyber attacks as well. In any case, the list contained in the Definition is not exhaustive and is not binding on the Security Council.


\(^{116}\) It is well-known that the drafters of the Charter deliberately left the notion undefined, United Nations Conference on International Organization, Documents, Vol. XII, 1945, 505.

\(^{117}\) DoD, An Assessment, see note 27, 15.
major Western economic powers (perhaps in the form of economic espionage) that would clearly not threaten the peace if discovered."

If the Security Council does qualify a cyber attack as a threat to the peace, it will be able to adopt recommendations under Article 39, measures to prevent the worsening of the crisis under Article 40 and measures involving or not involving the use of force under Arts 41 and 42. In particular, Article 41 lists, among the measures not involving the use of force, “complete or partial interruption of [...] telegraphic, radio, and other means of communication”. The Security Council could thus impose a cyber blockade on the state responsible of the cyber attack in order to prevent its continuation or repetition.

2. Resort to an International Court

The responsible state, if identified, might also be brought before an international tribunal (for instance, the ICJ) in order to obtain reparation for the violation of Article 2 para. 4 and the principle of non intervention. The amount of damage caused by a cyber attack might however be difficult to quantify; financial institutions might for instance be reluctant in providing the exact data and the damage occurred because of business confidentiality. Furthermore, the ICJ, like any other international court, does not have compulsory jurisdiction and therefore both parties must agree to submit the case to adjudication.

Another option would be the request of an Advisory Opinion of the ICJ on the legality of cyber attacks in accordance with Article 96 of the UN Charter. Such opinions are optional and non-binding, although they might decisively contribute to the formation of a customary international law rule.

Some commentators have also suggested that, apart from giving rise to state responsibility, cyber attacks amounting to aggression also entail the international criminal responsibility of the individuals being re-

118 Schmitt, see note 26, 928.
119 Schmitt suggests that cyber attacks as a means to enforce Security Council resolutions might be “an ‘intermediate step’ between Article 41 non-forceful measures and the outright use of force under Article 42”, Schmitt, see note 103, 70.
120 CCDCOE Report, see note 22, 17.
The 2010 Review Conference of the Statute of the International Criminal Court (ICC) eventually adopted a definition of aggression modeled on that contained in the 1974 General Assembly Resolution 3314 (XXIX) but, in order to be consistent with the principle of legality, without including article 4, which declares the non-exhaustive nature of the list of cases of aggression thereby contained. In 2008, some delegations expressed their concern that this wording of the definition would exclude cyber attacks and supported a previous proposal that also included forms of attack other than the use of armed force affecting the political or economic stability or exercise of the right to self-determination or violating the security, defense or territorial integrity of one or more states. While it is true that some of the cases listed in article 8 bis (2) of the ICC Statute could also cover certain cyber attacks by invoking analogy with kinetic attacks, it is doubtful whether such broad interpretative approach would be consistent with article 22 of the Statute, which prohibits extension by analogy. On the other hand, the “leadership clause”, that limits liability to persons “in a position ef-

122 Weisbord, see note 72, 39; Ophardt, see note 62, para. 75. The individuals accused of the crime of aggression could of course also be brought before a domestic court. Another problem, which is beyond the scope of this article, is whether genocide, war crimes and crimes against humanity (over which the ICC has jurisdiction according to arts 6, 7 and 8 of its Statute) could also be committed through cyber means, D. Brown, “A Proposal for an International Convention to Regulate the Use of Information Systems in Armed Conflict”, Harv. Int’l L. J. 47 (2006), 179 et seq. (212-213).
123 <www.mediafire.com/?ijnvmhwnzo>, Resolution RC/Res. 4, of 11 June 2010. The new article 8 bis (1) of the ICC Statute defines the “crime of aggression” as “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations”. An “act of aggression” is “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations” (article 8 bis (2)).
125 The Estonian Defense Minister, for instance, equated cyber attacks to the blockade of a country’s ports two hundred years ago, NATO and Cyber Defense, see note 112, para. 59.
126 Ophardt, see note 62, para. 64.
fectively to exercise control over or to direct the political or military action of a State”, would probably not exclude prosecution of hackers that take over the missile operational system of a state and use it to launch an aggression against another state. The equalizing effect of cyber technologies, thus, could broaden the otherwise limited spectrum of individuals that might commit the crime of aggression.

3. Retortions and Countermeasures

The state victim of a cyber attack could also adopt retortions and non-military countermeasures against the attacker. If the former, being unfriendly acts but not involving any breach of international law, can be adopted at any time, countermeasures consist of conduct inconsistent with a state’s international obligations in response to a prior violation of international law by another state. The injured state could adopt them only when the cyber operation is illegal under international law, which is not the case, for instance, of cyber espionage. Cyber attacks as defined above and cyber propaganda with the purpose of causing civil strife in the target state would, however, be both unlawful, as in contrast with the prohibition of the use of force and of intervention in the domestic affairs of another state, respectively, and would entitle the injured state to adopt proportionate countermeasures consistently with the limitations and conditions spelt out in arts 50, 51 and 52 of the ILC Articles on State Responsibility.

Can the state victim of a cyber attack also adopt countermeasures involving the use of force against the attacker? As such measures are considered unlawful in contemporary international law, the answer would be affirmative only if one should conclude that a cyber attack triggers the right to self-defense under Article 51 of the UN Charter or under customary international law. This will be discussed below. It is worth noting that, if cyber force falls within the scope of Article 2 para. 4 and therefore of article 50 para. 1 of the ILC Articles on State Responsibility, a state victim of a cyber attack could not react in kind unless the cyber attack entitles it to invoke Article 51 of the UN Charter. Nevertheless, the situation the ILC had in mind is that of a state us-

127 Ibid., para. 47.
128 See article 49 of the ILC Articles on State Responsibility, see note 52.
129 Article 50 para. 1 of the ILC Articles on State Responsibility, see note 52. See also ICJ Reports 1996, see note 86, 246 para. 46.
ing armed force against the previous violation of, for instance, a commercial treaty by the other party. It would indeed seem unreasonable to argue that the state victim of a cyber attack could not retaliate by sending a malicious code unless the cyber attack reaches the threshold of an armed attack. Of course, the expected consequences of the counter cyber attack will have to be proportionate to those of the attack. This might be difficult to achieve because, like biological weapons, malware sent through the cyberspace might spread uncontrollably. Another problem lies in the fact that, in case of a DDoS attack carried out by millions of hijacked computers, the risk of a counter cyber attack for the actual attacker would be negligible, because the counter attack will be directed towards the hijacked computers (which could be located even in the victim state).

4. Use of Armed Force in Self-Defense under Article 51 of the UN Charter

a. When does a Use of Cyber Force amount to an “Armed Attack”?

Article 51 of the UN Charter provides that, “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” The state victim of a use of cyber force will thus be entitled to react in self-defense only to the extent that such use of cyber force can be qualified as an “armed attack”. In the Nicaragua case, the ICJ acknowledged that a definition of “armed attack” does not exist in the Charter and is not part of treaty law. The ICJ, however, made clear that Article 51 does not refer to specific weapons and that it applies to “any use of force, regardless of the weapons employed.” As seen above in the context of Article 2 para. 4, the fact that cyber attacks do not employ traditional kinetic weapons does not necessarily mean they cannot be “armed”. As Zemanek notes, “it is neither the designation of a device, nor its normal use, which make it a weapon but the intent with which it is used and its ef-

130 Delibasis, see note 45, 364.
131 ICJ Reports 1986, see note 64, 94 para. 176.
132 ICJ Reports 1996, see note 86, 244 para. 39.
133 Above, Part IV.
fect. The use of any device, or number of devices, which results in a considerable loss of life and/or extensive destruction of property must therefore be deemed to fulfil the conditions of an ‘armed’ attack.”

This conclusion is supported by the Security Council’s reaffirmation of the right to self-defense in response to the 11 September 2001 attacks on the United States, where the “weapons” employed were hijacked airplanes.

But are all uses of cyber force “armed attacks”? It is well-known that the ICJ identified “the most grave forms of the use of force”, i.e. armed attacks, and less grave forms and adopted the “scale and effects” criterion in order to distinguish them. A commentator has tried to specify this criterion by arguing that an armed attack is, “an act or the beginning of a series of acts of armed force of considerable magnitude and intensity (i.e. scale) which have as their consequence (i.e. effects) the infliction of substantial destruction upon important elements of the target State namely, upon its people, economic and security infrastructure, destruction of aspects of its governmental authority, i.e. its political independence, as well as damage to or deprivation of its physical element namely, its territory”, and the “use of force which is aimed at a State’s main industrial and economic resource and which results in the substantial impairment of its economy.” Dinstein suggests some examples of cyber attacks amounting to armed attacks: “[f]atalities caused by the loss of computer-controlled life-support systems; an extensive power grid outage (electricity blackout) creating considerable deleterious repercussions; a shutdown of computers controlling waterworks and dams, generating thereby floods of inhabited areas; deadly crashes deliberately engineered (e.g., through misinformation fed into aircraft computers)” and “the wanton instigation of a core-meltdown of a reactor in a nuclear power plant, leading to the release of radioactive materials that can result in countless casualties if the neighbouring areas are densely populated.” On the other hand, disruption of communications caused by a temporary DoS attack which does not result in sig-

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136 ICJ Reports 1986, see note 64, para. 191, 103 para. 195.
137 A. Constantinou, The Right of Self-Defence under Customary International Law and Article 51 of the UN Charter, 2000, 63-64.
138 Dinstein, see note 31, 105.
significant human losses or property damage would not amount to an armed attack, although it might be a use of force.\textsuperscript{139}

It is not clear against whose computers and computer networks the cyber attack should be directed in order to be considered an attack on the state. In a traditional attack, the fact that the target is military or civilian does not make any difference. The state where the target is located would be entitled to self-defense because its territorial integrity has been violated. Hence, Dinstein correctly argues that, if a conventional armed attack against a civilian facility on the territory of the target state would amount to an armed attack even if no member of the armed forces is injured or military property damaged, there is no reason to come to a different conclusion with regard to cyber attacks against civilian systems: “[e]ven if the CNA impinges upon a civilian computer system which has no nexus to the military establishment (like a private hospital installation), a devastating impact would vouchsafe the classification of the act as an armed attack.”\textsuperscript{140} The fact that the computer network is run by a corporation possessing the nationality of a third state or that the computer system operated by the victim state is located outside its borders (for instance, in a military base abroad) does not change the situation.\textsuperscript{141} When the damage caused to a certain state or its nationals is however not intended (e.g., because the cyber attack was an accident or the real target was another state),\textsuperscript{142} it is doubtful that self-defense can be invoked by the casual victim: according to the ICJ, an armed attack must be carried out “with the specific intention of harming.”\textsuperscript{143}

\textsuperscript{139} Ibid. The view according to which stealing or compromising sensitive military information could also qualify as an armed attack “even though no immediate loss of life or destruction results” occur (C.C. Joyner/ C. Lo- trionte, “Information Warfare as International Coercion: Elements of a Legal Framework”, \textit{EJIL} 12 (2001), 825 et seq. (855)) cannot thus be shared.

\textsuperscript{140} Dinstein, see note 31, 106.

\textsuperscript{141} Ibid., 106-107.

\textsuperscript{142} As Schmitt notes, “the attacker, because of automatic routing mechanisms, may not be able to control, or even accurately predict, the cyber pathway to the target”, which increases the risk of unintended consequences, Schmitt, see note 103, 56.

\textsuperscript{143} Case concerning Oil Platforms (Iran v. United States), ICJ Reports 2003, 161 et seq. (191 para. 64). It is not however clear whether the Court wanted to emphasize a general requirement for self-defense or it only intended to limit the requirement to that specific case, C. Gray, \textit{International Law and the Use of Force}, 2008, 146.
Nonetheless, the problem is whether a cyber attack on the computer network of any civilian infrastructure could potentially amount to an armed attack (providing it satisfies the scale and effects criterion). It has been claimed, for instance, that, as Google is the most powerful presence on the Internet, an attack on it would be an attack on the United States critical infrastructure. There is no agreement, though, on what “critical infrastructures” are. The UN General Assembly recognized that “each country will determine its own critical infrastructure.” The 1999 DoD’s Assessment of International Legal Issues in Information Operations, for instance, refers to a nation’s air traffic control system, its banking and financial system and public utilities and dams as examples of targets that, if shut down by a coordinated computer network attack, might entitle the victim state to self-defense. The 2001 PATRIOT Act defines “critical infrastructure” as “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.” The 2003 United States National Strategy to Secure Cyberspace describes critical infrastructures as “the physical and cyber assets of public and private institutions in [...] agriculture, food, water, public health, emergency services, government, defense industrial base, information and telecommunications, energy, transportation, banking and finance, chemicals and hazardous materials, and postal and shipping.” The United Kingdom Cyber Security Strategy refers to nine sectors that deliver essential services: energy, food, water, transport, communications, government and public services, emergency services, health and finance. The Australian government defines critical infrastructures as “those physical facilities, supply chains, information technologies and

144 M. Glenny, “In America’s new cyber war Google is on the front line”, The Guardian, 19 January 2010, 32.
146 DoD, An Assessment, see note 27, 16.
149 United Kingdom Cyber Security Strategy, see note 59, 9.
communication networks which, if destroyed, degraded or rendered unavailable for an extended period, would adversely impact on the social or economic well-being of the nation or affect Australia’s ability to ensure national security”, in particular in the following sectors: “banking and finance, communications, emergency services, energy, food chain, health (private), water services, mass gatherings, and transport (aviation, maritime and surface).”\(^\text{150}\) Australia’s Cyber Security Strategy, however, also points out that systems of national interest “go beyond traditional notions of critical infrastructure” and include “systems which, if rendered unavailable or otherwise compromised, could result in significant impacts on Australia’s economic prosperity, international competitiveness, public safety, social wellbeing or national defence and security.”\(^\text{151}\) Finally, the Commission of the European Union defines critical infrastructures as “those physical resources, services, and information technology facilities, networks and infrastructure assets which, if disrupted or destroyed, would have a serious impact on the health, safety, security or economic well-being of Citizens or the effective functioning of governments.”\(^\text{152}\)

The problem of the identification of national critical infrastructures is further complicated by the fact that, in most countries, the majority of such infrastructures are owned by the private sector. At the end of the day, the notion of “critical infrastructure” is linked to that of “national security”, which is equally difficult to define, both in domestic and international law.\(^\text{153}\) International tribunals recognize a broad mar-

\(^{150}\) Australia’s Cyber Security Strategy, see note 4, 20.

\(^{151}\) Ibid., 12. The Strategy acknowledges that “[t]he identification of systems of national interest is not a static process and [...] must be informed by an ongoing assessment of risk” (ibid.).

\(^{152}\) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0576:FIN:EN:PDF> EU Commission, Green Paper on a European Programme on Critical Infrastructure Protection, COM (2005) 576 final, 17 November 2005, 20. Critical information infrastructures are defined as those information and communication technologies “that are critical infrastructures for themselves or that are essential for the operation of critical infrastructures (telecommunications, computers/software, Internet, satellites, etc.)” (ibid., 19). An indicative list of critical infrastructure sectors includes energy, information and communication technologies, water, food, health, financial, public and legal order and safety, civil administration, transport, chemical and nuclear industry, and space and research (ibid., 24).

gin of appreciation to states when it comes to determine what amounts to a threat to their national security, which “rend, en fin de compte, quelque peu vaine la recherche d’une définition objective et immutable du concept de «sécurité nationale».”

b. The Legal Requirements of the Reaction in Self-Defense against a Cyber Attack

The reaction in self-defense against cyber attacks amounting to armed attacks must meet the requirements of necessity, proportionality and immediacy. Necessity means that the use of force is a means of last resort and that all other available means have failed or are likely to fail. As a minimum, it implies an obligation to identify the author, verify that the cyber attack is not an accident and that the matter cannot be settled by less intrusive means (for instance, by preventing the hackers from accessing the networks and websites under attack through the use of cyber defenses). The major problem with using self-defense to react against a cyber attack is the identification of the aggressor. Aware of this difficulty, certain commentators have suggested that responses in self-defense to a cyber attack against national critical infrastructures should be allowed even without first attributing and characterizing the attack. According to this view, “the law should permit an active response based on the target of the attack, regardless of the attacker’s identity.” This position, however, cannot be accepted. Apart from being at odds with the law of state responsibility, it is inherently illogical. If it has not yet been established where the attack comes from and to whom it is attributable, against whom and where will the reaction be directed? Furthermore, as seen above, there is no generally accepted definition of “critical infrastructure”. Finally, if one accepts “active self-defense” with regard to cyber attacks, why should it not also apply to terrorist attacks by traditional weapons, when no final evidence of state support has been found? Indeed, the United States DoD correctly rejects this view and argues that “the international law of self-defense would not generally justify acts of ‘active defense’ across international

154 Ibid., 15.
155 Y. Dinstein, War, Aggression and Self-Defence, 2005, 208-211.
156 See above, Part III.
boundaries unless the provocation could be attributed to an agent of the
country concerned, or until the sanctuary nation has been put on notice
and given the opportunity to put a stop to such private conduct in its
territory and has failed to do so, or the circumstances demonstrate that
such a request would be futile.\textsuperscript{158}

As to proportionality, a response in kind might not be possible, ei-
ther because the victim state does not have the technology to conduct a
cyber attack or because the aggressor does not have a sufficiently devel-
oped computer network to hit.\textsuperscript{159} It is also doubtful whether a series of
small-scale cyber attacks can be considered cumulatively when assessing
the proportionality of the reaction. The doctrine of the accumulation of
events, often invoked by Israel and the United States against terrorist
attacks, is controversial.\textsuperscript{160} In the Oil Platforms case, the ICJ did not
expressly reject it, although the Court found it not applicable in the
case before it.\textsuperscript{161}

Finally, the requirement of immediacy reflects the fact that the ulti-
mate purpose of self-defense is not punishing the attacker, but rather
repelling the armed attack. This requirement must be applied flexibly,
especially in the case of cyber attacks. If a state’s military computer
network has been incapacitated by the cyber attack, it might take some
time for it to be able to react in self-defense. Furthermore, if the aggres-
sor uses logic or time bombs, the actual damage could occur well after
the cyber attack, which might delay the reaction.

c. Anticipatory Self-Defense against a Conventional Attack
Preceded by a Cyber Attack

Even when the use of cyber force does not reach the threshold of an
“armed attack”, the victim state might still be in a position to invoke
anticipatory self-defense against an imminent attack through conven-
tional means that the cyber operation aims to prepare.\textsuperscript{162} As mentioned
above, for instance, right before the 2008 Russian invasion several
Georgian governmental websites had already been the target of brief
but debilitating cyber attacks that continued throughout the conflict.
The shutting down of crucial websites in particular severed communi-

\textsuperscript{158} DoD, \textit{An Assessment}, see note 27, 21.
\textsuperscript{159} Greenberg/ Goodman/ Soo Hoo, see note 112, 32.
\textsuperscript{160} Zemanek, see note 134, para. 7; Dinstein, see note 31, 109.
\textsuperscript{161} ICJ Reports 2003, see note 143, 191 para. 64.
\textsuperscript{162} Robertson, Jr., see note 89, 139.
cation from the Georgian government in the initial phase of the conflict.\textsuperscript{163} It also appears that the 2007 bombing by Israel of a nuclear facility in Syria was preceded by a cyber attack that neutralized ground radars and anti-aircraft batteries.\textsuperscript{164}

In the Nicaragua case, the ICJ did not take position on the problem of anticipatory self-defense, since “the issue of the lawfulness of a response to the imminent threat of armed attack” was not raised.\textsuperscript{165} Similarly, in the case concerning Armed Activities on the Territory of the Congo the Court expressed no view, as Uganda eventually claimed that its actions were in response to armed attacks that had already occurred.\textsuperscript{166} However, the Court was aware that the security needs that Uganda aimed to protect were “essentially preventative”\textsuperscript{167} and held that “Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived security interests beyond these parameters.”\textsuperscript{168}

The crucial question is how imminent the armed attack is, which determines whether the reaction is anticipatory or preventive.\textsuperscript{169} It appears that a right to anticipatory self-defense against an imminent

\textsuperscript{163} CCD COE Report, see note 22, 4-5, 15.
\textsuperscript{165} ICJ Reports 1986, see note 64, 103 (para. 194).
\textsuperscript{166} Armed Activities on the Territory of the Congo (DRC v. Uganda), ICJ Reports 2005, 168 et seq. (222 para. 143).
\textsuperscript{167} Ibid.
\textsuperscript{168} Ibid., 223 (para. 148).
\textsuperscript{169} Although the terminology is controversial, the present author will refer to self-defense against imminent attacks as “anticipatory” and to self-defense against non-imminent attacks as “preventive”. The doctrine of preventive self-defense was contained in the 2002 United States National Security Strategy (reaffirmed in 2006), that tried to expand the definition of “imminence” of armed attack to cover cases where “uncertainty remains as to the time and place of the enemy’s attack”, The National Security Strategy of the United States of America, 20 September 2002, <http://www.whitehouse.gov/nsc/nss.pdf>, 15; the 2006 version is available at <http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf>, 23. However, the doctrine of preventive self-defense has no basis in international law, either customary or conventional, A. Cassese, International Law, 2005, 361; Gray, see note 143, 213.
armed attack is consistent not only with customary international law,\textsuperscript{170} but also with Article 51 of the UN Charter.\textsuperscript{171} It is true that, under a literal reading of this provision, the armed attack must “occur”, but, according to article 32 of the 1969 Vienna Convention on the Law of Treaties, the application of the article 31 criteria should not lead to an interpretation which is “manifestly absurd or unreasonable”. It is unrealistic to expect that states will in all circumstances await an attack before reacting. The rationale of self-defense is to avert an armed attack. If the danger is “instant, overwhelming, leaving no choice of means, and no moment for deliberation”,\textsuperscript{172} if, in other words, it is necessary to react in that very moment because otherwise it would be too late, the victim state should be entitled to invoke self-defense.\textsuperscript{173} According to Schmitt, three factors must be taken into account when establishing the right to respond in (anticipatory) self-defense against a cyber attack that does not amount in itself to an armed attack under Article 51 of the UN Charter: “1) The CNA is part of an overall operation culminating in armed attack; 2) The CNA is an irrevocable step in an imminent (near-term) and probably unavoidable attack; and 3) The defender is reacting in advance of the attack itself during the last possible window of opportunity available to effectively counter the attack.”\textsuperscript{174} This appears to be a reasonable application of the Caroline criteria. The imminence of the attack must be assessed not only against the time factor but also on the basis of the circumstances of each specific case. In the case of cyber attacks, the imminent character “depends on the intensity of the attack, the target of the attack, the reaction time required in order to successfully pre-empt the attack, and the speed with which the damage may move throughout the computer networks.”\textsuperscript{175} The defensive reaction


\textsuperscript{172} Note from Daniel Webster on the Caroline incident to Henry S. Fox of 24 April 1841, in: British and Foreign State Papers 29 (1857), 1137-1138.

\textsuperscript{173} Classic examples of imminent attacks are an advancing army or ships on the horizon or a large scale mobilization of troops by an unfriendly neighboring state on its frontiers, W.H. Taft, IV, The Legal Basis for Pre-emption, 18 November 2002, <http://www.cfr.org/publication.php?id=5252>.

\textsuperscript{174} Schmitt, see note 26, 932-933.

\textsuperscript{175} Joyner/ Lotrionte, see note 139, 860.
should also be proportionate not to the cyber attack, but rather to the overall attack of which the cyber attack is a preliminary part.\textsuperscript{176}

5. Does Customary International Law Permit Self-Defense against a Cyber Attack?

In addition to whether Article 51 of the UN Charter can be interpreted as allowing a reaction in self-defense against a cyber attack, one has also to investigate if any customary international law rule has already developed on the matter. In the Nicaragua case, the ICJ famously acknowledged that there is no complete identity between the customary international law rules on the use of force and the relevant provisions of the UN Charter and that “customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content.”\textsuperscript{177} About ten years ago, D’Amato predicted that “computer network attack will soon be the subject of an outright prohibition under customary international law.”\textsuperscript{178} Other commentators, however, have argued that no customary international law has yet developed because the phenomenon is still too recent and there is no state practice yet.\textsuperscript{179} This reasoning is, however, flawed. Apart from the fact that cyber attacks are as old as computer networks and are thus not such a recent phenomenon, “the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law.”\textsuperscript{180} Therefore, “[s]ome customary rules have sprung up quite quickly: for instance, sovereignty over air space, and the regime of the continental shelf, because a substantial and representative quantity of State practice grew up rather rapidly in response to a new situation.”\textsuperscript{181} With regard to the alleged absence of state practice, it is indeed difficult, if not impossible, to

\textsuperscript{176} Schmitt, see note 26, 933.
\textsuperscript{177} ICJ Reports 1986, see note 64, 96 para. 179.
\textsuperscript{178} A. D’Amato, “International Law, Cybernetics, and Cyberspace”, in: Schmitt/ O’Donnell, see note 11, 69.
\textsuperscript{179} Schmitt, see note 26, 921, who concludes that “[a] customary norm may develop over time, but it does not exist at present” as “[n]either practice, nor \textit{opinio juris}, is in evidence”; Shackelford, see note 12, 219.
\textsuperscript{180} North Sea Continental Shelf, ICJ Reports 1969, 3 et seq. (43 para. 74).
find cyber attacks clearly imputable to states. *Usus* as an element of cus-
tom, however, also includes “[v]erbal acts, and not only physical acts, of
States”, e.g. “[d]iplomatic statements (including protests), policy state-
ments, press releases, official manuals (e.g., on military law), instruc-
tions to armed forces, comments by governments on draft treaties, legis-
islation, decisions of national courts and executive authorities, pleadings
before international tribunals, statements in international organizations
and the resolutions those bodies adopt.”182 In fact, several states have
expressed their views with regard to the issue of self-defense in re-
sponse to a cyber attack. This practice, which also reveals *opinio juris*,
should be “extensive and virtually uniform.”184 True, statements and

182 Ibid., 725. As Gray states, interpreting state practice means looking at what
states say, not necessarily at what they do, Gray, see note 143, 418. Accord-
ing to the ICTY, “[w]hen attempting to ascertain State practice with a view
to establishing the existence of a customary rule or a general principle, it is
difficult, if not impossible, to pinpoint the actual behaviour of the troops in
the field for the purpose of establishing whether they in fact comply with,
or disregard, certain standards of behaviour. This examination is rendered
extremely difficult by the fact that not only is access to the theatre of mili-
tary operations normally refused to independent observers (often even to
the ICRC) but information on the actual conduct of hostilities is withheld
by the parties to the conflict; what is worse, often recourse is had to misin-
formation with a view to misleading the enemy as well as public opinion
and foreign Governments. In appraising the formation of customary rules
or general principles one should therefore be aware that, on account of the
inherent nature of this subject-matter, reliance must primarily be placed on
such elements as official pronouncements of States, military manuals and
judicial decisions” (Tadić, see note 66, para. 99). Although the ICTY refers
to *jus in bello*, it seems that the same rationale would apply to *jus ad bellum*
too.

183 Indeed, “the role of usage in the establishment of rules of international cus-
tomary law is purely evidentiary: it provides evidence on the one hand of
the contents of the rule in question and on the other hand of the *opinio ju-
ris* of the States concerned. Not only is it unnecessary that the usage should
be prolonged, but there need also be no usage at all in the sense of repeated
practice, provided that the *opinio juris* of the States concerned can be
clearly established”, B. Cheng, “United Nations Resolutions on Outer
(36).

184 The ICJ held that “an indispensable requirement would be that within the
period in question, short though it may be, State practice […] should have
been both extensive and virtually uniform in the sense of the provision in-
voked; - and should moreover have occurred in such a way as to show a
declarations on the issue under examination come from a limited number of states, but this is not an insurmountable obstacle to the formation of a custom. As Guzman observes, “[f]or many rules of CIL [customary international law], powerful states dominate the question of state practice. The group may grow still smaller once it is recognized that only states with a stake in the issue must be considered.”\textsuperscript{185} The ILA Report on the formation of customary international law also points out that the extensive character of state practice is more a qualitative than a quantitative criterion: “if all major interests (‘specially affected States’) are represented, it is not essential for a majority of States to have participated (still less a great majority, or all of them).”\textsuperscript{186} Cassese makes the example of outer space: as only two states had the technology to exploit it, their convergence facilitated the fast creation of a customary international law rule.\textsuperscript{187} The same applies to cyber attacks - it is those states that have developed military cyber technologies that one has to mainly look at in order to establish whether a “general practice accepted as law” has evolved in the field.\textsuperscript{188}

The United States has repeatedly taken a stance in favor of the right to self-defense against cyber attacks. According to the 1999 DoD’s Assessment of International Legal Issues in Information Operations, “[s]tate-sponsored [cyber] attacks may well generate the right of self-defence.”\textsuperscript{189} The document goes on to say, that “if a coordinated computer network attack shuts down a nation’s air traffic control system along with its banking and financial systems and public utilities, and opens the floodgates of several dams resulting in general flooding that causes widespread civilian deaths and property damage, it may well be that no one would challenge the victim nation if it concluded that it was a victim of an armed attack, or of an act equivalent to an armed attack.”\textsuperscript{190} The 2003 United States National Strategy to Secure Cyberspace states that “an investigation, arrest, and prosecution of the perpetrators, or a diplomatic or military response in the case of a state spon-

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\textsuperscript{186} ILA Report, see note 181, 737.
\textsuperscript{187} Cassese, see note 169, 158.
\textsuperscript{188} Article 38 para. 1 lit. b of the ICJ Statute.
\textsuperscript{189} DoD, \textit{An Assessment}, see note 27, 21.
\textsuperscript{190} Ibid., 18.
\end{flushright}
sored action” will follow large cyber incidents. More ambiguously, the 2006 National Security Strategy affirms that the United States is “pursuing a future force that will provide tailored deterrence of both state and non-state threats (including WMD [weapons of mass destruction] employment, terrorist attacks in the physical and information domains, and opportunistic aggression) while assuring allies and dissuading potential competitors.” In a United States Senate questionnaire in preparation for a hearing on his nomination to head of the new Cyber Command, Lt. Gen. Alexander made clear that, while the right to self-defense “has not been specifically established by legal precedent to apply to attacks in cyberspace, it is reasonable to assume that returning fire in cyberspace, as long as it complied with the law of war principles [...] would be lawful.” Richard Clarke, the National Coordinator for Security, Infrastructure Protection and Counterterrorism, stated that “an attack on American cyberspace is an attack on the United States that should trigger a military response.” The Head of the United States Strategic Command said that the White House retains the option to respond with physical force (including nuclear weapons) in case of a disabling cyber attack against United States computer networks. Another Pentagon official recently stated that the United

191 United States National Strategy to Secure Cyberspace, see note 3, 28 (emphasis added). This is subsequently reaffirmed in the document: “When a nation, terrorist group, or other adversary attacks the United States through cyberspace, the U.S. response need not be limited to criminal prosecution. The United States reserves the right to respond in an appropriate manner”, ibid., 50.

192 2006 United States National Security Strategy, see note 169, 43 (emphasis added).


States is considering the possibility of using military force in response to a cyber attack.196

As to other states, the 2009 United Kingdom Cyber Security Strategy leaves open every option by saying that “[w]e recognize the need to develop military and civil capabilities, both nationally and with allies, to ensure we can defend against [cyber] attack, and take steps against adversaries where necessary.”197 A senior Russian military officer is reported to have said that “considering the possible catastrophic use of strategic information warfare means by an enemy, whether on economic or state command and control systems, or on the combat potential of the armed forces [...] Russia retains the right to use nuclear weapons first against means and forces of information warfare, and then against the aggressor state itself.”198 It also appears that a proposed new law would allow Russian authorities to treat a cyber attack of whatever kind as an act of war if established that it originates from another state.199

The practice of relevant international organizations is another form of “state practice” to be considered when assessing the existence of a rule of customary international law.200 Although recognizing that “[t]he next significant attack on the Alliance may well come down a fibre optic cable”,201 the position of NATO and its Member States on the applicability of the duty of assistance in collective self-defense under article 5 of the North Atlantic Treaty in case of a cyber attack is not clear. In January 2008, NATO adopted a Policy on Cyber Defense that was endorsed by the Heads of State and Government at the Bucharest Summit in April of the same year.202 Paragraph 47 of the Summit’s Final Declaration emphasizes “the need for NATO and nations to protect key information systems in accordance with their respective responsibilities;

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197 United Kingdom Cyber Security Strategy, see note 59, 14.
198 Quoted in Antolin-Jenkins, see note 110, 166.
199 McAfee Report, see note 5, 30.
200 ILA Report, see note 181, 730.
202 The exact details of the Policy remain classified.
share best practices; and provide a capability to assist Allied nations, upon request, to counter a cyber attack.”

It appears, however, that NATO responses to cyber attacks were not placed under article 5, but rather under article 4 of the North Atlantic Treaty, that calls upon the Member States to “consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened.” On 23 April 2010, Estonia concluded a memorandum of understanding (MoU) with NATO to facilitate exchange of information and to create a mechanism of assistance in case of cyber attack. Although the MoU is not for public release, in response to a question from this author an Estonian official from the Ministry of Defense answered that the MoU sets up a framework of support, information exchange and consultations in case of cyber attacks against Estonia and does not consider cyber attacks as armed attacks against NATO.

The Organization’s position with regard to the applicability of article 5 to cyber attacks is, however, still (perhaps intentionally) ambiguous. If a NATO official is reported to have “completely excluded” any military reaction under article 5 in a case of cyber attack against a Member State, another official did not rule out such option. The 2010 Report of the Group of Experts on the New Strategic Concept for NATO maintains this ambiguity where it refers to “less conventional threats to the Alliance”, such as cyber assaults, “which may or may not reach the level of an Article 5 attack.” The document further points out that large-scale cyber attacks against NATO’s command and control systems or energy grids “could readily warrant consultations under Article 4 and could possibly lead to collective defence measures under Article 5” and that “whether an unconventional danger – such as a

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205 See <www.nato.int/cps/en/natolive/news_62894.htm>. Similar agreements have also been signed with Slovakia, Turkey, the United Kingdom and the United States.
206 E-mail on file with the author.
208 NATO 2020, see note 201, 9.
209 Ibid., 45.
cyber attack [...] – triggers the collective defence mechanisms of Article 5 [...] will have to be determined by the NAC [North Atlantic Council] based on the nature, source, scope, and other aspects of the particular security challenge.\(^{210}\) NATO Member States’ position is also kept vague. The United Kingdom National Security Strategy (2009 Update), for instance, refers to the fact that “some allies of the UK, to which we have an obligation under Article V of the NATO Charter, could be threatened from other states, through military or other means.”\(^{211}\) With regard to the 2007 cyber attack on Estonia, a German official is claimed to have stated that, while such attack did not activate article 5 of the North Atlantic Treaty, this could change in the future if the attacks become more sophisticated.\(^{212}\) The Estonian President and Defense Minister were also said to consider the invocation of article 5.\(^{213}\)

VI. Concluding Remarks

The current debate on the need for an international treaty prohibiting the use of cyber force among states brings to mind the situation in Constantinople in 1453, where the doctors of faith were debating the issue of whether angels have a gender at the very moment the Ottoman army was at the gates.\(^{214}\) Indeed, cyber warfare is already a reality and, in the

\(^{210}\) Ibíd., 20.

\(^{211}\) United Kingdom National Security Strategy, see note 30, 41 (emphasis added). The Strategy points out that security threats “go beyond the traditional domains of land, sea and air, to include weapons of mass destruction, and the increasing importance of cyberspace” (ibíd., 7).

\(^{212}\) Quoted in Lewis, see note 24, 3.

\(^{213}\) Shackelford, see note 12, 194; “NATO agrees common approach to cyber defence”, see note 207. The fact that Estonia did not eventually invoke article 5 of the North Atlantic Treaty does not necessarily mean that the government of the Baltic state did not believe that collective self-defense could be invoked, but it could rather be an indication that the cyber attack was not regarded as reaching the threshold of an armed attack, as it did not cause physical damage or human losses.

\(^{214}\) The Russian Federation has supported the conclusion of a treaty to regulate the offensive use of cyber technologies by states and to ban attacks on computer networks, but the United States appears to prefer a law enforcement approach and improve cooperation in the context of cyber crime and cyber terrorism, Markoff, see note 108. On why new rules on cyber warfare are needed, see Hollis, see note 13, 1053-1057. See also Johnson, see note 109, 442-453.
current absence of specific *jus ad bellum* rules, we are left with the provisions contained in the UN Charter and in customary international law. These rules seem to be flexible enough to be extended to warfare that did not exist when they were conceived: after all, this already happened in the past with regard to nuclear weapons.

It has been seen that the main question is whether a cyber attack is an action below the threshold of the use of force, or a use of force, or a use of force amounting to an armed attack. This article has concluded that cyber force, unlike CNE operations, can be qualified as a use of “armed” force in the sense of Article 2 para. 4. On the other hand, only large scale cyber attacks on critical infrastructures that result in significant physical damage or human losses comparable to those of an armed attack with conventional weapons would entitle the victim state to invoke self-defense under Article 51 of the UN Charter. Self-defense would also be possible against a cyber attack that does not reach the threshold of an armed attack but which prepares an imminent armed attack with conventional weapons (although only if the *Caroline* requirements are met). The absence of frontiers in cyberspace and the possibility for the perpetrators to hide behind botnets or IP spoofing, however, could hamper the identification of the origin of the cyber attack and the application of the law of state responsibility.

This article has also suggested that customary international law could play a role in this area, as there is already some relevant state practice and *opinio juris*, in particular with regard to the right to self-defense against cyber attacks. Although this might lead to the formation of a customary rule in the forthcoming years, the process is on-going and, considering the ambiguity of the positions of certain states and international organizations, it is still difficult to predict its outcome.
Commission on the Limits of the Continental Shelf

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1 The views expressed in this paper are strictly those of the author and in no way represent or reflect the views or position of any institution or government.
I. Introduction

The Commission on the Limits of the Continental Shelf (hereinafter CLCS) is one of the three institutions created under the 1982 United Nations Convention on the Law of the Sea (hereinafter the Convention). The Commission has been assigned to play mainly two significant roles in the establishment of the outer limits of the continental shelf beyond 200 nautical miles of a Coastal State.

First, the CLCS is tasked to evaluate the claim of a Coastal State for an area of the continental shelf beyond 200 nautical miles. Second, the CLCS may, upon request, also provide scientific and technical advice to the Coastal State in its preparation of its submission of the claim.

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Following the entry into force of the Convention in November 1996, the first elections were held for the 21 members of the CLCS in March 1997. The CLCS held its first session in June 1997. During the first year, the CLCS adopted the first version of its Rules of Procedure. The other significant document which the CLCS drafted and completed were the Scientific and Technical Guidelines (hereinafter Guidelines). They were adopted on 13 May 2009. In considering which date to use in order to extend the ten-year deadline for filing submissions with the CLCS, the Meeting of States Parties decided to refer to the date of adoption of the Guidelines, namely,

“for a State for which the Convention entered into force before 13 May 1999, the date of commencement of the 10-year time period for making submissions to the Commission is 13 May 1999.”

The Guidelines contain the Commission’s “authoritative interpretation of Article 76.” One reason why many states felt the need for the
deadline to be extended was because they wanted comprehensive scientific and technical guidance from the CLCS before they could adequately prepare their submissions.

Out of the 51 submissions made to the CLCS since its establishment in 1997, evaluation has been completed and recommendations have been made on nine submissions. As had been predicted by many observers, there was a sharp increase in the workload of the CLCS in the months before the deadline of 13 May 2009. In addition to the 42 claims currently undergoing evaluation at various stages, the following submissions will also add to the workload of the CLCS:

(a) Up to 44 additional submissions from states that have submitted preliminary information to the Secretary-General pursuant to the Decision of the Meeting of States Parties contained in Document SPLOS/183;

(b) Submissions from states that have become parties to the Convention less than ten years ago;

(c) Submissions from states that may become parties in the future and could therefore make submissions to the Commission within 10 years of the entry into force of the Convention;

(d) Additional submissions from states that have thus far made only partial submissions.

This article takes stock of the law and practice of the CLCS from 1997 to 2009 and includes comments and analysis of its procedure and of the completed submissions as of 2009.


II. Mandate of the Commission on the Limits of the Continental Shelf

The CLCS has a two-pronged mandate under article 3 of Annex II of the Convention:

1. To consider the data and other material submitted by Coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles and to make recommendations; and

2. To provide scientific and technical advice, if requested by the Coastal State concerned during the preparation of the submission.

The first task of the CLCS is to consider the data and other materials submitted to it by the Coastal States concerning the outer limits of the continental shelf and to make recommendations. The methods, data, and other material, as well as analysis, which were undertaken by the Coastal State in establishing its outer limits shall be evaluated as to whether they are in accordance with article 76 of the Convention. The CLCS does not have a direct mandate to establish the outer limits. The right and the power to establish the outer limits belong to the Coastal State. The recommendatory nature of the first task is therefore an acknowledgement of the Coastal State's sovereign right. Though technically it is not part of the territory of a Coastal State, the continental shelf possesses characteristics which are similar to those of a territory.

Para. 3 of article 77 of the Convention confirms this,

“The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.”

The second task of the CLCS refers to the advisory role it could play during the preparation of the submission by the Coastal State. The preparation of the Coastal State of its submission includes its initial determination of the outer limits of the continental shelf. At the time of preparation of its submission, the Coastal State may request the CLCS for a scientific and technical advice.

While the nature of the work of the CLCS is scientific and technical, nevertheless, one should accentuate the inherently legal nature of its work. In a previous work, the present author described the nature of the work of determining the outer limits of the continental shelf under article 76 as follows,
“(I)t is in fact difficult to maintain the illusion of a boundary between legal interpretation on the one hand and scientific/technical interpretation on the other. Article 76, a legal provision, is replete with scientific terms and formulae that can be properly understood and implemented via the application of science and technology, which is to say, by scientists and technical experts. At the same time, scientists and technical experts cannot sustain a credible application of Article 76 by relying purely upon science…”

The two-pronged mandate of the CLCS is a result of the distinctive role that the delegates at the third United Nations Conference on the Law of the Sea (UNCLOS III) envisioned for it. Early on, the delegates at UNCLOS III acknowledged that Coastal States have sovereign rights over their continental shelves, including over areas beyond 200 nautical miles. There was a realization, however, that the establishment of the outer limits of the continental shelf beyond 200 nautical miles needs science and technology for its proper implementation. The goal was therefore to establish procedures that would satisfy the two concerns.

With respect to the first task, the delegates debated whether to give the CLCS the power to determine the outer limits or grant it powers that were more restrictive. In the final text of article 76 the delegates opted to give the CLCS the authority to evaluate and make recommendations on the particulars, data and other materials submitted by a Coastal State concerning the outer limits. To ensure that the recommendations are regarded by the Coastal State, the Convention has placed a further condition: for the outer limits to be final and binding on the Coastal State, they must be determined by the Coastal State on the basis of the recommendations of the CLCS.

This formulation, in the view of the present author, complements and respects the legal status of the continental shelf, which, earlier in this article, was described as possessing characteristics similar to those of a territory. At the same time it assures the international community that a procedure is in place to evaluate the scientific and technical aspects of claims of a Coastal State.

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11 Suarez, see note 6, 132.
III. Membership

The 21 members of the CLCS must be experts in the field of geology, geophysics or hydrography (article 2 para. 1 of Annex II of the Convention). The composition of the CLCS gives due regard to the need to ensure equitable geographical representation. The Convention requires that at least three members come from each geographical region. Except for the first Commission (1997-2002), this requirement had been observed in practice. Members serve for a period of five years and may be re-elected. In practice, some members of the CLCS have been re-elected more than once. Almost half of the membership of the CLCS is serving their third term. A few are on their second term. This means that a significant number of Commissioners who participated and took the lead in drafting all important documents the CLCS relies on to implement its tasks under article 76 and Annex II of the Convention, namely, the Scientific and Technical Guidelines and the Rules of Procedure, continue to be active. These Commissioners are also experienced in testing and applying the formulae and rules of article 76 in relation to specific submissions.

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13 Eastern Europe decided not to fill the third seat in the first Commission. See Doc. SPLOS/20, para. 13, which recorded the decision of the Mtg. of States Parties to give the extra seat to the Western European and Other States Group on the proviso that such was not to be considered a precedent for future elections.
14 Para. 4, Annex II of the Convention, see note 2.
16 Albuquerque, Alexandre Tagore Medeiros de (Argentina); Astiz, Osvaldo Pedro (Brazil); Awosika, Lawrence Folajimi (Nigeria); Brekke, Harald (Norway); Carrera Hurtado, Gálo (Mexico); Croker, Peter F. (Ireland); Kazmin, Yuri Borisovitch (Russian Federation); Jaafar, Abu Bakar (Malaysia); Lu, Wenzheng (China); Park, Yong-Ahn (Korea).
17 Pimentel, Fernando Manuel Maia (Portugal) and Symonds, Philip Alexander (Australia).
IV. Expenses of the Members of the CLCS and Issues Relating to the Workload

The state which nominated the member is responsible for his/her remuneration and payment of expenses in the performance of the work.\(^\text{18}\) In practice, some states are not able to meet this obligation. Some states only include in their budgets the expenses relating to the attendance of the sessions, but exclude the work that members have to undertake at the Sub-commission level. At its 55th session in October 2000, the United Nations General Assembly approved the request of the Tenth Meeting of States Parties of the Convention and requested the Secretary-General to establish a voluntary trust fund to meet the costs of participation in the meetings of the CLCS of members from developing countries.\(^\text{19}\) The fund is administered by the United Nations Division for Ocean Affairs and the Law of the Sea.\(^\text{20}\)

Notwithstanding the trust fund, financing the remuneration and expenses of the work of the members of the CLCS remains an extremely critical issue in light of the workload of the CLCS. With normally only three Sub-commissions functioning at the same time, the CLCS estimated that it would finish consideration of the first 51 submissions only in the year 2030.\(^\text{21}\) Discussion on how to address the problem in a sustainable manner continues. Among the solutions proposed, two ideas appear to be sensible, and in the long-term, sustainable. First, the proposal to include the payment of expenses and emoluments of the members of the CLCS in the regular budget of the United Nations.\(^\text{22}\) This is the proposal favored by the CLCS.\(^\text{23}\) The second proposal is to require all parties to the Convention to contribute to the expenses of the CLCS. The system of assessed contributions used in maintaining the International Tribunal for the Law of the Sea is considered as a model.

\(^{18}\) Para. 5 of article 2 of Annex II of the Convention, see note 2.
\(^{19}\) A/RES/55/7 of 30 October 2000, op. para. 20.
\(^{20}\) As of the end of July 2009, the trust fund had a balance of US$ 432,000, para. 139, Doc. CLCS/64, 28.
\(^{22}\) Suarez, see note 6, 92.
\(^{23}\) Statement by the Chairman of the CLCS on the progress of work in the Commission – 17th Sess., Doc. CLCS/50, 14-15.
Both proposals are considered by the Meeting of States Parties via an Informal Working Group.\footnote{ Suarez, see note 6, 92.}

In economic terms the international community has an interest in the determination of the outer limits of the continental shelves of all Coastal States as this would be the basis for determining the area of the international seabed. Since the international seabed area legally speaking belongs to the common heritage of mankind, the international community has a share in the future income that would be derived from the exploitation of the resources in the international seabed area. One should also point out that a portion of the income derived by the respective Coastal State from its exploitation activities in the area of its continental shelf beyond 200 nautical miles must be shared with the international community (article 82 of the Convention). To share the administrative costs of determining the outer limits of the continental shelves under national jurisdictions would therefore make economic sense.

In addition to the legal and economic argument, either proposal is faithful to the international nature of the legal procedure agreed upon by the negotiators in the establishment of the outer limits of the continental shelf. The negotiators at UNCLOS III intentionally designed a procedure which involves the collective work of the Coastal State and the international community, represented by the CLCS. Notwithstanding the soundness of both proposals, they are admittedly not in compliance with the Convention. For either proposal to proceed, the Convention must be amended. Concerning the first proposal, it must be pointed out that there exist already precedents in the UN practice approving the inclusion of the budget of a treaty organ in the budget of the UN.\footnote{ 
Letter dated 15 March 2010 from Mr. Eden Charles, Head of the Informal Working Group to the Director of UNDOALOS.} Given the lengthy negotiations at UNCLOS III, it is understandable that any proposal to amend the Convention is not favored. However, the problem is a real one and has already affected the work of the CLCS. Tangible solutions must therefore be considered even if they involve the rather complicated procedure of amendment of the Convention.

Another proposal which should be considered by the Meeting of States Parties to the Convention is to impose administrative fees on the Coastal State making the submission to the CLCS. The fees could pay...
for items other than “expenses” of the Commissioners while performing work for the CLCS during regular sessions; this may include for example remuneration for the work in a Sub-commission during intersessional periods. The term “expenses” could be restricted to refer to the cost of accommodation and meals incurred by a member of the CLCS while in the UN Headquarters in New York. In the understanding of the present author it is current practice, that some states only pay for the expenses of the member they nominated during regular sessions.26

The Coastal State stands to benefit the most from a determination of the outer limits of a continental shelf beyond 200 nautical miles. Submission fees should therefore be treated as part of the Coastal State’s costs in preparing and completing the procedure of fixing the outer limits of the continental shelf. The Meeting of States Parties would be the ideal forum to deal with this proposal. Consideration of this proposal does not necessarily imply an amendment of the Convention. An understanding could be arrived at among the Parties to the Convention for submitting states to pay for the administrative costs of evaluating their claims. States which nominated the respective member of the Commission shall continue to defray the expenses incurred as provided for under the Convention.

V. Procedures

1. Submission

Unless otherwise decided by the CLCS, it shall function by way of Sub-commissions composed of seven members. Hence, each claim for an extended continental shelf is evaluated by a Sub-commission.27 Under the Rules of Procedure, other members of the CLCS are not precluded from examining the submission, its materials, additional presentations, written materials, data, and any written communication submitted by the Coastal State, provided, however, that their confidentiality shall be observed.28 Further, other members of the CLCS may also discuss the submission among themselves.29

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26 Ibid., 90.
27 Article 5, Annex II, Convention, see note 2.
28 Rule 44 bis, Rules of Procedure, CLCS, see note 3.
29 Rule 44 bis para. 3, Rules of Procedure, CLCS, see note 3.
The actual composition of each Sub-commission depends on the specific elements of a submission,\(^{30}\) as well as, as far as possible, the need to ensure a scientific and geographical balance.\(^{31}\) Under the Convention, members of the CLCS who have provided advice to the Coastal State during its preparation are not allowed to become members of the Sub-commission.\(^{32}\) In its Rules of Procedure, the CLCS would also exclude from the Sub-commission members “who may, for other reasons, be perceived to have a conflict of interest regarding the submission, e.g. members who are nationals of a State which may have a dispute or unresolved border with the coastal State.”\(^{33}\) With the exception of the submission of the Russian Federation,\(^{34}\) the procedure in establishing a Sub-commission has been as follows,

“(T)he nomination of members of the sub-commission would be conducted in two rounds: (a) during the first round of nominations, each group of members from the same region would nominate one member to the sub-commission to satisfy the requirement of geographical balance while at the same time attempting to maintain a scientific balance; (b) the Chairman would coordinate that process by way of informal consultations; and (c) the names of those nominated would then be announced to the Commission and the nominees deemed appointed members of the sub-commission by acclamation.

(In) a separate, second round of nominations to be conducted after the announcement of the results of the first round, each regional group might nominate one further member, taking into account the particular scientific skills required for a specific submission and the composition of the sub-commission. Should the total number of members from both rounds exceed seven, the Commission would undertake consultations as to how to appoint the required number of members from the second round of nominations.”\(^{35}\)

The procedure agreed by the CLCS reveals the importance it places on maintaining a geographical balance, on the one hand, and scientific

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\(^{30}\) Ibid.

\(^{31}\) Rule 42 para. 1 lit. c, Rules of Procedure, CLCS, see note 3.

\(^{32}\) Ibid.

\(^{33}\) Rule 42 para. 1 lit. b, Rules of Procedure, CLCS, see note 3.

\(^{34}\) The members of the Sub-commission in the Russian submission were elected by consensus.

\(^{35}\) Statement by the Chairman of the CLCS on the progress of work in the Commission – 14th Sess., Doc. CLCS/42, paras 19-20.
and technical competence, on the other. The procedure, however, does give the impression that geographical balance is given primary significance over scientific requirements. The members after all make the selection not as individuals but always through their regional groups. On the other hand, the second round of selection, which is a separate round, does require members to make a further selection taking into account the scientific requirements of a particular submission. In a previous work, the present author took the view that “(t)he objectivity of a technical and scientific expert body rests not only on the scientific expertise of its members but also on its equitable geographical composition. In this context, equitable geographical representation becomes a tool of neutrality and objectivity.”

It should also be underlined that other members of the Commission have the opportunity to participate in the work of the Sub-commission as advisers. Section 10 para. 2 of Annex III to the Rules of Procedure, provides,

“If necessary, the sub-commission may request the advice of other members of the Commission and/or, on behalf of the Commission, request the advice of a specialist in accordance with rule 57, and/or the cooperation of relevant international organizations, in accordance with rule 56.”

The Sub-commissions, in the following completed submissions, requested the advice of another member of the Commission, taking the total number of members participating in their work to eight: Brazil, Australia, Ireland, and Norway.

What happens when some of the members of the Sub-commission are not re-elected and therefore become ineligible to continue working in the Sub-commission? This scenario occurred in the first submission considered by the CLCS, the Russian submission. Two of the members of the Sub-commission were not re-elected for a second term: Mr. Karl Hinz of Germany and Mr. Ian Lamont of New Zealand. The CLCS decided to invite them as experts.

36 Suarez, see note 6, 87.
37 Doc. CLCS/42, 5, para. 24, see note 35.
38 Statement by the Chairman of the CLCS on the progress of work in the Commission – 15th Sess., Doc. CLCS/44, para. 31, 6.
39 Statement by the Chairman of the CLCS on the progress of work in the Commission – 16th Sess., Doc. CLCS/48, para. 29, 7.
40 Statement by the Chairman of the CLCS on the progress of work in the Commission – 19th Sess., Doc. CLCS/54, para. 51, 11.
The Sub-commission's evaluation is undertaken in two stages. First, it is required to conduct an initial examination within a period of not more than a week. During the initial examination, the Sub-commission will conduct a preliminary analysis of certain issues, including a determination whether the Coastal State's claim satisfies the test of appurtenance, and an estimate of the time required by it to review all the data and prepare its recommendations to the Commission. At the initial examination, information concerning any disputes related to the submission shall also be considered and the Sub-commission, if necessary, shall take action thereto.

During the initial examination, clarifications may be sought from the representatives of the Coastal State in the form of written questions and answers. The written communication may be combined with consultations between national experts when they are present at the UN Headquarters in New York, and the members of the Sub-commission. The clarification may also be in the form of presentations and/or additional materials submitted through the Secretariat.

The second stage of evaluation by the Sub-commission is the main scientific and technical examination. The items to be considered at the main examination are based on the Scientific and Technical Guidelines and are enumerated in Section V para. 9 of the Modus Operandi for the consideration of a submission made to the CLCS.

A submission is evaluated in private by the Sub-commission. This means that there will be “(no) records of the oral deliberations and personal notes distributed among members of the sub-commission shall be

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41 Section III, para. 8, Annex III, Rules of Procedure, CLCS, see note 3.
42 Section III, para. 5, Annex III, Rules of Procedure, CLCS, see note 3. Other issues that will be considered at the initial examination are (b) Which portions of the outer limits of the continental shelf are determined by each of the formulae and constraint lines provided for in article 76 of the Convention and the Statement of Understanding; (b bis) Whether appropriate combinations of foot of the continental slope points and constraint lines have been used; (c) If the construction of the outer limits contains straight lines not longer than 60 M; (d) If the Sub-commission intends to recommend that the advice of specialists, in accordance with rule 57, or that the cooperation of relevant international organizations, in accordance with rule 56, be sought.
43 Section III, para. 6.3, Annex III, Rules of Procedure, CLCS, see note 3.
disclosed to other members of the Commission who are not members of the sub-commission.”

During the period of evaluation, the Coastal State has opportunities to interact with the Sub-commission. One occasion is when the Sub-commission determines that it needs additional data, information or clarification from the Coastal State. Also, at an advanced stage of the examination, the Sub-commission shall invite the delegation of the Coastal State to meetings at which “it shall provide comprehensive presentation of its views and general conclusions arising from the examination of part or all of the submissions.” The printed format and electronic copies of the presentations made shall be made available to the Coastal State. During such meetings, the Coastal State will have the opportunity to respond to the presentations made by the Sub-commission.

At its 18th session, the CLCS allowed five Sub-commissions to function simultaneously. The members of the CLCS took note of the difficulties encountered and decided by consensus to allow only three Sub-commissions to conduct examinations at the same time.

Exceptions were made in certain submissions. After meetings at an advanced stage of the examination have taken place, the Sub-commission shall prepare its recommendations for consideration of the entire CLCS.

Under Rule 53 para. 1 of the Rules of Procedure, the “Commission shall consider and approve or amend the recommendations prepared by the sub-commission.” In approving the recommendations, the Commission “shall make every effort to reach agreement on substantive matters by way of consensus and there shall be no voting on such matters until all efforts to achieve consensus have been exhausted.”

44 Rule 44 bis para. 4, Rules of Procedure CLCS, see note 3.
45 Section IV, para. 10.1, Annex III, ibid., see note 3.
46 Section IV, para. 10.3, Annex III, ibid., see note 3.
47 Section IV, para. 10.4, Annex III, ibid., see note 3.
48 Ibid.
49 Statement by the Chairman of the CLCS – 18th Sess., Doc. CLCS/52, 8, para. 38.
50 The CLCS made exceptions to Mexico, see Statement by the Chairman of the CLCS on the progress of work in the Commission – 20th Sess., Doc. CLCS/58 and Indonesia, Statement by the Chairman of the CLCS on the progress of work in the Commission – 23rd Sess., CLCS/62.
51 Section IV, para. 10.5, Annex III, Rules of Procedure CLCS, see note 3.
52 Rule 35 para. 2, ibid., see note 3.
The recommendations of the Commission respecting the outer limits of the continental shelf shall be in writing and submitted to the Coastal State and to the Secretary-General.\textsuperscript{53} If the Coastal State does not agree with the recommendations of the CLCS, it has the option to make a new submission or revise its submission.\textsuperscript{54}

2. Advice to Coastal States

Advice to the Coastal State in the preparation of its submission is not automatically provided by the members of the CLCS. To implement article 3 para. 1 (b) of Annex II of the Convention, the CLCS has established a standing subsidiary body composed of five members who upon request could provide a list of proposed members being able to provide advice. The main factors in determining who among the members could be proposed are the technical and scientific particulars of the request.\textsuperscript{55} The CLCS has limited the maximum number of members who could provide advice in each request to three. The members who provide advice to a Coastal State are not compelled to disclose the substance of the advice given. However, they are required under the Rules of Procedure to submit to the CLCS a report outlining their activities.\textsuperscript{56} The Coastal State also has to disclose the names of the members of the CLCS who provided advice during the preparation of its submission.\textsuperscript{57} In practice, the Coastal State making a submission reveals the name(s) of the members of the CLCS who provided advice at the time of its first presentation of its outer limits before the plenary of the Commission.

3. Resort to Experts and other Technical and Scientific Organizations

In order to assist the CLCS in discharging the above mentioned functions, it is noteworthy to point out that the Convention authorizes it to cooperate, to the extent considered necessary and useful, with the fol-

\textsuperscript{53} Rule 53 para. 3, ibid., see note 3.
\textsuperscript{54} Article 8, Annex II, Convention, see note 2; Rule 53 para. 4, Rules of Procedure CLCS, see note 3.
\textsuperscript{55} Rule 55 para. 2, Rules of Procedure CLCS, see note 3.
\textsuperscript{56} Rule 55 para. 5, ibid., see note 3.
\textsuperscript{57} Rule 45 para. b, ibid., see note 3.
lowing organizations: Intergovernmental Oceanographic Commission of the UNESCO, the International Hydrographic Organization and other competent international organizations with a view to exchanging scientific and technical information. In the submission of the Russian Federation, for example, some members of the Sub-commission visited the Lamont-Doherty Earth Observatory in Palisades, New York, to examine “the SCICEX-1999 data in the Ocean Drilling Program Data Bank in order to review recent data containing several seismic tracklines and multi-channel seismic and swath bathymetry data.”

4. Participation of Coastal States Representatives in the Proceedings

Article 5 of Annex II of the Convention provides,

“The coastal State which has made a submission to the Commission may send its representatives to participate in the relevant proceedings without the right to vote.”

The CLCS has interpreted this to mean, first, that the Coastal State is not entitled to participate in all proceedings. Second, it is up to the CLCS to identify which proceedings are relevant. In the current Rules of Procedure which were adopted in 2008, the CLCS has identified three proceedings which are deemed relevant:

(a) The meeting at which the Coastal State makes its presentation to the Commission concerning the submission;

(b) Meetings at which the representatives of the Coastal State wish to provide additional clarification to the submission on any matters relating to the submission; and

(c) Meetings at which the representatives of the Coastal State wish to provide additional clarification to the Sub-commission on any matters relating to the submission.

One final presentation opportunity is also granted to the Coastal State after the Sub-commission has presented its recommendations to the Commission and before the Commission considers and adopts the

58 Article 3 para. 2, Annex II, Convention, see note 2.
recommendations. The presentation shall be up to half-a-day. No discussion shall be allowed between the Coastal State and the Commission at such presentation.

5. Participation of Third States

Under para. 10 of article 76 of the Convention, the establishment of the outer limits of the continental shelf beyond 200 nautical miles is without prejudice to the question of the delimitation of the continental shelf between states with opposite or adjacent coasts. Article 9 of Annex II of the Convention reiterates this principle.

According to the CLCS, there is,

“only one role to be played by other States in regard to the consideration of the data and other material submitted by coastal States concerning the outer limits of the continental shelf beyond 200 nautical miles. Only in the case of a dispute between States with opposite or adjacent coasts or in other cases of unresolved land or maritime dispute would the Commission be required to consider communications from States other than the submitting one.”

The United States of America sent a letter in relation to the submission of Brazil. Noting that the United States had no delimitation dispute with Brazil,

“the Commission concluded that the content of the letter from the United States should not be taken into consideration by the Commission. The Commission also instructed the Subcommission to disregard the comments contained in that letter during its examination of the Brazilian submission.”

The United States appealed the decision of the CLCS. Following a discussion on the appeal, “it was concluded that the Commission did not consider it necessary to change its previous decision.”

Communications received from states which possess interest in the relevant area under consideration by the CLCS are considered, along

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60 Section VI, para. 15, Annex III, Modus Operandi, Rules of Procedure CLCS, see note 3.
61 Doc. CLCS/42, 3–4, para. 17, see note 35.
62 Ibid., 4, para. 17.
63 Ibid.
with all the information and materials received from the submitting Coastal State.

VI. Submissions

As of 30 October 2009, 51 Coastal States have submitted information and the particulars of the outer limits of the continental shelves beyond 200 nautical miles to the CLCS. Evaluations of nine submissions have been completed and recommendations have been given to the following Coastal States: Russian Federation, Brazil, Australia, Ireland, New Zealand, Joint Submission by France, Ireland, Spain and the United Kingdom of Great Britain and Northern Ireland, Norway, France, and Mexico. \(^{64}\) Four of the completed submissions dealt only with portions of the continental shelf areas of the Coastal States concerned. One completed submission was a joint effort of four Coastal States which share a common continental shelf, the outer limits of which lie beyond 200 nautical miles from the baseline of the territorial sea. The nine completed submissions and the recommendations adopted by the CLCS will be considered separately in this section.

Depending on the complexity of a submission, the Commission spends two to four years on each submission before recommendations are adopted. Normally, only three Sub-commissions work at the same time. The Sub-commissions work during sessions, and if necessary, also during intersessional periods.

1. General Principles and Rules on which Recommendations are Based

Article 76 and the Scientific and Technical Guidelines form the bases of the principles on which recommendations adopted by the CLCS are based. Article 76 provides for the definition, composition and breadth of the continental shelf (paras 1 and 3), it limits (paras 4 to 6), and the methods by which the outer limits may be established (paras 4 to 7).

Para. 1 of article 76 provides that,

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“the continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.”

Paras 4 to 6 provide the methods by which the outer edge of the continental margin of continental shelves determined as natural prolongations of the land territory shall be made. In general, article 76 speaks of formulae and constraint rules in determining the outer limits of the continental shelf. A Coastal State may establish its outer limits by either,

a. Delineating a line by reference to the outermost fixed points at each of which the thickness or sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or

b. Delineating a line by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.

In either of the formulae, the reference is to the location of the foot of the slope. The first decisive determination is therefore to determine where the foot of the continental slope in each claim lies. If the foot of the continental slope is not determined by either of the formulae above, Coastal States may turn to article 76 para. 4 (b), “In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base”. Evidence to the contrary refers to geophysical evidence.

After determining the fixed points following the application of the formulae in paras 4 (a) (i) and (ii), the Coastal State must ensure that these points either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 meter isobath, which is a line connecting the depth of 2,500 meters.65 These two rules are also called constraint lines.

For continental shelves composed of submarine ridges, para. 5 of article 76 requires that the outer limits shall not exceed 350 nautical miles from which the breadth of the territorial sea is measured. The Convention underscores that the constraint of 350 nautical miles applies only to

65 Article 76 para. 5, Convention, see note 2.
submarine ridges but not to “submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs.”

The Coastal State shall thereafter delineate the outer limits of the continental shelf beyond 200 nautical miles, by straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by coordinates of latitude and longitude.

Following completion of the preparation, the Coastal State shall then submit the information and data concerning the particulars of the limits of the continental shelf beyond 200 nautical miles to the CLCS. As mentioned earlier, the CLCS shall evaluate the submission of the Coastal State and shall make recommendations thereon. “The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.”

Finally, article 76 requires the Coastal State to deposit with the Secretary-General of the United Nations, the charts and relevant information, including geodetic data, which permanently describe the outer limits of the continental shelf. The Secretary-General shall give due publicity to the charts and relevant information.

Notwithstanding the details of article 76, the terms, rules and formulae contained therein are not sufficient for Coastal States and the CLCS to determine and establish the outer limits of the continental shelf. None of the terms in article 76 are defined. The legal meaning of some of the terms does not have corresponding definitions in science. In practice, Coastal States and the Commission refer to the Guidelines in interpreting and applying the provisions of article 76.

The Guidelines contain ten sections. The first section, which is an introduction contains the Commission’s objectives in drawing up the Guidelines which are essentially to guide Coastal States during the preparation of the submission and to “clarify its interpretation of scientific, technical and legal terms contained in the Convention.” The Commission also intends that the Guidelines lead to a “uniform and extended State practice” with respect to the methodologies used in the

66 Article 76 para. 6.
67 Ibid., para. 7, see note 2.
68 Ibid., para. 8, see note 2.
69 Ibid., para. 9, see note 2.
70 Ibid.
71 Doc. CLCS/11, para. 1.3, Guidelines, see note 4.
preparation of the technical and scientific data and analyses undertaken in order to establish the outer limits of the continental shelf.\textsuperscript{72}

The rest of the section includes guidelines on geodetic methodologies; determination of the 2,500 meter isobath and the sources of data and type of modeling that could be used for the analysis; locating the foot of the continental slope determined as the point of maximum gradient at its base and its sources of data; identifying the foot of the continental slope by means of evidence to the contrary to the general rule and the geological and geophysical evidence needed to do so; the different types of ridges and submarine elevations; delineation of the outer limits based on sediment thickness; and the data necessary for the submission of the information on the limits of the extended continental shelf (bathymetric and geodetic data, geophysical and geological data, and digital and non-digital data) and other relevant supporting information and data. Section ten of the Guidelines contains references and bibliography which Coastal States could use. There is also an Annex listing international organizations which might possess data and information which Coastal States could use in preparing their submissions.

2. Russian Federation

The Russian Federation was the first Coastal State to submit the particulars of the outer limits of the continental shelf beyond 200 nautical miles to the CLCS on 30 December 2001. The Russian submission was related to four areas: the Barents Sea, the Bering Sea, the Sea of Okhotsk and the Central Arctic Ocean. There is no available executive summary containing information on the submission of the Russian Federation.

The recommendations were adopted by the CLCS by consensus on 27 June 2002.\textsuperscript{73} A short summary of the recommendations adopted by the CLCS was included in the Report of the Secretary-General of the United Nations to the 57th Sess. of the General Assembly under the agenda item Oceans and the Law of the Sea.\textsuperscript{74} As for the Barents and Bering seas, the CLCS’ recommendation to the Russian Federation was for it to transmit the charts and coordinates of the delimitation lines

\textsuperscript{72} Ibid., para. 1.4, see note 4.
\textsuperscript{73} Statement by the Chairman of the CLCS on the progress of work in the Commission – 11th Sess., Doc.CLCS/34, 4, para. 33.
\textsuperscript{74} Doc. A/57/57/Add.1, paras 38-41.
agreed with Norway in the Barents Sea and with the United States of America in the Bering Sea.\textsuperscript{75} These delimitation lines would be considered the outer limits of the continental shelf of Russia in these two seas.\textsuperscript{76} For the Sea of Okhotsk, the recommendation was mainly for the Russian Federation to “make a well-documented partial submission for its extended continental shelf in the northern part of that sea” and “to make its best efforts to effect an agreement with Japan.”\textsuperscript{77} For the area of the extended continental shelf claimed in the Central Arctic Ocean, the Russian Federation was requested to make a revised submission based on the findings contained in the recommendations given by the CLCS.\textsuperscript{78}

3. Brazil

On 17 May 2004, Brazil proceeded to make a submission to the CLCS for the consideration of the information and other materials in relation to its extended continental shelf. Brazil’s submission included four geographical regions: Northern and Amazonas fan region, Northern Brazilian and Fernando de Noronha ridges, Vitória-Trinidad ridge, and São Paulo plateau and southern regions.\textsuperscript{79} The executive summary provided by Brazil showed that the submission was divided into five segments.\textsuperscript{80}

Following a series of interactions between the Sub-commission and Brazil, additional materials and an additional Executive Summary were submitted.\textsuperscript{81} In the additional Executive Summary, Brazil delineated the following lines in the chart: foot of the continental slope, 60 nautical miles from the foot of the continental slope, thickness of sedimentary rocks that is at least one per cent of the shortest distance to the foot of the continental slope, 100 nautical miles from the 2,500 meters isobath, 350 nautical miles from the baselines from which the breadth of the ter-

\textsuperscript{75} Ibid., para. 39.
\textsuperscript{76} Ibid.
\textsuperscript{77} Ibid., para. 40.
\textsuperscript{78} Ibid., para. 41.
\textsuperscript{79} Doc. CLCS/54, 4, para. 14, see note 40.
\textsuperscript{80} <http://www.un.org/Depts/los/clcs_new/submissions_files/bra04/bra_exec_sum.pdf> Executive Summary, Brazil.
\textsuperscript{81} <http://www.un.org/Depts/los/clcs_new/submissions_files/bra04/bra_add_executive_summary.pdf>, Additional Executive Summary, Brazil Submission.
The territorial sea is measured, and 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. The additional Executive Summary showed eleven segments, compared with the five segments in the original submission. As a result, the area of the Brazilian continental shelf increased from 911,847 sq. kilometers to 953,525 sq. kilometers.

The recommendations concerning the Brazilian submission were adopted by the CLCS on 4 April 2007 by a vote of 15 to 2, with no abstentions. There is no summary of recommendations available concerning the submission made by Brazil. Brazil informed the CLCS, that as a result of the recommendations of the Sub-commission following the series of meetings and interaction between them, Brazil had made revisions which “led to an increase of only 5.5 per cent in the total area of the extended continental shelf.”

4. Australia

On 15 November 2004, Australia submitted information, materials and data concerning the extended continental shelf of ten regions: Argo Region, Australian Antarctic Territory, Great Australian Bight Region, Kerguelen Plateau Region, Lord Howe Rise Region, Macquarie Ridge Region, Naturaliste Plateau Region, South Tasman Rise Region, Three Kings Ridge Region, Wallaby and Exmouth Plateaus Region.

Despite submission of information, data and other documents concerning the Australian Antarctic Territory, Australia, in a note verbale attached to the Executive Summary, referred to the “circumstances of the area south of 60 degrees South latitude and the special legal and political status of Antarctica under the provisions of the Antarctic Treaty”, and therefore requested the CLCS “not to take any action for the time being.”

82 Ibid.
83 Ibid.
84 Doc. CLCS/54, 6, para. 22, see note 40.
85 Ibid.
87 Ibid.
The CLCS took note of the reaction of eight states to the submission of Australia concerning the outer limits of the continental shelf. The notes from the United States of America, the Russian Federation, Japan, Netherlands, Germany and India, referred to their support of Australia’s decision to exclude from the consideration of the CLCS, the Australian Antarctic Territory.\(^\text{88}\) The note from the Democratic Republic of Timor-Leste referred to the Timor Sea and the note from France concerned the areas of Kerguelen Plateau region and the Three Kings Ridge.\(^\text{89}\)

The CLCS adopted recommendations concerning the nine regions on 9 April 2008, confirming that Australia was entitled to extended areas of the continental shelf in all nine regions in accordance with article 76, para. 4 of the Convention.

The CLCS accepted the application of Australia of the formulae and constraint rules in establishing the outer limits of the following: Argo Region, Great Australian Bight Region, Kerguelen Plateau Region, Lord Howe Rise Region, Macquarie Ridge Region, Naturaliste Plateau Region, South Tasman Rise Region, Three Kings Ridge Region, Wal-laby and Exmouth Plateau Region. However, it disagreed with Australia over the method it employed in connecting the outer limits continental shelf points beyond 200 nautical miles in the above regions since this resulted in inclusion of areas of the continental shelf that fall outside the continental margin as defined in article 76 paras 4 and 7. The CLCS therefore made specific recommendations including the replacement of points and lines in order to comply with article 76.

As for the Three Kings Ridge region, the CLCS noted that it is located within the New Zealand maritime space pursuant to a treaty between Australia and New Zealand and therefore stated that the final outer limits may depend on the delimitation between New Zealand.\(^\text{90}\)

For all nine regions, Australia did not require evidence to the contrary to locate the foot of the continental shelf.\(^\text{91}\) It relied mainly on


\(^{89}\) Ibid., 1, para. 4.

\(^{90}\) Ibid., 33, para. 117.

\(^{91}\) Ibid., 1, para. 6.
morphology or morphology combined with geology to determine the foot of the continental slope.\textsuperscript{92}

Altogether, Australia's extended continental shelf covers an area of over 2.5 million kilometers as evaluated and confirmed by the Commission when it adopted the recommendations concerning Australia's submission on 9 April 2008 by a vote of 14 to 3, with 1 abstention.\textsuperscript{93} Australia's decision to exclude the information and data concerning the Australian Antarctic Territory was considered by some to be a successful “high-latitude diplomacy.”\textsuperscript{94} On the one hand, it “was thus able to symbolically preserve its options for future generations by asserting its claimed Antarctic sovereignty, but without deriving any benefit or creating any rights of sovereignty in Antarctica while the matter was effectively locked up under Article IV.2 of the Treaty.”\textsuperscript{95} On the other hand, it succeeded in establishing the area of the continental shelf arising from the Heard Island and the McDonald Islands, two sub-Antarctic islands whose continental shelves overlap with the area of application of the Antarctic Treaty.\textsuperscript{96} The agreement of the CLCS with Australia concerning the outer limits of the continental shelves of the two islands resulted into a situation where “(f)or the first time, seabed resources inside the Antarctic Treaty area have an undisputed sovereign ‘owner’.”\textsuperscript{97} It remains to be seen what Australia will do concerning the resources of the continental shelf of Heard Island and the McDonald Islands and what the reaction of the international community will be.

5. Ireland (Porcupine Abyssal Plain)

For purposes of submitting the particulars of the outer limits of its continental shelf, Ireland divided its continental shelf into three zones.\textsuperscript{98}

\begin{footnotes}
\item[92] Ibid.
\item[95] Id., “The Australian continental shelf: Has Australia’s high-latitude diplomacy paid off?”, \textit{Marine Policy} 33 (2009), 429 et seq.
\item[96] Ibid.
\item[97] Ibid.
\end{footnotes}
The subject of the partial submission of 25 May 2005 is located in Zone B, Porcupine Abyssal Plain. Two notes verbale were received respecting the submission: one from Denmark on 19 August 2005 and the other from Iceland on 24 August 2005.\textsuperscript{99} Both notes indicated that the submission and the subsequent recommendations from the CLCS are without prejudice to future submissions of both Coastal States.\textsuperscript{100} The partial submission was made “in accordance with paragraph 3 of Annex I to the rules of procedure, in order not to prejudice unresolved questions relating to the delimitation of boundaries between Ireland and some of its neighbours in other portions of the extended continental shelf claimed by Ireland.”\textsuperscript{101}

The Porcupine Abyssal Plain, located in the North Atlantic which is half the size of Europe’s landmass, is the continental margin of Ireland. Five locations of the foot of the continental slope were found to be acceptable. During the submission process, Ireland proposed to adjust the limit by introducing a new fixed point, FP 15, by generating from the point called FOS 53.\textsuperscript{102} The Sub-commission prepared a 3D view of FOS 53 based on the multi-beam bathmetry data of FOS 53 submitted by Ireland “which clearly shows that the high is separated from the lower slope.”\textsuperscript{103} For scientific and technical reasons therefore, the proposal to introduce FP 15 from FOS 53 was not supported. Ireland accepted this view.\textsuperscript{104} The CLCS also accepted Ireland’s determination of sediment thickness and its application of both constraint lines at 350 M and 2,500 m isobath + 100 M.\textsuperscript{105} The CLCS thus recommended that Ireland should establish the outer limits of the Porcupine Abyssal Plain in accordance with Table 3 of the Executive Summary.\textsuperscript{106}

The CLCS adopted the recommendations on information submitted by Ireland on 5 April 2007 by a vote of 14 to 2, with 2 abstentions.\textsuperscript{107}

\textsuperscript{99} Ibid., 1, para. 2.
\textsuperscript{100} Ibid.
\textsuperscript{101} Ibid., 1, para. 4.
\textsuperscript{102} Ibid., 19, para. 36.
\textsuperscript{103} Ibid., 19, para. 37.
\textsuperscript{104} Ibid.
\textsuperscript{105} Ibid., 21, para. 47.
\textsuperscript{106} Ibid., 22, para. 57.
\textsuperscript{107} Doc. CLCS/54, 8, para. 37, see note 40.
6. New Zealand

For purposes of its submission to the CLCS on 19 April 2006, New Zealand divided its continental shelf beyond 200 nautical miles into four regions: Northern Region, Eastern Region, Southern Region and the Western Region. On 22 August 2008, the CLCS adopted its recommendations concerning New Zealand’s submission.

New Zealand identified the different areas and features found within each region. The Northern Region covers the Three Kings Ridge, Colville Ridge, and northern Kermadec Ridge and Kermadec Trough. In the Eastern Region, the following are included: southern Kermadec Ridge and Kermadec Trench, Hikurangi Plateau, Chatham Rise, Bounty Trough, and northern Campbell Plateau. The Southern margin of the Campbell Plateau constitutes the Southern Region. While the Norfolk Ridge System, New Caledonia Basin, Challenger Plateau, Lord Howe Rise, and the Macquarie Ridge Complex made up the Western Region.

The CLCS confirmed New Zealand’s entitlement to an extended continental shelf in all four regions in accordance with para. 4 of article 76 of the Convention. The CLCS accepted New Zealand’s application of the 60 M distance criterion, the application of sediment thickness formula and constraint lines.

A few remarks should be made concerning ridges and submarine elevations. In the Eastern Region, the CLCS classified the Wishbone Ridge as a submarine elevation based on literature and the evidence submitted by Australia; the application of the depth constraint line was therefore accepted. Based on literature and the evidence submitted,
the Kermadec and Colville Ridge systems and in the Three Kings Ridge with the Fantail Terrace these features were considered by the CLCS as submarine elevations in the context of article 76 para. 6 of the Convention.\footnote{Ibid., 43, para. 145.}

Approximately 1.7 million square meters were confirmed by the CLCS as New Zealand’s extended continental shelf area.\footnote{\url{http://www.beehive.govt.nz/release/un+recognises+nz+extended+seabed+rights}, UN recognizes NZ's extended seabed rights, 22 September 2008.}

7. Joint Submission by France, Ireland, Spain and the United Kingdom of Great Britain and Northern Ireland (in the Area of the Celtic Sea and the Bay of Biscay)

France, Ireland, Spain and the United Kingdom of Great Britain and Northern Ireland, submitted a partial Joint Submission to the CLCS on 19 May 2006. According to the four Coastal States, the submission was of “a joint nature, comprising a single project prepared collectively and collaboratively by the four coastal States.”\footnote{Ibid., 7, paras 10-11.} They also informed the CLCS that the area concerned – in the Celtic Sea and the Bay of Biscay – is not subject of any dispute among them and would not cause prejudice on matters relating to the delimitation of the continental shelf in the area.\footnote{Ibid., 43, para. 145.}

Based on the additional data provided by the four Coastal States and the application of article 76 para. 4, the CLCS concluded that the four states were entitled to a continental shelf in the area beyond 200 nautical miles.\footnote{\url{http://www.un.org/Depts/los/clcs_new/submissions_files/frgbires06/fisu_clcs_recommendations_summary2009.pdf}, Summary of the Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Joint Submission Made by France, Ireland, Spain and the United Kingdom of Great Britain and Northern Ireland in Respect of the Area of the Celtic Sea and the Bay of Biscay on 19 May 2006, 4, para. 2.} The CLCS confirmed the methodologies used by the four states as to the locations of the foot of the slope points and the application of the 60 M distance criterion. As for the application of the distant constraint lines, the CLCS noted that one fixed point FP 30, “lies within the Spanish 350 M constraint” but “beyond all other 350 M con-
The CLCS was of the view that the “relevant constraint with respect to FP 30 is the 350 M line constructed from the baselines from which the territorial sea of Ireland is measured.” The recommendation was adopted by the four states.

The CLCS therefore concluded that the outer limits of the continental shelf of the four states consist of fixed points connected by straight lines not exceeding 60 M in length defined by coordinates of latitude and longitude as listed in Table 3 of the Summary of Recommendations for the four states. The CLCS adopted the recommendations on the joint submission on 24 March 2009 by consensus.

8. Norway (in the North East Atlantic and the Arctic)

On 27 November 2006, information on the limits of the continental shelf was submitted by Norway to the CLCS for three separate areas in the North East Atlantic and the Arctic: the Loop Hole in the Barents Sea, the Western Nansen Basin in the Arctic Ocean and the Banana Hole in the Norwegian Sea. Notes verbale were received from the following states: Denmark, Iceland, the Russian Federation, and Spain.

The Loop Hole is an area of the continental shelf in the Barents Sea. Bound in the north by mainland Norway and the Russian Federation. It is beyond the 200 nautical-mile limit of both states and is therefore subject of delimitation between them. The CLCS referred to the submission of the Russian Federation and its recommendations concerning the delimitation of the continental shelf between it and Norway and confirmed the entitlement of Norway over the continental shelf in the area. Delimitation between Norway and Russia was the final recom-
mendation of the CLCS for the determination of the outer limits of the continental shelf located in the Loop Hole in the Barents Sea.128

As for the Western Nansen Basin in the Arctic Ocean, the Sub-commission’s consideration of the foot of the slope point located in Franz Victoria Fan, should be mentioned. Due to the intensive sedimentation in the said area, “the location of the base of the continental slope is not readily identifiable on the basis of morphology.”129 The Sub-commission was not convinced that Norway produced sufficient geological and geophysical data in support of the location of the foot of the slope in that area. The Sub-commission therefore advised Norway to “explore more landward possibilities for the foot of the continental slope.” Norway presented additional evidence including a high-resolution, Parasound, sub-bottom profiler data which was “relevant to the consideration of the base of the slope zone associated with the Franz Victoria Fan.”130 The additional evidence convinced the Sub-commission to agree to a revision of the critical foot of the slope point to a more seaward location.131

The submission of Norway for an extended continental shelf in the Banana Hole in the Norwegian and Greenland Seas is highly remarkable not only for its geological complexity but also for the novelty of its approach. In this area, Norway claimed an extended continental margin that “consists of two parts – that of Mainland Norway and Svalbard in the east, and that associated with the island of Jan Mayen in the west.”132 Norway justified its decision based on morphology, stating that “it appears evident that these two continental margins link with each other via the Iceland-Faroe Ridge inside the 200 M zones of Iceland and the Faroe Islands.”133 In Norway’s submission, it made clear its position that the two relevant continental margins are indeed separate but that “each contributes individually to continental shelf beyond 200 M in the Banana Hole area.”134

Following the evaluation of the technical and scientific documentation in the submission and in the additional materials submitted by Norway, the CLCS agreed with all the foot of the slope points identi-

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128 Ibid., 9, para. 23.
129 Ibid., 11, para. 29.
130 Ibid., 12, para. 29.
131 Ibid., 12, para. 29.
132 Ibid., 18, para. 41.
133 Ibid.
134 Ibid.
fied by Norway, stating that it fulfilled the requirements of article 76 of the Convention and Chapter 5 of the Guidelines. It therefore recommended that the foot of the slope points should “form the basis for the establishment of the continental margin in the Banana Hole.”

The CLCS also confirmed its agreement with the 60 M distance formula which was applied in all the three parts comprising the continental margin of Norway in the Banana Hole, stating that it was in accordance with article 76 para. 4 (a) (ii).

For the constraint lines, both the distance and depth constraints were applied by Norway. The CLCS was of the view that with respect to the depth constraint line, it had to determine whether the relevant seafloor highs in the Banana Hole could be considered natural components of the continental margin. Based on evidence submitted, the CLCS agreed with Norway that the Vøring Plateau is a natural component of the continental margin of Mainland Norway in the context of article 76 para. 6. Depth constraint may therefore be applied. As for the Vøring Spur, though the CLCS agreed that it is part of the submerged prolongation of the landmass of Mainland Norway and the additional material provided by Norway indicated that it is “underlain by thick magmatic crust and has a different evolution and geological character to the adjacent Vøring Plateau.” The CLCS therefore did not consider it as a natural component of the continental margin of Mainland Norway in accordance with article 76 para. 6.

Overall, the CLCS recommended that Norway establishes its outer limits based on the fixed points listed in Table 1, Annex I of the Summary of Recommendations. It further recommended that the delineation be undertaken in accordance with article 76 para. 7, by straight lines not exceeding 60 M in length, connecting fixed points, defined by coordinates of latitude and longitude, and dependent on delimitation between states. The recommendations concerning the extended continental shelf of Norway in the three areas were adopted on 27 March

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135 Ibid., 18-23, paras 45-54.
136 Ibid., 23, para. 55.
137 Ibid., 27, para. 75.
138 Ibid., 27, para. 76.
139 Ibid.
140 Ibid.
141 Ibid., 30, para. 80.
142 Ibid.
2009 by consensus. The reaction of Norway to the recommendations of the CLCS were stated in a press release.

9. France (in respect of the areas of French Guiana and New Caledonia)

Submitted on 22 May 2007, this is the second submission made by France to the CLCS. This particular submission requested the CLCS to make recommendations in two geographically separate areas. The first area with respect to French Guiana in the North Eastern part of South America, between Brazil and Suriname in the Atlantic Coast. The second area concerns New Caledonia composed of the main island of New Caledonia, the Chesterfield Islands and the Bellona Reefs, which are located between the northern parts of the Fiji Basin in the east and the Tasmania Sea in the west.

In a note verbale, the Republic of Suriname stated that the submission was without prejudice to any future submission it will make to the CLCS and to the delimitation of the continental shelf between it and France. For the second area, Vanuatu sent a note verbale stating that the “area to the south east of New Caledonia will have serious implications and ramifications on Vanuatu’s legal and traditional sovereign territory of Matthew and Hunter Islands, south of Vanuatu.” In response to Vanuatu’s note verbale, France requested the Sub-commission not to proceed with the examination of the south-east area of submission, “leaving only the south-west area between the New Caledonia Basin and the Tasman Sea.” New Zealand also sent a note verbale to inform

143 Doc. CLCS/62, para. 19, 5, see note 50.
147 Ibid., 13, para. 43.
148 Ibid., 13, para. 44.
of the “potential overlap between the areas of the extended continental shelf of the two States in the Loyalty Ridge and the Three Kings Ridge region” and of the delimitation between it and France.\(^\text{149}\) It assured the CLCS that it had no objection to the submission nor to the consideration and recommendations to be made.\(^\text{152}\)

The CLCS confirmed France’s entitlement over an extended continental shelf in both areas. As the basis of France’s claim in the area of New Caledonia, France was of the view that the “whole elevated area between the South Fiji basin in the east and the Tasman Sea in the west constitutes the submerged landmass of the island of New Caledonia.”\(^\text{151}\) The Sub-commission disagreed with this position principally and recommended to France to view the Lord Howe Rise as “one entity not connected to the ridges further east,” and for it to become the “basis for the submerged prolongation of the nearest land territory of New Caledonia dependencies, in this case the Bellona Islands, to the area beyond 200 M in the Western Area.”\(^\text{152}\) Although not in agreement with the view taken by the Sub-commission, France agreed to implement the recommendation of the Sub-commission and was able to demonstrate “that in terms of both crustal characteristics and morphology, this area is underlain by the submerged prolongation of the landmass of the Bellona Islands.”\(^\text{153}\) On this revised submission, the Sub-commission thereafter confirmed that France was entitled to an extended continental shelf in the area.\(^\text{154}\)

The CLCS also agreed with the methodologies used by France in implementing the formulae and constraint rules under article 76. In the first area, the Sub-commission and France engaged in a series of discussions concerning the location of the fifth critical foot of the slope point. Clarifications were asked and responses and additional information, including publications, were provided. Following the revision of the location of the fifth critical point by France, the Sub-commission agreed with all the locations of the five critical points as well as the other points, including the data and the methodology used in determining the points. The CLCS also agreed with France’s decision, including the methodology used, to apply the 350 M constraint.

\(^{149}\) Ibid., 13, para. 45.
\(^{150}\) Ibid.
\(^{151}\) Ibid., 14, para. 47.
\(^{152}\) Ibid.
\(^{153}\) Ibid., 15, paras 48, 50.
\(^{154}\) Ibid., 15, para. 51.
In order to take into consideration the revised view of the submerged prolongation in the second area, France added one critical foot of the slope point and revised another critical foot of the slope point. The CLCS confirmed its agreement with the establishment of the two foot of the slope points and recommended these as the basis for establishing the outer limits of the continental margin of France.

In the second area, France applied only the distance constraint criterion but the Sub-commission advised France that it should be combined with the depth constraint criterion. The CLCS stated that the Lord Howe Rise and its northern extension which “is continental in origin” “were once parts of the Australian continent and separated from it by extension and possible seafloor spreading.” Accordingly, the CLCS classified it as a submarine elevation that is a natural component of the continental margin of France in the context of article 76 para. 6 of the Convention and in accordance with the Guidelines.

The CLCS adopted its recommendations on 2 September 2009 by consensus. The size of the continental shelf in the French Guiana region had been estimated to be 43,538.9 square kilometers and 46,256.9 square kilometers in the New Caledonia region.

10. Mexico (in respect of the Western Polygon in the Gulf of Mexico)

Mexico submitted the particulars of the outer limits of its continental shelf beyond 200 nautical miles for one region in the Western Polygon in the Gulf of Mexico on 13 December 2007. Following an application of article 76 para. 4, the CLCS concluded that Mexico was indeed entitled to an area of the continental shelf in the said region beyond 200

\[155\quad\text{Ibid., 16, paras 54-55.}
\[156\quad\text{Ibid., 18, para. 57.}
\[157\quad\text{Ibid., 19, para. 68.}
\[158\quad\text{Ibid.}
\[159\quad\text{Statement by the Chairman of the CLCS on the progress of work in the Commission – 24th Sess., Doc. CLCS/64, 5, para. 13.}
\[160\quad\text{<http://earthtrends.wri.org/text/coastal-marine/variable-62.html>, World Resources Institute, Coastal and Marine Ecosystems — Marine Jurisdictions: Continental shelf area.}
The CLCS was in agreement with Mexico’s identification of the locations of the base of the continental slope and the foot of the slope as well as the methodologies it used in constructing the 60 M distance formula, and the sediment thickness formula. For the sediment thickness formula, the CLCS noted the ease by which it was applied by Mexico due to the “considerable sediment thickness (ca. 9-10 km) in this part of the Gulf of Mexico.” As for constraint lines, Mexico applied both the distance and depth criteria which were accepted by the CLCS. The CLCS adopted its recommendations on 31 March 2009 by consensus.

VII. Assessment

Assessment concerning the work and achievements of the CLCS should be focused on two areas: its procedures and its practice relating to article 76 of the Convention.

Concerning its procedures, there were two issues that were most pressing: the issue concerning the participation of Coastal States in the relevant proceedings and the issue concerning the role of third states.

The submission procedure had been designed by the delegates at UNCLOS III to involve mainly the submitting Coastal State and the CLCS. Each has its own spheres of responsibilities and tasks to complete. The submission process allows the two entities to have an interaction in order to evaluate the outer limits of the continental shelf beyond 200 nautical miles. The Convention is very clear in the respect that the Coastal State participates without a vote only in the proceedings that are deemed relevant. It is for the CLCS to determine which proceedings are relevant. During the submission of the Russian Federation, it was obvious that there were not too many occasions for the CLCS or the relevant Sub-commission to interact with the submitting state. The CLCS was under a strong pressure to open its proceedings to the Coastal State, including its deliberations of the submission. In the view of the present author, it would have been clearly in violation of the


162 Doc. CLCS/62, 7, para. 26, see note 50.
Convention. The solution found was to provide more possibilities for interaction between the submitting state and the Sub-commission. The interactive arrangement in the view of the present author has made the submission process truly a dialogue between the Coastal State and the CLCS.

It seems that many of the Coastal States which have received recommendations from the CLCS found the interaction with the CLCS very productive. In the Norwegian submission, for example, the Sub-commission was not convinced of the location of the foot of the slope in the Franz Victoria Fan. The interactive phase of the Sub-commission examination enabled Norway to present additional evidence which not only convinced the Sub-commission but also made it agree to a revision of the foot of the slope to a more seaward location.

If there is, thus, an opportunity for a claim to be maximized, the practice of the CLCS has been to make such recommendation to the Coastal State. In the case of Brazil, it reported an increase of 5.5 per cent of the area of its extended continental shelf after it followed the recommendation of the Sub-commission. Nevertheless, the CLCS has also been vigilant in informing the Coastal State to make revisions in cases where it thought the lines as established by the Coastal State included areas that were legally already outside the continental margin in the sense of article 76. For example in the Joint Submission made by France, Ireland, Spain and the United Kingdom. The four states relied on the distance constraint rule. The CLCS noted that one fixed point FP 30, “lies within the Spanish 350 M constraint” but “beyond all other 350 M constraint lines.” The CLCS was of the view that the “relevant constraint with respect to FP 30 is the 350 M line constructed from the baselines from which the territorial sea of Ireland is measured.” The recommendation was adopted by the four states.

Concerning the role of third states, the present author agrees that only those third states which have delimitation or territorial disputes with the submitting Coastal State may participate to a limited extent in the submission process. These third states may submit communications which then are normally considered by the Sub-commission along with the information and other materials submitted by the Coastal State. All other states which do not possess any juridical interest should not have access to the submission process. Any communication by these states is

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164 Ibid., 13, para. 27.
165 Ibid.
Suarez, Commission on the Limits of the Continental Shelf

not considered by the CLCS or by the Sub-commission. This practice had prompted severe criticisms by some observers. According to one, the CLCS has not changed this practice. It has nevertheless made revisions in the ways it shares and makes public information concerning the submissions and recommendations it adopts. For example, except for the first two submissions, the CLCS now makes available very detailed summaries of all submissions for which recommendations have been adopted. Information which is confidential or proprietary in nature is not included in the summary of recommendations adopted. Charts of the outer limits established by the Coastal State and confirmed by the CLCS are also published online. The Coastal State making a submission has also been required to submit and make available an executive summary of its submission. The executive summaries include concise descriptions of how the various rules of article 76 have been applied as well as charts depicting the various lines, including the lines depicting the outer limits of the continental margin. The progress of the work of the CLCS in any submission is contained in the statements by the chairman which are published after the completion of each session.

On substantive matters, there is no doubt that the CLCS has made major contributions to the further development of the law on the establishment of the outer limits of the continental shelf beyond 200 nautical miles. In the recommendations it has adopted, the CLCS has provided life to the provisions of article 76. On the matter of ridges and submarine elevations, for example, the international community now has a good sampling of the types of ridges and the features of submarine elevations that would be considered in the context of article 76 para. 6. The CLCS has also shown that it would not hesitate to consider new approaches used by Coastal States in determining the outer limits of the continental shelf. The case of Norway in the area in the Banana Hole may be cited as an example. Norway attempted to claim an area of the continental shelf by enclosing it from two opposite references: that of Mainland Norway and Svalbard and the island of Jan Mayen. The CLCS agreed with Norway’s approach and confirmed its entitlement as well as the way it established the outer limits.

The recommendations studied here also show that the CLCS would not hesitate to make cross-references in submissions which involve the same or adjacent areas of the continental shelf. In the case of the Norwegian submission, the CLCS referred to the earlier submission of the Russian Federation for the Loop Hole in the Barents Sea. The CLCS made reference to the relevant parts of the Australian submission when
it considered and made recommendations in the submission made by New Zealand.
United Nations Human Rights Council

Between Institution-Building Phase and Review of Status

Maximilian Spohr
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VII. Conclusion
I. Introduction

The replacement of the United Nations Commission on Human Rights (CHR) that had fallen from grace, by a smaller Human Rights Council (HRC) in 2006, sixty years after its creation, marks without doubt one of the most significant reforms of the United Nations Human Rights System. The question, whether the creation of the HRC is to be seen as a success or if, on the contrary, it must be regarded as a backward step has been the subject of animated discussion during the first years of its existence. Concluding its fourth year in June 2010, the HRC has not only completed its institution-building phase by taking up all of its functions and mechanisms but faces a general revision of its status and functions during its fifth year of existence as determined by its founding resolution.¹

In this context the present article aims at summarizing the development of the HRC within its first four years and the associated debate concerning the success of this reform. Furthermore it tries to identify problems and opportunities for improvement in the light of the upcoming general review. In terms of avoiding an excessive scope, the present analysis focuses on the core functions of the newly established HRC, namely the Universal Periodic Review (UPR), the Special Procedures, the Advisory Council (AC) and the Complaint Procedure, since the development of these functions is the crucial point in assessing its further development.

II. Establishment of the Human Rights Council

The, at times, heatedly debated creation of the HRC was particularly influenced by the classical conflict of developing an effective international human rights system on the one hand and the preservation of national sovereignty on the other.

¹ A/RES/60/251 of 15 March 2006, op. paras 1 and 16.
1. The Criticism on the Commission on Human Rights

Created back in 1946 by ECOSOC the CHR was the core human rights body of the United Nations for more than sixty years. Focusing initially on standard-setting during the first 20 years of its existence, step by step the implementation of these standards became the second focal point of the work of the CHR. Therefore a mechanism for the investigation of human rights violations and a complaint procedure were established and from the 1980s onwards a system of monitoring mechanisms was developed under the auspices of the CHR. Furthermore, against the background of a growing international concern for human rights issues, the CHR emerged as the UN’s most important political organ and discussion forum in the field of human rights.

However, the CHR increasingly became the target of criticism in the post Cold War era, in which the political vacuum left by the disappearance of the traditional East-West divide had been filled with new con-

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2 E/RES/5 (I) of 16 February 1946.
3 In this regard one has to name the Universal Declaration of Human Rights (A/RES/217 (III) of 10 December 1948) and the human rights treaties adopted since the 1960s; for an overview of these treaties see <www2.ohchr.org/english/law/index.htm>.
4 The so-called 1235-Procedure, named after the resolution by which it was created, E/RES/1235 (XLII) of 6 June 1967.
5 In the so-called 1503 procedure, named after its founding resolution E/RES/1503 (XLVIII) of 27 May 1970, communications concerning human rights violations could be submitted by the victims themselves or by others, representing them. Thereby the procedure was not designed to prosecute the human rights violations of individuals but to bring to the CHR’s attention “gross and reliably attested violations of human rights and fundamental freedoms”. The complaint procedure was applicable to every state, regardless whether they had adopted resolution 1503 or ratified any of the international human rights treaties. The 1503 procedure was confidential and the CHR considered the situations brought up in closed sessions. The authors of the communications were only informed whether their complaint was adopted but not about the process.
6 The so-called system of special procedures. It is distinguished by country-specific and thematic mandates. See <www2.ohchr.org/english/bodies/chr/special/index.htm>.
frontations such as those between regional groups, between the North and the South or the West against “the Rest”. Gradually expanded from 18 to 53 members, the members were elected by ECOSOC, for three year terms, on the following basis: 15 from African States; 12 from Asian States; five from Eastern European States; 11 from Latin American and Caribbean States; 10 from Western European and other States. In line with its increased importance as a political forum and the constantly growing membership of the United Nations in the course of the process of decolonization, it became clear, with regard to the limited meeting time of one annual session of six weeks, that the institutional frame of a functional commission would no longer suffice. Furthermore in the context of an increasing number of condemning resolutions and an expanding agenda the CHR became more and more politicized. Most notably this was illustrated by the increasing number of so called “no-action motions” tabled from the mid-nineties on and a further shift of the opinion and decision making to the different political groups.

Moreover, as a result of its excessive politicization, the CHR was increasingly accused of applying double standards while reviewing the human rights records of members and non-members and therefore being unprofessional and biased. This was mainly the result of the circumstance that many states with bad human rights records sought membership of the CHR to protect themselves from being reviewed.

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10 No-action motions are procedural motions provided by article 2 of Rule 65 of the Rules of Procedure of the functional commissions of ECOSOC. If accepted, member states can by this be prevented from discussing a resolution at all. In the CHR no-action motions were primarily used to avoid the condemnation of the human rights situation in a specific country (e.g. China, see Doc. E/CN.4/2000/SR.55, paras 83 et seq.) and led to endless discussions over procedural matters.
11 For example, the Non-Aligned Movement, the League of Arab States and the Organisation of the Islamic Conference (OIC) on the one side, facing the group of the Western States on the other.
but, nevertheless, to denounce others. The election of many of those states was enabled by the so-called presenting of “clean slates”, a practice by which regional groups determine membership from their region by putting up the same number of candidates from the region as there are seats to be filled by that region. Triggered by the reaction of the United States to its failed candidacy to the CHR in 2001 the discussion on the need for reform of the CHR was again ignited in the following years by the election of the Libyan representative as chairperson of the CHR in 2003 and the election of Sudan to the CHR in 2004. In the same year the United States placed the topic of reforming the CHR on the agenda of ECOSOC, claiming that only “real democracies” should be awarded membership of the CHR.

2. The Founding Resolution A/RES/60/251

The establishment of the HRC, in the first place, is due to the extraordinary dedication of Secretary-General Kofi Annan, who integrated the topic of reforming the CHR into the general UN debate on reform in the run-up to the UN World Summit of 2005. He charged the High-Level Panel on Threats, Challenges and Change with assessing this issue. In its 2004 report the Panel then criticized the shortcomings of the CHR, developed ideas for reform and proposed the creation of a HRC as a principal organ of the United Nations. In March 2005 Kofi An-

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13 Only members were able to request a vote and to vote, so that membership enabled the states to challenge resolutions condemning their own human rights situation and to gain support to do so on the basis of regional and political solidarity or by exchanging votes.

14 For the members of the groups see the draft statistical report of the twelfth session of the HRC, page 3, available on the HRC extranet, <http://portal.ohchr.org>.


16 See on this in detail P. Alston, “Reconceiving the UN Human Rights Regime”, Melbourne Journal of International Law 1 (2006), 189 et seq.

nan published his follow-up report, *In Larger Freedom: Towards Development, Security and Human Rights for All*, in which he associated himself with the criticism of the Panel and called for a replacement of the CHR by a smaller standing HRC, to be created either as a new principal organ or alternatively as a subsidiary organ of the General Assembly. This discretion considering the creation of the HRC is perhaps related to the questionable feasibility of such a reform project since it would require an amendment of Article 7 para. 1 of the United Nations Charter. In the following month Kofi Annan then concretized his proposals in a speech before the CHR and in an explanatory note to the president of the General Assembly. In the speech before the CHR Kofi Annan also introduced a “Universal Peer Review”. Despite fears that the replacement of the CHR by the HRC would do away with some of the biggest accomplishments within the UN human rights system, the idea of the creation of a HRC prevailed at the World Summit in 2005. The outcome document of the summit, however, dedicates only four paragraphs to the HRC, outlining a mandate for the new institution and requesting the president of the General Assembly to conduct negotiations in this regard. These negotiations subsequently proved to be extremely difficult, since opinions differed concerning the question of how the new Council should look and what features of the CHR should be preserved. However, on 15 March 2006 the General Assembly succeeded in adopting the founding resolution of the HRC that was supported by a great majority of the member states.

Kälin, “Towards a UN Human Rights Council” of 2004, commissioned by M. Calmy-Rey. The three core elements of this concept were the creation of the HRC as a principal organ of the UN, a drastic reduction of the membership and the implementation of human rights criteria for membership in the HRC, \(<www.humanrights.ch/home/upload/pdf/050107_kelin_hr_council.pdf>\).

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19 See Article 7 of the UN Charter.


21 Explanatory note of 14 April 2005, published as Annex to the report of the Secretary-General, see note 18.

but failed to reach consensus.\textsuperscript{23} The United States, followed by its closest allies, had turned its back on the reform project that it itself had instigated, since it became clear that not all of its positions were going to be accepted by the majority of the General Assembly.\textsuperscript{24}

\textbf{a. Mandate}

According to resolution A/RES/60/251 of 15 March 2006 the HRC replaces the CHR\textsuperscript{25} while assuming all of its mandates, mechanisms, functions and responsibilities.\textsuperscript{26} The HRC is also provided with a comprehensive mandate, according to which it “shall be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner.”\textsuperscript{27} Besides that the HRC “should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon. It should also promote the effective coordination and the mainstreaming of human rights within the United Nations system.”\textsuperscript{28} Furthermore it shall undertake a Universal Periodic Review (UPR), make recommendations with regard to the promotion and protection of human rights and submit an annual report to the General Assembly.\textsuperscript{29}
b. Institutional Status

Instead of establishing a new principal organ, resolution A/RES/60/251 creates the HRC as a subsidiary organ of the General Assembly, based on Article 22 of the UN Charter.\textsuperscript{30} However, as a compromise it was agreed, that the institutional status of the HRC shall be reviewed within five years, thus leaving the door open for upgrading the HRC in the future.\textsuperscript{31}

c. Meeting Time

By extending the limited meeting time of only one annual session of six weeks in the CHR to no fewer than three sessions per year, including a main session, for a total duration of no less than ten weeks, the founding resolution of the HRC seeks to solve one of the most fundamental problems of the CHR.\textsuperscript{32} Furthermore the HRC can convene special sessions at the request of a member of the Council with the support of one third of the membership of the Council.\textsuperscript{33}

d. Membership

Reducing the overall membership from 53 seats to 47, to make the HRC more maneuverable, the resolution tries to establish a compromise in respect of one of the most controversial questions in the course of the reform process.\textsuperscript{34} The resolution merely states that “when electing members of the Council, Member States shall take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto.”\textsuperscript{35} From now on member states are elected “directly and individually by

\textsuperscript{30} Ibid., op. para. 1.
\textsuperscript{31} Ibid.
\textsuperscript{32} Ibid., para. 10.
\textsuperscript{33} Ibid. This was already possible in the CHR at the request of the majority of the members according to resolution E/RES/1990/48 of 25 May 1990, op. para. 3, but it was used very rarely and the CHR only held five special sessions between 1992 and 2000.
\textsuperscript{34} A/RES/60/251, see note 23, op. para. 7. A more drastic reduction of the membership did not find majority support in the General Assembly, see Alston, see note 16, 199.
\textsuperscript{35} A/RES/60/251, see note 23, op. para. 8.
secret ballot by the majority of the members of the General Assembly" for a three year term, so that every candidate has to win over 97 of the currently 192 members of the General Assembly.  

The election system thereby aims at regularly attracting a larger number of candidates than seats to be filled at the HRC to avoid the presenting of “clean slates”. Besides, the members of the Council shall not be eligible for immediate re-election after two consecutive terms, thereby excluding permanent membership, and furthermore the Resolution provides for a suspension of membership rights by a two-thirds majority in the General Assembly, if a member of the HRC commits gross and systematic violations of human rights.

Besides the new approach in the selection of members another development in the field of membership must be considered. The geographic distribution of seats reveals a reduction of the influence of the Western States and an increase of the influence of the Asian States. Therefore, the states of the southern hemisphere now hold a two-third majority in the HRC.

e. Universal Periodic Review

The most important element of the establishment of the new HRC is the implementation of the so-called Universal Periodic Review (UPR). The founding resolution instructs the HRC to “undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the coun-

36 Ibid., op. para. 7. Every year one third of the seats will become available due to ending terms and will be filled with new members.
37 See note 15.
38 A/RES/60/251, see note 23, op. para. 7.
39 Ibid., op. para. 8.
40 Group of African States CHR 15 (28 per cent), HRC 13 (28 per cent); Group of Asian States CHR 12 (23 per cent), HRC 13 (28 per cent); Group of Latin American and Caribbean States CHR 11 (21 per cent), HRC 8 (17 per cent); Eastern European States CHR 5 (9 per cent), HRC 6 (13 per cent); Group of Western European and other States CHR 10 (19 per cent), HRC 7 (15 per cent), A/RES/60/251, see note 23, op. para. 7.
try concerned and with consideration given to its capacity-building needs.\textsuperscript{41} The mechanism, which was ultimately named “periodic” instead of “peer” review, is however based on the idea that member states review themselves instead of being examined by independent experts. Therefore the UPR differs fundamentally from the review by treaty bodies, whose work the UPR shall complement and not duplicate,\textsuperscript{42} forming an unique mechanism within the UN Human Rights System.\textsuperscript{43} The mechanism based on ECOSOC resolution 1235 (XLII) bore some resemblance indeed, but was rather selective compared to the UPR.\textsuperscript{44}

Only states that were accused of violating human rights by UN Rapporteurs were addressed by the condemning resolution of the CHR and the General Assembly. This was perceived by many developing countries as being unfair, since the exigencies of many of those states were not adequately taken into consideration. Against this backdrop, the establishment of the UPR aims at solving the often criticized politicization of the CHR by simply reviewing all UN member states within four years, thereby avoiding the politically sensitive question of whose human rights record is being reviewed. Furthermore this means that all HRC members are reviewed, so that membership can no longer be used as a shield against scrutiny.\textsuperscript{45}

\textsuperscript{41} A/RES/60/251, see note 23, op. para. 5 (c).
\textsuperscript{42} Ibid.
\textsuperscript{43} However, the idea of monitoring the implementation of human rights standards by regularly examining state reports had already been realized on the initiative of the CHR by ECOSOC resolution E/RES/624 B (XXII) of 1 August 1956. According to this resolution states were obliged to submit reports on progress made in implementing the standards of the Universal Declaration of Human Rights and the right to self-determination. See further Doc. E/2844-E/CN.4/731 and E/RES/1074 C (XXXIX) of 28 July 1965 on the reform of the procedure. With the entry into force of the international human rights treaties that provided for reporting procedures, the reporting procedure of 1956 became more and more superfluous and was eventually abolished by A/RES/35/209 of 17 December 1980.
\textsuperscript{44} See note 4. See further on this C. Tomuschat, Human Rights, Between Idealism and Realism, 2008, 140 et seq.
\textsuperscript{45} See on this note 13 and A/RES/60/251, see note 23, op. para. 9.
f. Special Procedures

The system of Special Procedures,\(^{46}\) which in many eyes constitutes one of the most important achievements of the abolished CHR,\(^{47}\) was already under heavy pressure in the years prior to the establishment of the HRC.\(^{48}\) In this context, besides several reform efforts,\(^{49}\) an increasing number of attempts to restrict or even completely abolish the entire system of special procedures were to be observed.\(^{50}\) In light of the fundamental opposition to country-specific mandates by a number of member states\(^{51}\) the thematic and country-specific mandates became the main target of criticism. Unsurprisingly during discussions on the establishment of the HRC a complete abolishment of the system of special procedures was called for to enable the new organ to start anew.\(^{52}\) In the end supporters and opponents of the special procedures reached a compromise which preserved the entire system of special procedures but provided for a review and, if necessary, a rationalization of all mandates and functions within one year after the holding of the first session of the HRC.\(^{53}\) Thus, the question of which mandates should be extended or abolished was somewhat adjourned.

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46 See on this note 6.
47 See on the achievements of the Special Procedures, Gutter, see note 8.
51 Especially by the Like Minded Group. See further on this Gutter, see note 8, 95.
53 A/RES/60/251, see note 23, op. para. 6.
g. Expert Advice and Complaint Procedure

In para. 6 of the Resolution it is stated that the HRC, just like the CHR, shall maintain expert advice and a complaint procedure, without further describing it.\textsuperscript{54}

III. The First Year of the Human Rights Council

Following the first elections in May 2006, the HRC assembled for its inaugural session on 19 June 2006 in Geneva, electing Ambassador Luis Alfonso de Alba of Mexico as its first President.\textsuperscript{55} Additionally, it was decided that the first “year” of the council would end on 18 June 2007.\textsuperscript{56} As was to be expected during its first year, the HRC engaged in institution-building issues that were left open by its founding resolution. However, this proved to be an extremely difficult venture and it was not until the very last minutes of the first year of the HRC that it adopted a package on institution-building.\textsuperscript{57} Despite initial fears, the HRC, nevertheless, managed to tackle a number of important human rights situations\textsuperscript{58} and standard-setting tasks\textsuperscript{59} during its five regular and four special sessions of the first year. Similarly to its predecessor,

\textsuperscript{54} Ibid.
\textsuperscript{55} Elected by acclamation, see report of the first HRC session, part III, para. 8, published in Doc. A/61/53.
\textsuperscript{56} It was discussed whether the “year” should end 365 days after the beginning of the first session (i.e. 19 June 2006 to 18 June 2007) or at the end of June or even the end of 2006. Ultimately the UN Legal Counsel ruled, that 18 June was the final day.
\textsuperscript{58} Amongst others concerning Belarus, Burundi, Cambodia, Cuba, Congo, Haiti, Democratic People’s Republic of Korea, Kirgizstan, Liberia, Burma, Nepal, Somalia, Sri Lanka and Zimbabwe.
the HRC thereby paid special attention to the situation in the occupied Palestinian territory, which provoked stark criticism among a number of western commentators.

1. Election of Members

The General Assembly elected the first 47 members of the new HRC on 9 May 2006 out of 74 candidates. While succeeding in keeping away some candidates with bad human rights records like Sudan, the Democratic People’s Republic of Korea (North Korea), Belarus, Zimbabwe, Uzbekistan, Syria and Nepal, next to others, still managed to collect a sufficient number of votes to gain a seat in the HRC. All permanent members of the UN Security Council were elected with the exception of the United States which, in line with its rejection of the founding resolution of the HRC, had decided not to run for election. However, in the end the new HRC and its predecessor looked very

60 First special session on the Human Rights Situation in the Occupied Palestinian Territory; second special session on the Grave Situation of Human Rights in Lebanon caused by Israeli military operations and third special session on the Israeli Military Incursions in Occupied Palestinian Territory.


62 The initial members were: Algeria, Argentina, Azerbaijan, Bahrain, Bangladesh, Brazil, Cameroon, Canada, China, Cuba, Czech Republic, Djibouti, Ecuador, Finland, France, Gabon, Germany; Ghana, Guatemala, India, Indonesia, Japan, Jordan, Malaysia, Mali, Mauritius, Mexico, Morocco, Netherlands, Nigeria, Pakistan, Peru, Philippines, Poland, South Korea, Romania, Russian Federation (Russia), Saudi Arabia, Senegal, South Africa, Sri Lanka, Switzerland, Tunisia, Ukraine, United Kingdom, Uruguay and Zambia.

63 See for a list of candidates and their voluntary pledges <http://www.un.org/ga/60/elect/hrc>.

64 These former CHR members decided not to present a candidacy for the HRC, see P. Lauren, “To Preserve and Build on its Achievements and to Redress its Shortcomings”, HRQ 29 (2007), 307 et seq. (337).

65 China, Cuba, Pakistan, Russian Federation and Saudi Arabia gained a seat in the HRC despite being considered as “unsuitable” for membership in the HRC by Human Rights Watch, see the comprehensive Human Rights Watch assessment of all 74 initial candidates <www.hrw.org/legacy/un/elections/index.htm>.
much alike in terms of membership, so that it was even more important to successfully establish new mechanisms and functions to solve the problems of the CHR.

2. The Institution-Building Package

The discussions on the institution-building process were to be carried out by three open-ended, inter-sessional working groups—one on review of mechanisms and mandates, one on the development of the modalities of the UPR and one on the formulation of recommendations on the HRC’s future agenda, program of work, methods of work and rules of procedure. The working group on review of mechanisms and mandates was charged with reviewing the special procedures, the Sub-Commission on the Promotion and Protection of Human Rights (the Sub-Commission) and the so-called 1503 procedure. The extremely difficult and contentious institution-building process culminated in the dramatic developments that eventually led to the adoption of an institution-building package in the last session of the first year of the HRC on 18 June 2007. It determines the agenda, program of work, working methods, rules of procedure, complaint proce-

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66 Members of the HRC, other states and observers, NGOs and national human rights institutions (NHRIs) with the requisite accreditation could participate in the working groups’ sessions.
67 Doc. A/HRC/DEC/1/104. The working group was authorized to meet for twenty days.
68 Doc. A/HRC/DEC/1/103. The working group was authorized to meet for ten days.
69 Doc. A/HRC/3/4. The working group was authorized to meet for ten days.
71 See note 57.
73 Doc. A/HRC/RES/5/1 of 18 June 2007, Annex V.
dure\textsuperscript{76} and establishes a comprehensive framework for the UPR,\textsuperscript{77} the special procedures\textsuperscript{78} and an Advisory Committee (AC).\textsuperscript{79}

\textbf{a. Universal Periodic Review}

According to resolution A/HRC/RES/5/1 the review is conducted by one working group, chaired by the President of the Council and composed of the 47 member states of the HRC.\textsuperscript{80} A group of three Rapporteurs, selected by the drawing of lots among members of the HRC from different regional groups (“troika”), is formed to facilitate each review, including the preparation of the report of the working group.\textsuperscript{81} A country concerned may request that one of the Rapporteurs be from its own regional group and may also request the substitution of a Rapporteur on only one occasion.\textsuperscript{82}

The review is based on information prepared by the state concerned, which can take the form of a national report, on the basis of general guidelines, and any other information considered relevant by the state concerned. Additionally a compilation prepared by the Office of the High Commissioner for Human Rights (OHCHR) of the information contained in the reports of treaty bodies, special procedures, including observations and comments by the state concerned, and other relevant official UN documents are taken into account.\textsuperscript{83} States are “encouraged to prepare the information through a broad consultation process at the national level with all relevant stakeholders.”\textsuperscript{84} The centerpiece of the mechanism is an interactive dialogue between the state under review and the UPR working group in which observer states can participate.\textsuperscript{85}

\textsuperscript{74} Ibid., paras 100-128.
\textsuperscript{75} Ibid., VII.
\textsuperscript{76} Ibid., paras 85-109.
\textsuperscript{77} Ibid., paras 1-38.
\textsuperscript{78} Ibid., paras 39-64.
\textsuperscript{79} Ibid., paras 65-84.
\textsuperscript{80} Ibid., para. 18 (a).
\textsuperscript{81} Ibid., para. 18 (d).
\textsuperscript{82} Ibid., para. 19. It is not announced which member was rejected. Further, the selected members can refuse to participate in the troika.
\textsuperscript{83} Ibid., para. 15.
\textsuperscript{84} Ibid., para. 15 (a).
\textsuperscript{85} Ibid., para. 18 (b).
Other stakeholders, such as NGOs, are only entitled to attend but not to participate at this stage of the UPR. Within the interactive dialogue three hours are designated to every state under review. Further, it is determined that the first cycle of the UPR shall be completed within four years, therefore reviewing 48 states per year. However, here it is pointed out that the UPR is an evolving process and that its modalities and periodicity may be reviewed after its first year.

The outcome of the UPR will take the form of a report of the working group, which summarizes the proceedings of the review process, conclusions and recommendations, and the voluntary commitments of the state concerned. It then will be presented to the plenary of the HRC where, before the adoption, the state under review is given the opportunity to present replies to questions or issues that were not sufficiently addressed during the interactive dialogue. The consideration of the reports of the working group is the only phase during the entire process of the UPR, where other stakeholders like NGOs are allowed to take the floor, by making general comments. This indicates the very limited role granted to them in the UPR. Concerning the implementation of the results of the UPR, the resolution states that the outcome “should be implemented primarily by the State concerned and, as appropriate, by other relevant stakeholders.” The wording of this paragraph demonstrates clearly the cooperative and rather “soft” approach of the UPR, even though the HRC can address cases of persistent non-cooperation with the mechanism after exhausting all efforts to encourage a state to cooperate with the UPR.

b. Special Procedures

“Special procedures” is the general name given to the mechanisms established by the CHR and assumed by the HRC to address either spe-

86 Ibid., para. 18 (c).
87 Ibid., para. 22.
88 Ibid., para. 14.
89 Ibid., para. 14, footnote a.
90 Ibid., para. 26.
91 Ibid., para. 29.
92 Ibid., para. 31.
93 Ibid., para. 33.
94 Ibid., para. 38.
cific country situations or thematic issues in all parts of the world. According to resolution A/RES/60/251 the HRC shall “assume, review and, where necessary, improve and rationalize all mandates of the CHR ‘in order to maintain a system of special procedures, ...’”. Unsurprisingly the special procedures, which had already been under severe strain before the creation of the HRC, were heatedly debated also during the institution-building period. The country-specific mandates were particularly contentious and at one point the fight became one to preserve the existing strength of the special procedures and the institution of country specific mandates, rather than to improve the system.

In this context, the most important achievement of resolution A/HRC/RES/5/1 is that it upholds the system of special procedures as a whole. However, by establishing a new selection procedure and code of conduct for mandate-holders as well as by limiting thematic mandates to three years and country-specific mandates to one year only, the resolution contains a number of reforms that bear the risk of weakening the system as a whole. Besides that, the trend towards terminating country-specific mandates that was to be observed in the CHR between 1998 and 2006 (decrease from 26 to 13 mandates), continued in the HRC by the non-renewal of the mandates regarding Cuba and Belarus.

95 A/RES/60/251, see note 23, op. para. 6.
96 See Lempinen, note 48.
97 See Abraham, note 72, 25.
98 Doc. A/HRC/RES/5/1, see note 73, paras 39 – 53.
100 A/HRC/RES/5/1, see note 73, para. 60. Apparently the mandate concerning the occupied Palestinian territories (Doc. E/CN.4/1993/2 A of 19 February 1993) is exempted from this rule since it is supposed to operate “until the end of the occupation”.
The new selection procedure is based on a public list of eligible candidates, prepared, maintained and periodically updated by the OHCHR. Governments, regional groups operating within the United Nations human rights system, international organizations or their offices, NGOs and other human rights bodies and individuals are entitled to nominate candidates as special procedures mandate holders. The selection from the list will be carried out by a consultative group, consisting of one member of each regional group, serving in his/her personal capacity. The consultative group proposes to the HRC President, at least one month before the selection of mandate holders, a list of candidates who possess the highest qualifications for the mandates in question and meet the required criteria. On the basis of these recommendations and following broad consultations, the President of the Council will identify an appropriate candidate for each vacancy and will present to the member states and observers a list of candidates and the appointment will be completed upon the subsequent approval of the Council. Thereby member states are now more integrated into the selection process, while the responsibility of the President is maintained. The code of conduct is based on a draft proposal tabled by the African regional group and aims at guaranteeing that mandate holders remain impartial and independent. The code of conduct bears the risk of being used to limit the independence and constrain the work of, in particular, mandate holders of country-specific mandates. The review and rationalization of mandates, as determined by resolution A/RES/60/251 was not carried out during the first year of the HRC.

102 Doc. A/HRC/RES/5/1, see note 73, para. 39 lists as general criteria for candidates: expertise, experience in the field of the mandate, independence, impartiality, personal integrity and objectivity.
103 Ibid., para. 43.
104 Ibid., para. 42.
105 Ibid., para. 49.
106 Ibid., para. 47.
107 Ibid., paras 52 and 53.
108 At the CHR the Chairperson appointed mandate-holders after consultations with his bureau. This was criticized by a number of member states of the CHR which then refused to be reviewed by mandate-holders with the argument that they had no influence on their selection.
c. Advisory Committee

The resolution creates a HRC Advisory Committee (AC), which replaces the former Sub-Commission\textsuperscript{109} of the CHR, thereby meeting the requirements of A/RES/60/251, which provides for a consultative organ.\textsuperscript{110} The AC consists of 18 experts serving in their personal capacity. Members are nominated exclusively by HRC member states\textsuperscript{111} which “should consult their national human rights institutions and civil society organizations and, in this regard, include the names of those supporting their candidates.”\textsuperscript{112} In contrast to special procedures mandate holders, the members of the AC are elected in secret ballot, with a geographical distribution of seats among the regional groups.\textsuperscript{113} The distribution of seats in the AC, just like in the HRC, now displays the overall UN membership which constitutes a decreased influence of Western States compared to the former Sub-Commission.\textsuperscript{114} According to resolution A/HRC/RES/5/1 the AC is supposed to function as a “think tank” for the HRC\textsuperscript{115} and is to provide expertise only to the Council “in the manner and form requested by the Council.”\textsuperscript{116} The AC should be implementation-oriented and the scope of its advice should be limited to thematic issues, namely promotion and protection of all human rights. Although being entitled to make “further research proposals within the scope of the work set out by the Council” the AC has no power to adopt resolutions or decisions, so that it is left with little space.

\textsuperscript{109} A/RES/60/251, see note 23, op. para. 6. Here it is only determined that the HRC shall be provided with expert advice, thereby leaving it open in what way this was to be realized.
\textsuperscript{110} Ibid., op. para. 6.
\textsuperscript{111} Doc. A/HRC/RES/5/1, see note 73, para. 70.
\textsuperscript{112} Ibid., para. 66.
\textsuperscript{113} Ibid., paras 70, 73.
\textsuperscript{114} Distribution of seats of the HRC Advisory Committee (AC) and the CHR Sub-Commission: African States: AC: 5 (27.7 per cent)/ Sub-Commission: 7 (26.9 per cent); Asian States: AC: 5 (27.7 per cent)/ Sub-Commission: 5 (26.9 per cent); Eastern European States: AC: 2 (11.1 per cent)/ Sub-Commission: 3 (11.54 per cent); Latin American and Caribbean States: AC: 3 (16.6 per cent)/ Sub-Commission: 5 (26.9 per cent); Western European and Other States: AC: 3 (16.6 per cent)/ Sub-Commission: 6 (23.08 per cent).
\textsuperscript{115} Doc. A/HRC/RES/5/1, see note 73, para. 65.
\textsuperscript{116} Ibid., para. 75.
to be proactive.\textsuperscript{117} This is a trend that could already be observed throughout the last years of the CHR.\textsuperscript{118} The AC shall convene up to two sessions for a maximum of ten working days per year.\textsuperscript{119} Additional sessions may be scheduled on an \textit{ad hoc} basis with prior approval of the Council.\textsuperscript{120} Member states and observers, including states that are not members of the Council, specialized agencies, other intergovernmental organizations and national human rights institutions (NHRIs),\textsuperscript{121} as well as NGOs shall be entitled to participate in the work of the Advisory Committee based on certain arrangements.\textsuperscript{122}

d. Complaint Procedure

A complaint procedure is being established according to para. 85 to address consistent patterns of gross and reliably attested violations of all human rights and fundamental freedoms occurring in any part of the world and under any circumstances. Given the little interest member states showed, it was decided, that the HRC should continue the CHR’s 1503 procedure,\textsuperscript{123} with some small changes. The “new” 1503 procedure has the same scope as it had before.\textsuperscript{124} The outcome of the complaint procedure is set out in para. 109.

IV. The Second Year of the Human Rights Council

At the election of member states for the second year of the HRC 14 new members were elected out of only 16 candidates. Therefore only in the Eastern European and Western European regional groups were

\textsuperscript{117} Ibid., para. 77.
\textsuperscript{118} See Abraham, see note 72, 17 et seq.
\textsuperscript{119} Doc. A/HRC/RES/5/1, see note 73, para. 79.
\textsuperscript{120} Ibid., paras 79 and 81.
\textsuperscript{121} See on national human rights institutions the so-called Paris Principles, A/RES/48/134 of 4 March 1993.
\textsuperscript{122} Doc. A/HRC/RES/5/1, see note 73, op. para. 83.
\textsuperscript{123} See note 5.
\textsuperscript{124} Doc. A/HRC/RES/5/1, see note 73, paras 85 et seq. Interestingly the wording was changed from “any country” to “any part” of the world. Apparently this was changed to ensure that the procedure was also applicable to states’ action e.g. in occupied territories.
more candidates running for membership than seats were available. Moreover Bosnia and Herzegovina submitted its candidacy only one week before the elections due to great pressure by human rights organizations and states that tried to prevent Belarus from winning a seat in the HRC because of its bad human rights record. However, Bosnia and Herzegovina failed to gain the required 97 votes in the General Assembly so that it needed a second round to finally beat Belarus. During the second year (June 2007 to June 2008) the HRC held its sixth, seventh and eighth regular and its fifth, sixth and seventh special sessions under the newly elected president Doru Costea of Romania. The HRC was initially occupied with institution-building tasks that were left open and established further sub-organs, which, in particular, replaced the Sub-Commission on Human Rights working-groups. Besides that, progress was made in the field of standard-setting and a variety of human rights situations were discussed.

1. Special Procedures

In view of the revision of all mandates and the newly established selection procedure, the system of special procedures was of particular interest during the second year of the HRC. Once again the country-specific

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127 Special Sessions on “the human rights situation in Myanmar”, on “human rights violations emanating from Israeli military incursions in the Occupied Palestinian Territory” and “on the negative impact of the world food crisis on the realization of the right to food”.
131 In particular the situation in Darfur, Myanmar, North Korea, Congo, the occupied Palestinian territories, Sri Lanka and Iran.
mandates were extremely contentious, even so they were all preserved. Drawing up a completely new selection mechanism by which a large number of vacancies had to be filled, the establishment was a challenge for everyone involved but member states eventually succeeded in setting up the procedure and a public list of candidates. All thematic mandates except the one of the Working Group on People of African Descent and the Special Rapporteur on Adverse Effects of the Movement and Dumping of Toxic and Dangerous Products and Wastes were reviewed during the second year. While most mandates were extended without discussion, some of them and some of the mandate-holders, such as the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Special Rapporteur on the Freedom of Religion and Belief and the one on the Promotion and Protection of the Right to Freedom of Opinion and Expression proved to be very contentious. However, all these mandates were extended in the end, although with regard to the mandates on torture and on extrajudicial executions a rather awkward presidential statement was necessary to settle the dispute.

The restriction of thematic mandates to three years as stipulated by the institution-building package, led to an upgrading of those mandates

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132 The public list is available at the HRC extranet, <http://portal.ohchr.org>.
133 Alston (Australia) and Nowak (Austria) both criticized especially by Cuba, Egypt (on behalf of the African regional group), India, Russian Federation, Singapore and Sri Lanka.
134 Mandate and mandate-holder Asma Jahangir (Pakistan) especially criticized by Pakistan (on behalf of the Organization of Islamic States).
135 Ambeyi Ligabo (Kenya), criticized especially by Pakistan (on behalf of the Organization of Islamic States), Egypt (on behalf of the African regional group) and the occupied Palestinian territories (on behalf of the League of Arab States). Discussions related to the conflict over the Mohammed cartoons.
which were initially established for a term of two years only.\textsuperscript{138} However, at the same time a certain downgrading of mandates appeared in the replacement of Special Representatives of the Secretary-General by Special Rapporteurs of the HRC.\textsuperscript{139} Furthermore, all mandates now contain a standard reference to the code of conduct for mandate holders\textsuperscript{140} and two new thematic mandates were established – the Special Rapporteur on Contemporary Forms of Slavery, including its Causes and Consequences\textsuperscript{141} and the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation.\textsuperscript{142}

The country-specific mandates, as could be expected, were far more contentious than the thematic mandates. Thereby, the extension of the mandates concerning Sudan and the Congo were particularly controversial. Due to the hostile attitude of the Sudanese government and the criticism of the Expert Group on the Darfur-Crisis,\textsuperscript{143} a compromise had to be established. The mandate of the Expert Group was terminated, while the mandate of the Special Rapporteur on the Situation of Human Rights in the Sudan was extended, thereby assigning the task of implementing the recommendations of the Expert Group to him.\textsuperscript{144} The mandate of the independent expert for the Congo, in contrast, was not renewed. Although the duties of this expert were transferred to a num-

\textsuperscript{138} This was the case for the Independent Expert on Minority Issues (Doc. A/HRC/7/6 of 27 March 2008) and the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises (Doc. A/HRC/7/8 of 18 June 2008).

\textsuperscript{139} See, e.g., the mandate of the Special Representative of the Secretary-General for Human Rights Defenders (Doc. A/HRC/7/8 of 27 March 2008). Downgrading evolves from the fact, that mandate-holders are no longer appointed by the Secretary-General.

\textsuperscript{140} See note 99.

\textsuperscript{141} Doc. A/HRC/6/14 of 28 September 2007. It replaces the working group of the Sub-Commission on this matter.

\textsuperscript{142} Doc. A/HRC/7/22 of 28 March 2008. This forms the first special procedure mandate established by the HRC that had no predecessor in the CHR.

\textsuperscript{143} Doc. A/HRC/S-4/101 of 13 December 2006. Members of the expert group were not able to obtain visas for the Sudan. See also on this Doc. A/HRC/4/8 of 30 March 2007.

\textsuperscript{144} Doc. A/HRC/6/34 of 14 December 2007. See also on this Doc. A/HRC/7/16 of 27 March 2008.
ber of thematic mandates which were instructed to report regularly to the HRC, this did not constitute a sufficient substitution for an independent expert. Furthermore, the renewal of the mandate on Burundi was of interest, since it was extended due to its approval by Burundi, despite the opposition of the African regional group. Furthermore, the mandates of the independent experts on Haiti, Liberia and Somalia, as well as the ones of the Special Rapporteurs on North Korea and Myanmar were renewed. The mandates in respect of Cambodia and on the Palestinian territories occupied since 1967 were not reviewed during the second year.

2. Advisory Committee

The members of the new Advisory Committee were elected on 26 March 2008 at the seventh regular session of the HRC. Unlike the selection procedure for special procedure mandate holders the procedure for Advisory Committee members was not renewed. As a result there were “clean slates” presented by the African, Asian, Latin-American and Caribbean Group, so that no real selection took place. The first session was not to take place before the third year of the HRC.

146 Doc. A/HRC/6/5 of 28 September 2007. Initially Egypt had announced, supposedly on behalf of the entire African group, to refuse all country-specific mandates.
152 Seven of the elected candidates had already been members of the Sub-Commission and three of them were from a permanent member of the Security Council (Russian Federation, France and China).
3. Universal Periodic Review

Constituting the most important new mechanism of the HRC and functioning as an indicator for its success or failure,\(^{153}\) it was of utmost importance to get the Universal Periodic Review off the ground during the second year. In April 2008 the HRC succeeded in finally holding the inaugural session of the Universal Periodic Review.\(^{154}\) However, the first session was preceded by protracted and difficult discussions concerning the institutional framework of the Review, where some states proposed not to broadcast sessions live via the internet and on the contrary to make the state report the main source of information.\(^{155}\) This would have marginalized the information provided by NGOs but was not accepted in the end. As was to be expected for a new mechanism, some procedures emerged during the first session.\(^{156}\) The selection of troika members, which took place at an organizational meeting on 28 March 2008, proved to be quite difficult, since troika members are selected by the drawing of lots, considering the geographic distribution prescribed.\(^{157}\) About 40 per cent of the states under review demanded the drawing of one troika member from their own regional group\(^{158}\)

\(^{153}\) Abraham, see note 72, 35.


\(^{155}\) Algeria, speaking on behalf of the African regional group, demanded a state report, rather than just “information of the state under review”. See on this Brett, see note 145, 11.


\(^{158}\) Universal Periodic Review 1: 4 African States of 4; 1 Asian State of 4; 1 Latin-American and Caribbean State of 3; none of the other two regional groups. Universal Periodic Review 2: 4 African States of 5, 2 Asian States of 5; none of the other three regional groups. The Western European and other States group declared in advance, that they would not use this right, nor would they reject any Rapporteur drawn or decline any assignment as a troika member.
and one selected Rapporteur refused to participate. At this meeting
the role of the troikas in discharging their duties, namely the compila-
tion of the primarily submitted questions and the preparation of the fi-
nal report, was further defined, leaving them with no space for own ini-
tiatives. Troika members are neither authorized to incorporate their
own views, nor to participate in any way in the assessment of the hu-
man rights situation of the state under review. However, this role of
the troikas might be a reason for the relatively harmonic selection pro-
cedure. In the course of the second year of the HRC 32 states were re-
viewed under the Universal Periodic Review. The interactive dialogues
of the first session showed that most states presented their questions
and comments orally instead of submitting them in writing, as previ-
ously. This could be linked to the fact that it was often unclear
whether states under review would address the written questions at all
or just ignore them. Contributions in the interactive dialogue varied
from overly positive statements, which left the impression, that some
states under review had lined up their allies to exclude negative com-
ments. Besides that, many states confined themselves to always issu-

159  Pakistan refused participation in the Universal Periodic Review of India.
        (India, for its part, had not rejected the troika member from Pakistan). No
troika member drawn was rejected.
160  See further on this the presidential statement, see note 156.
161  See opening statement of the President, see note 157.
162  With the exception of the Russian Federation in the Universal Periodic Re-
        view of the Ukraine only a few Western States used this opportunity. See
163  Sri Lanka, e.g., advised the United Kingdom to abolish its monarchy, a pro-
        posal that was not made to any other monarchy. See Universal Periodic
        criticized the length of pre-charge detention in the United Kingdom, citing
        the British member of the Human Rights Committee in the review of Alge-
        ria on this matter (see above paras 17 and 41).
164  Primarily Ratification of the new Convention on the Rights of Persons
        with Disabilities; establishment of independent NHRI; standing invita-
        tions to the special procedures; discrimination against women; abolition
        of the death penalty.
concluding observations or individual cases of the treaty bodies are regularly taken up in the Universal Periodic Review.165

Regarding the outcome of the UPR several things needed to be clarified during the first session. Concerning the final report of the Working Group it was decided, that recommendations can only be accepted by the state under review and that those accepted shall be “identified” as such, whereas the “other” recommendations are only to be “noted”.167 Thereby only recommendations that enjoy the support of the state under review are published in the second section of the report named “Conclusions and/or Recommendations”. The recommendations that were not accepted are only cited by the paragraph under which they are to be found in the first part of the report named “Summary of the Proceedings of the Review Process”, thus making it harder to find them and letting them somewhat disappear.168 Moreover, it is noted which state has introduced which recommendations.169 Furthermore, the first Universal Periodic Review sessions showed that recommendations are only indicated as such in the report if they are specifically called “recommendations”170 and that no other state than the addressee can reject them.171

Overall, most recommendations were accepted, but many states followed the example of the United Kingdom and delayed their decision

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165 Slovenia and the United Kingdom, e.g., brought up the issue of the right to conscientious objection in the Universal Periodic Review of South Korea, Universal Periodic Review report South Korea, Doc. A/HRC/8/40, para. 64 (recommendations no. 17 and 24). See on this Human Rights Committee, Doc. CCPR/C/KOR/CO/3 of 28 November 2006, para. 17.

166 See in this respect para. 91 of Doc. A/HRC/RES/5/1, see note 73.

167 Presidential statement, see note 156, para. 3.


169 In particular, the states of the African regional group argued that otherwise recommendations of single states could be attributed to the working group as a whole. See on this A. Abebe, “African States and the UPR”, Human Rights Law Review 9 (2009), 16 et seq.

170 In the Universal Periodic Review concerning Finland, the British proposal to cut the alternative military service to the length of the military service was not indicated as recommendation, Doc. A/HRC/8/24 of 23 May 2008.

regarding the adoption of the recommendations until the consideration of the report by the plenary of the HRC.\textsuperscript{172} It was decided that there will be 20 minutes for the state under review,\textsuperscript{173} 20 minutes for states and observer states\textsuperscript{174} and 20 minutes for other stakeholders, altogether one hour.\textsuperscript{175}

V. The Third Year of the Human Rights Council

In May 2008 15 new members were elected to the HRC, this time out of 19 candidates. Once again, too few candidates applied for membership, thus in two groups there were as many candidates as seats to be filled.\textsuperscript{176} The HRC held its ninth, tenth and eleventh regular session and its eighth to eleventh special session in the course of its third year.\textsuperscript{177} With the inaugural session of the AC in August of 2008 all HRC functions were now operating, so that the institution-building phase of the HRC was completed.

\textsuperscript{172} States can deliver their decision concerning the adoption of recommendations either during the Universal Periodic Review, between the Universal Periodic Review and the next HRC session or at the session of the HRC, see presidential statement, Doc. A/HRC/8/PRST/1, see note 156, para. 11.

\textsuperscript{173} Within this time the state under review can present its views on recommendations and/or conclusions, on voluntary pledges and commitments, reply to questions not sufficiently addressed, present its views on the outcome and make final comments.

\textsuperscript{174} Three minutes of speaking time for members, two minutes for observers.


\textsuperscript{177} Special sessions were held on “the situation of the human rights in the east of the Democratic Republic of Congo (DRC), “the violations of human rights in the occupied Palestinian territory”, “the Impact of the global economic and financial crisis on the universal realization of human rights” and “the human rights situation in Sri Lanka”.
1. Special Procedures

By the end of the second year two thematic and two country-specific mandates were still to be examined in the context of the review and rationalization of all special procedures mandates. \(^{178}\) Seven mandates were extended and four new mandate-holders were elected overall. Concerning the thematic mandates, the Special Rapporteur on Toxic Waste and the Working Group on People of African Descent were extended for three years. \(^{179}\) Further it was decided to establish a new mandate of an Independent Expert in the Field of Cultural Rights. \(^{180}\)

The country-specific mandates remained a contentious issue during the third year. However, it was possible to extend a number of mandates without any further debate and member states succeeded in concluding the process of reviewing, rationalizing and improving mandates with the extension of the mandate concerning Cambodia. \(^{181}\) However, instead of a Special Representative of the Secretary-General it was appointed a Special Rapporteur. Another development was the extension of mandates for less than one year. At first the mandate concerning Sudan was extended for only nine months and then the mandate concerning Somalia was renewed for just six months without a vote. \(^{182}\) Although the termination of the country-specific mandate concerning Sudan was avoided by a small majority at the eleventh session, \(^{183}\) this development could lead to a further down-grading of country-specific mandates, which had been already restricted to one year only, and questions the fragile compromise reached in the institution-building pack-

\(^{178}\) The mandate on the situation of human rights in the Palestinian territories occupied since 1967 is supposed to run “until the end of the Israeli occupation”. Apparently it was therefore not reviewed.


\(^{182}\) Doc. A/HRC/9/17 of 24 September 2008 and Doc. A/HRC/10/32 of 27 March 2009. Supported by China as well as Sudan and Somalia themselves. Disapproved by France, concerning Sudan and Germany, concerning Somalia, both announcing on behalf of the EU that this short extension does not set a precedent.

\(^{183}\) Instead of a Special Rapporteur it was implemented an independent expert, Doc. A/HRC/11/10 of 18 June 2009, approved by 20 votes to 18, with 9 abstentions.
age anew. The mandates concerning Haiti, \(^{184}\) Myanmar \(^{185}\) and the Democratic People’s Republic of Korea \(^{186}\) were extended for one year. However, in terminating the mandate of the Independent Expert on Human Rights in Liberia \(^{187}\) the HRC has now already abolished four country-specific mandates since its establishment. Furthermore the mandate concerning Burundi was only extended “until the establishment of an independent national human rights commission.”\(^{188}\)

2. Advisory Committee

After electing its members already at the seventh session of the HRC in March 2008, \(^{189}\) the committee convened its inaugural session from 4 to 15 August 2008, where Miguel Alfonso Martínez of Cuba was elected to the Chair.\(^{190}\) The second session thereafter was held from 26 to 30 January.\(^{191}\) Already the first sessions showed that the Advisory Committee exists in a field of tension created by its mandate. On the one hand, it is a body consisting of independent experts serving in their personal capacity, but on the other hand, it is tightly bound to the HRC. At the first session of the committee this continually led to lengthy discussions among members concerning the competencies of the Advisory Committee.\(^{192}\) Moreover, it became obvious that its close ties to the

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\(^{186}\) Doc. A/HRC/10/16 of 26 March 2009, approved by 26 votes to 6, with 15 abstentions.
\(^{190}\) The bureau of the chairman, as in the Sub-Commission, consists of three vice-chairmen Chin-Sung Chung (South Korea), Vladimir Kartashkin (Russian Federation), Mona Zulficar (Egypt) and one Rapporteur Emmanuel Decaux (France).
\(^{191}\) At the first session members had agreed to hold two sessions of one week instead of one 14 day session.
\(^{192}\) A number of members (e.g. Miguel Martínez, Vladimir Kartashkin, supported by Egypt and India), e.g. tried to make the rules of procedure subject to prior authorization by the HRC, which was vehemently rejected by
HRC make the committee dependant on the HRC taking notice of its work in a timely manner. This was demonstrated by the decision of the HRC to adjourn the consideration of the first report of the committee from its ninth to its tenth session, whereby the work of the committee was constrained. Besides that, the limited participation of NGOs was a negative result of the first two sessions. Despite optimal pre-conditions for a participation of NGOs and a great degree of openness of the committee for initiatives from this direction there were very few requests to speak and only a few sideline events. Furthermore, the very limited meeting time caused considerable difficulties. Several issues could not be sufficiently prepared, so that there was either no discussion at all or a debate of inferior quality on the matter. Despite these difficulties the Advisory Committee succeeded in producing some considerable results. Progress was made in the field of human rights education and concerning the right to food. Furthermore, on the basis of a merely rhetorical order of the HRC regarding “gender mainstreaming” the committee took the initiative by requesting permission to others, perceiving the rules of procedure as an internal issue. Further, the question of how to continue the work of the Sub-Commission aroused discussions on the competencies of the AC, too. See on this, Doc. A/HRC/DEC/10/117 of 27 March 2009, adopted by 29 votes to 3, with 15 abstentions.

NGOs are entitled to take the floor up to 15 minutes, hand out written information, hold sideline events and participate in the meetings of the working groups charged with elaborating the drafts, Doc. A/HRC/RES/5/1, see note 73, para. 83.


See in this respect the results of the second session, AC report Doc. A/HRC/AC/2/2 of 24 February 2009, pages 8-10.

By order of the HRC, Doc. A/HRC/6/10 of 28 September 2007, a draft statement in this regard was elaborated, which was presented at the thirteenth session of the HRC in March 2010, Doc. S/HRC/10/28 of 27 March 2009.

On the order of the HRC, Doc. A/HRC/7/14 of 27 March 2008, recommendations regarding further measures to realize the right to food were elaborated. Submitting further orders in this respect, these were adopted by the HRC, Doc. A/HRC/10/12 of 26 March 2009.

elaborate guidelines in this regard for its work and the entire UN sys-

All in all, the first sessions of the Advisory Committee showed that it is quite capable of achieving considerable results that enrich the work of the HRC. However, in light of the severely restricted competencies compared to the former Sub-Commission and the close ties to the HRC, as well as the limited meeting time and the scant interest of NGOs it appears to be questionable if the Advisory Committee will be an equal substitution to its predecessor.

3. Universal Periodic Review

The third year of the HRC saw the third, fourth and fifth Universal Pe-

The fourth session was of particular interest since permanent Security Council members China and the Russian Federation came under review. The selection of troika members confirmed the subordinate role accorded to them and thus constituted a mere formality. Once again, this could be the reason for the comparatively smooth selection process in which five states from the African group and the Russian Federation decided not to request one Rapporteur from their own regional group. Altogether about 50 per cent of all states reviewed made use of this opportunity and only two selected

199 The HRC adjourned the consideration of this issue to a later session, Doc. A/HRC/PRST/10/1 of 27 March 2009.
201 Universal Periodic Review 4: 856 comments in total (about 200 more than the previous sessions) from 128 different states.
202 Selection at the first meeting of the ninth session of the HRC, 8 to 26 September 2008.
203 Universal Periodic Review 3: 4 African States of 4; 4 Asian States of 4; 1 Eastern-European State of 2; none of the other two regional groups. Universal Periodic Review 4: 1 African State of 5; 5 Asian States of 5; 1 Eastern-European State of 2; none of the other two regional groups. Universal Periodic Review 5: 4 African States of 5; 3 Asian States of 3; 1 Eastern-European State of 2; 1 Latin-American State of 3; none of the other two regional groups.
Rapporteurs were rejected.\textsuperscript{204} The newly established mechanism succeeded in reviewing all 48 states scheduled with no delay, however, some negative developments observed continued. Once again an excessive number of comments in the interactive dialogue were just used for hymns of praise\textsuperscript{205} or invective and libel\textsuperscript{206} instead of addressing serious human rights concerns. This is particularly problematic in view of the limited time frame of the review, which allows only three hours for each review. In many cases 20 to 30 states – in reviews attracting much attention, like the one of China or Cuba, up to 40 states – are prevented from taking the floor.\textsuperscript{207} Once again only a handful of western states handed in their questions and comments in writing prior to the review and many questions and recommendations were answered very vaguely or were completely ignored. A positive development that continued was that issues and individual cases being reviewed by the treaty bodies were taken up in the review.\textsuperscript{208} This was equally recognized by the Chairpersons of the treaty bodies, calling the Universal Periodic Review the “political sounding box” of treaty body recommendations\textsuperscript{209} even though they had initially been skeptical.\textsuperscript{210} Furthermore, the review was used as a forum for developing and donor states\textsuperscript{211} and several states submitted overdue reports to the treaty bodies.\textsuperscript{212}

\textsuperscript{204} Only Turkmenistan and Tuvalu rejected a Rapporteur at the third Universal Periodic Review session.
\textsuperscript{205} In the review of China critical comments were openly regretted by other states (Algeria, Sri Lanka, Pakistan and Myanmar regarding Australia’s comment concerning the issue of Tibet), see Doc. A/HRC/11/25 of 3 March 2009, paras 33, 39, 88 and 94.
\textsuperscript{206} Israel, e.g., was called a “Zionist regime” by Iran in its review, whereupon the president of the HRC intervened, <http://portal.ohchr.org>.
\textsuperscript{207} Undelivered comments are published under<http://portal.ohchr.org>.
\textsuperscript{208} In the review of China, e.g., the issue of China’s rehabilitation program “reeducation through labour” was taken up (Doc. A/HRC/11/25 of 3 March 2009, para. 82) that had been criticized by the Committee against Torture (CAT) before, see Doc. CAT/C/CHN/CO/4 of 12 December 2008, para. 12.
\textsuperscript{209} See the report of the twenty first treaty body Chairperson meeting, Doc. A/64/276 of 10 August 2009, para. 4.
\textsuperscript{210} Seventh Inter-Committee meeting of human rights treaty bodies, Doc. A/63/280 of 13 August 2008, Annex, paras 22-23.
\textsuperscript{211} Tuvalu emphasized its lack of personnel and financial capacities to improve its human rights situation, whereupon several states called on the interna-
During the second year of the Universal Periodic Review it was of particular interest, how states like China and the Russian Federation would encounter the newly established mechanism. Both states presented rather meaningless reports that gave rise to doubts if there had been any consultation process at the national level with relevant stakeholders at all.\textsuperscript{213} The interactive dialogue then indicated the limits of a cooperative mechanism like the Universal Periodic Review. Reviewing states as powerful and influential as China and the Russian Federation many other states refrain from a critical examination of the human rights situation with a view to national interests. This leads to a particularly large number of laudatory comments and even Western states hold back criticism, as demonstrated in the review of China regarding the situation of Tibet.\textsuperscript{214} Although responding to a number of questions,\textsuperscript{215} China and the Russian Federation categorically rejected from the outset all contributions regarding more sensitive issues like the Tibetan or Georgian conflict. Comparing the Universal Periodic Review of China with its examination by a treaty body organ, e.g., the Committee against Torture (CAT) in November 2008, despite the narrower the-

\textsuperscript{212} For example, Jordan submitted its CCPR and CAT report in March 2009 after 12 and 13 years, following an accepted recommendation in its UPR in February 2009.

\textsuperscript{213} China’s national report states that oral and written dialogue with about 20 NGOs was held but looking at the websites of these listed NGOs it appeared questionable if they had the necessary independence towards government positions, see Doc. A/HRC/WG.6/4/CHN/1 of 10 November 2008, Annex 2. The report of the Russian Federation only speaks of the “consultation of Representatives of civil society organizations” with no further information submitted, Doc. A/HRC/WG.6/4/RUS/1 of 10 November 2008, para. 2. Contradictory to this, several NGO positions in the documentation of other stakeholders differ considerably from those in the state report, Doc. A/HRC/WG.6/4/RUS/3 of 1 December 2008.

\textsuperscript{214} Only Australia, Switzerland, the United Kingdom and the Czech Republic directly addressed the situation of Tibet. Others, like Germany, the Netherlands and Austria restricted themselves to only emphasizing the “important role of minority rights”, see report of the Universal Periodic Review working group on China, see note 213.

\textsuperscript{215} After all, the Russian Federation engaged itself to a certain extent on the topic of the journalist murders.
matic framework it can be observed that many sensitive issues were addressed more clearly. However, it is to be noted that China refused serious scrutiny by both the independent experts of CAT and their peers in the Universal Periodic Review.

Concerning the results of the interactive dialogue it was to be observed again that many of the recommendations were accepted but that states, however, focused mainly on the numerous positive and less important ones. As before, many states availed themselves of the opportunity to delay their decision regarding the adoption of the recommendations until the consideration of the report by the HRC plenary several months later. Concerning the structure of the reports of the UPR Working Group it is a failing that rejected recommendations are not adequately listed. Further, on several occasions reports were not made available in all official languages. Attempts were made to solve this problem.

The debate of the Universal Periodic Review outcome of the fourth session took place at the eleventh regular session of the HRC. This stage of the mechanism has shown that many states seriously provide written answers to the recommendations and distribute them prior to the discussion. As long as translations of these answers are available in time this is a useful procedure and should be followed by all states under review. Unfortunately the problem of an excessive number of purely laudatory comments that was already visible at the first stage of the Universal Periodic Review continues and is even exacerbated by the narrow timeframe of only one hour of discussion for each review outcome. In the discussion of the Universal Periodic Review report on China, Cuba and the Russian Federation for example, there were no critical comments at all and in respect of China and Cuba hardly any

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216 Doc. CAT/C/CHN/CO/4 of 12 December 2008. Here China had to at least take a stand on the events in Tibet in March 2008.

217 See note 168. See the reports of the working group on Burkina Faso, Columbia, Turkmenistan, Tuvalu, United Arab Emirates (UAE), Azerbaijan, Cameroon, China, Cuba, Djibouti, Jordan, Malaysia, Saudi Arabia, Chad, Congo, Monaco and Viet Nam. See further on the structure of the reports President’s statement on follow-up to President’s statement 8/1, Doc. A/HRC/PRST/9/1 of 24 September 2008.


critical statements by other stakeholders. In the end, however, it will be crucial for the Universal Periodic Review as to how the submitted recommendations will be implemented. First and foremost, it has to be determined how this is supposed to be monitored.

VI. The Fourth Year of the Human Rights Council – Current Developments

The election of members for the fourth year in May 2009 was of major interest since the United States had decided to present their first candidacy which eventually was successful. Thereby, the United States gave up their boycott of the HRC under the new Obama administration and aimed at a greater commitment. However, states like Saudi Arabia, China, the Russian Federation or Cuba were re-elected. Once again only 20 candidates applied for 18 seats. As of 1 April 2010 the HRC has so far concluded its twelfths and thirteenths regular session and its twelfths and thirteenths special session under the newly elected President Alex Van Meeuwen of Belgium. Having completed its institution-building phase and taken up all of its main functions for more than one year, it was to be hoped that some early conclusion could be drawn concerning this newly established human rights institution.

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223 Special sessions held on the human rights situation in the occupied Palestinian territories and East Jerusalem and on the recovery process in Haiti.
1. Special Procedures

After the worrying outcome of the contentious discussion of the country-specific mandates on Sudan and Somalia, it was questionable, whether this would constitute a precedent for future debates on mandates. Supporters of the special procedures feared that the fourth year of the HRC would witness a further loss of country-specific mandates. So far four mandates established by the CHR have already been terminated since the establishment of the HRC. Nevertheless, the renewal of the mandate on Sudan for a whole year at the end of year three gave rise to cautious optimism. This optimism then was confirmed by the extension of the mandates on Somalia, Cambodia, Myanmar and North Korea for an entire year without a vote, except for the latter. Against this backdrop, it can be said that the erosion of the country-specific mandates was so far stopped. However, those states campaigning for the abolition of country-specific mandates are not likely to give up on this goal. Therefore further attacks on mandates, mandate holders and the system as a whole are to be expected, particularly during the upcoming review of HRC functions. However, the discussions on the renewal of the mandate concerning Sudan showed that supporters of the system of special procedures have the strength to combine forces to successfully prevent mandates from being terminated and that particularly the African regional group is not that homogeneous in its

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224 The mandate on Sudan was renewed for only nine months, the mandate on Somalia for only six months thereby questioning the consensus of the institution-building package, see note 182.

225 The mandates on Cuba and Belarus in 2007, see note 101, and the mandates on Congo, see note 145 and Liberia in 2008, see note 187. The mandate on Burundi was only renewed “until the establishment of an independent national human rights commission”, see note 188.

226 An independent expert was implemented, see note 183.


position as it sometimes seems. Furthermore, the mandate of the Special Rapporteur on the Right to Food was renewed for three years.

2. Advisory Committee

After its inaugural year the Committee held its third and fourth session in August 2009 and January 2010. At the third session in August 2009 Ms Halima Embarek Warzazi of Morocco was elected as new chairperson. First and foremost, the Committee agreed on its rules of procedure that had been controversially discussed during the first two sessions. This set of rules of procedure, that was adopted rule by rule after discussions had continued for four meetings, provides a lot of flexibility for the Committee members in carrying out their work. In the course of its second year the Committee once again managed to produce some considerable results. After animated discussion of the issue at both sessions thereby attracting a great number of contributions by NGOs, the Committee submitted a draft declaration on human rights education and training to the HRC for consideration. Furthermore, in particular at the fourth session constructive discussions were held on the right to food. However, the quality of discussions varied considerably between the different topics and once again NGO participation was unsatisfactory. Only a very small number of side-events were held.

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234 For example, the AC agreed not to restrict long time studies to three years, as proposed by the drafting group, see Doc. A/HRC/AC/3/2, Annex III of 9 October 2009, rule 16.


236 With the exception of the topic on a Draft Declaration on Human Rights Education and the Right to Food hardly any NGO statements were made during the third and fourth AC session.

237 The third and fourth AC session saw only a single informal meeting, <http://www2.ohchr.org/english/bodies/hrcouncil/advisorycommittee/ses
3. Universal Periodic Review

The Universal Periodic Review has so far held its sixth and seventh session in the fourth year of the HRC, having now reviewed 112 states. The drawing of troika members proved once again to be of minor importance since troika members are left with no real facilitating role. There was a slight increase of states demanding a troika member to be drawn from their own regional group. All in all, about 50 per cent of the states under review made use of this possibility during the first two years of the procedure (63 of 128 states, 49.22 per cent). After the reviews of Cuba, China, Saudi Arabia and the Russian Federation at the fourth session, it seemed as if the procedure could not cope with the large number of participating states, leaving an unacceptable number of them with no speaking time at all. Compared to all previous and following sessions, however, this seems to be an exemption rather than the rule. Nevertheless, the seventh session showed that there are regu-
larly a number of politically sensitive reviews, like the one on Iran or Egypt, that cause insufficiencies regarding the participation of states. Furthermore, these reviews revealed a problem concerning the allocation of speaking time through the lists of speakers which are normally opened for inscription the morning of the day before the review. The large demand for speaking time led to a very competitive atmosphere and some obscure maneuvers to obtain one of the first 60 slots of the lists which are allocated on a “first come, first serve” basis. The bureau of the HRC President had already discussed this issue on several occasions finding “that the way the list is currently formed has led to inconveniences for delegations due to the need to queue early, repeatedly, and for long hours” and that “it has sometimes resulted into competition among delegations to be among the first 60 speakers on the list” but it had not reached an agreement on how to solve this problem. Basic ideas for a solution so far include the opening of speakers’ lists one week before the UPR and the President drawing a number corresponding to the position of a random speaker on the list. Speakers will then continue from that number downwards. This gives a fairer chance to all delegations whether or not they are at the top of the list. This problem of a competitive allocation of speaking time concerns other stakeholders such as NGOs as well and has occurred before.

244 In the afternoon of 15 February 2010 a number of states suddenly opened a hand written list of speakers for the UPR of Egypt, which should have been opened the next morning. The list is available at <http://www.upr-info.org/IMG/pdf/Egypt_Pre-List_of_speakers.pdf>. In the UPR of Iran delegates stayed overnight to cue up for the list of speakers.


247 See the point of order raised by Germany and the following comments at the eleventh session on 10 June 2009 concerning the pre-registration of NGOs that had managed to enter the premises before 8:00 am to cue up for the UPR list of speakers <http://portal.ohchr.org>.
The plenary stage of the UPR showed that not all states seriously answer as to what recommendations they have accepted in writing and distribute this information prior to the discussion of their UPR outcome.\textsuperscript{248} Besides that, these answers are often issued only in one or two of the official UN languages, thereby excluding delegations from the debate to a certain extent. Furthermore, the lack of translations of UPR documents also again proved to be a general problem. At the beginning of the seventh session the national reports of Gambia and Fiji, for example, were only published in English – 28 translations were missing overall.

On the contrary, there were also a number of continuing positive aspects during the fourth year. The Universal Periodic Review still attracts substantial attention among UN member states and all states reviewed have participated through high-level delegations, so far. Furthermore, several states under review signed or ratified one of the international human rights instruments,\textsuperscript{249} extended standing invitations to the special procedures,\textsuperscript{250} submitted overdue reports to the treaty bodies\textsuperscript{251} or further developed or strengthened their NHRI following UPR recommendations.\textsuperscript{252} Additionally, the structure of the UPR Working Group reports was improved, since rejected recommendations

\textsuperscript{248} 12 states did not circulate their responses prior to the discussion of the outcome of the seventh UPR session.

\textsuperscript{249} The Bahamas and Pakistan, e.g., ratified the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention against Torture at the time of their UPR in May and December 2008. Furthermore, Cuba (International Convention for the Protection of All Persons from Enforced Disappearance), Zambia, Ecuador, Azerbaijan (Optional Protocol to the Convention on the Rights of Persons with Disabilities) have ratified human rights treaties in connection with their UPR so far.

\textsuperscript{250} Overall nine standing invitations have been extended directly before or after the Universal Periodic Review by Albania, Portugal, Bolivia, El Salvador, Kazakhstan, North Korea, Zambia, Chile, Monaco.

\textsuperscript{251} Bolivia, e.g., made a voluntary pledge to submit all pending reports in its Universal Periodic Review in February 2010, Doc. A/HRC/WG.6/7/L.6 of 12 February 2010, para. 102.

\textsuperscript{252} For example, Chile and Belize received technical support from the OHCHR in 2009 to establish an NHRI (see Doc. A/HRC/13/44 of 15 January 2010, para. 12) following Universal Periodic Review recommendations in this regard.
are now fully listed.\textsuperscript{253} Unfortunately, on the other hand, a growing number of states dismiss numerous recommendations out of hand as “already implemented” or “in the process of implementation.”\textsuperscript{254} Interestingly, at the seventh Universal Periodic Review session the rejection of recommendations was questioned for the first time by a number of states in the discussion of the report of the Working Group on Iran, which rejected 45 recommendations for being “inconsistent with the Institution-Building text and/or not internationally recognized human rights, or not in conformity with its existing laws, pledges and commitments.”\textsuperscript{255}

\textsuperscript{253} See on this note 217. Overall development of reports listing rejected recommendations only by paragraph: Universal Periodic Review 1: 1 (Algeria); Universal Periodic Review 2: 3 (Pakistan, Sri Lanka, Zambia); Universal Periodic Review 3: 5 (Burkina Faso, Columbia, Turkmenistan, Tuvalu, United Arab Emirates); Universal Periodic Review 4: 8 (Azerbaijan, Cameroon, China, Cuba, Djibouti, Jordan, Malaysia, Saudi Arabia); Universal Periodic Review 5: 4 (Chad, Congo, Monaco, Viet Nam); Universal Periodic Review 6: none; Universal Periodic Review 7: none. Overall development of reports fully listing rejected recommendations: Universal Periodic Review 1: none; Universal Periodic Review 2: none; Universal Periodic Review 3: 1 (Bahamas); Universal Periodic Review 4: none; Universal Periodic Review 5: 3 (Afghanistan, Comoros, Yemen); Universal Periodic Review 6: 7 (Brunei, Norway, Costa Rica, Democratic Republic of the Congo, Dominica, Dominican Republic, Equatorial Guinea); Universal Periodic Review 7: 6 (Egypt, San Marino, Iran, Iraq, Qatar, Madagascar).


4. Review of Status

Resolution A/RES/60/251 provides for a review of the newly established HRC five years after its creation. This review is twofold – on the one hand General Assembly members are to review the institutional status of the HRC, on the other hand HRC member states are charged with reviewing all functions of the new human rights organ. Concerning the timeframe for the review, however, the related provisions differ, speaking of a review “within five years” regarding the status and “five years after” concerning the HRC functions. At its twelfth session the HRC already considered the issue of reviewing its functions and established an Open-Ended Intergovernmental Working Group (OEWG) with the mandate to review its work and functioning. This early consideration of the issue and the wording of Resolution A/RES/60/251 lead to contentious discussions concerning the question of when to start the review. Against this background the Resolution establishing the OEWG was only adopted by the European states on the understanding, that the OEWG would not commence its work prior to the fifteenth regular HRC session, that is, no earlier than the fall of 2010.

The OEWG will be chaired by the President of the HRC who is requested “to undertake transparent and all-inclusive consultations prior to working group sessions on the modalities of the review, and to keep the Council informed thereof.” The OEWG will hold two sessions of five days each “after its fourth session” that ends on 19 June 2010 and it is requested to report to the HRC on its progress at its seventeenth session in June 2011. Moreover, the Secretary-General is re-

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256 A/RES/60/251, see note 23, op. para. 1.
257 Ibid., op. para. 16.
258 Ibid., op. paras 1 and 16.
259 Draft introduced by the Russian Federation (Doc. A/HRC/12/L.28.), co-sponsored by 64 states from all regional groups. Adoption without a vote, Doc. A/HRC/RES/12/1 of 12 October 2009.
260 See the statement of France, available at HRC extranet: <http://portal.ohchr.org>. In the discussion of the draft a number of NGOs had expressed their concern that the OEWG would take up its work too early.
262 Ibid., paras 2 and 6.
quested to support the OEWG and to report on how to improve conferences and secretariat services for the HRC regular sessions by 15 September 2010.\footnote{Ibid., paras 5 and 7.} At the thirteenth HRC session some states have already expressed preliminary views on the review of the functions.\footnote{Including the proposal to preserve and further develop special procedures (Spain on behalf of the EU), to have less agenda items per session and to further diversify the format for discussion (Greece). See twelfth HRC Session, interactive dialogue with the High Commissioner for Human Rights, <http://portal.ohchr.org>.} The General Assembly corresponded with Alex Van Meeuwen, the HRC President in October 2010 in connection with its consideration of the HRC report. On 15 March 2010 General Assembly President Ali Abdussalam Treki then informed member states that he had appointed two facilitators to conduct consultations on the review of the status of the HRC.\footnote{See letter of the General Assembly President, at <http://www.un.org/ga/president/64/letters/hrc150310.pdf>. The facilitators are Ambassador Christian Wenaweser of Liechtenstein and Ambassador Mohammed Loulichki of Morocco.} They will consult member states in an “open, inclusive and transparent process” and have to “take into account” the “experiences and views of the Human Rights Council” while consulting and working “closely with the Human Rights Council on the Review.” The facilitators are to begin their work “during the 64th session” of the General Assembly which was opened on 15 September 2009. The date for the conclusion of the work of the facilitators is left unclear. The information of the President though reiterates Resolution A/RES/60/251 stating that the General Assembly has to conduct the review “within five years, i.e. 15 March 2010”, on the other hand it determines that the review of the HRC status “is to be completed in the 65th session [of the General Assembly]” that concludes no earlier than mid September 2011. However, the latter date would solve the conflicting reporting dates of Resolution A/RES/60/251. HRC members would be enabled to complete their review and report back to the General Assembly before it completes the review of the HRC status.
VII. Conclusion

After almost four years of existence, the HRC has taken up all of its functions and thereby completed its institution-building phase. Therefore it is possible to draw some first conclusions and give an answer to the question, whether this reform has so far been a success and what has to be improved in light of the upcoming review. The HRC continued the work of the CHR in the field of standard setting and as a political forum for human rights fairly successfully. However, the performance of its main functions was rather ambivalent.

The system of special procedures is still under strong pressure as it was during the last years of the CHR caused by those forces that wish to abolish all country-specific mandates. In particular, the special procedures have been weakened by limiting the country-specific mandates to a term of one year and by the code of conduct that can be and has been used as a tool to further restrict the independence of mandate-holders. Even though the system of special procedures was largely preserved during the contentious institution-building phase and the latest renewals of country-specific mandates left a more positive impression after four mandates had previously been terminated, this debate is very likely to be reopened during discussions concerning the review of HRC functions. It would be no surprise if it turns out to be a challenge to preserve the system as a whole again. In contrast to that the special procedures have to be further developed taking into account their significant importance for the UN human rights system. Concerning the particularly contentious country-specific mandates the proposal to introduce an independent expert for every UN member state appears to be an interesting idea.\textsuperscript{266} This would be an impartial alternative to the abolition of all country-specific mandates and a way to provide the HRC with the necessary information to react more swiftly to human rights crises. Furthermore, this would form an optimal supplementation to the Universal Periodic Review that has to be further linked to the special procedures and the treaty body system, enhancing the first positive developments in this regard described above.

The institution-building package provides the new Advisory Committee with much weaker competences and authority than its predeces-

\textsuperscript{266} Proposal by Germany during the thirteenth HRC session on 7 March 2010, <http://portal.ohchr.org>. 
Spohr, United Nations Human Rights Council

Other problems of the Advisory Committee are the limited meeting time that was reduced to only ten working days annually and the lacking interest of NGOs. Since civil society contributions are crucial for the work of the Advisory Committee, participation should be made more appealing to NGOs. This will be achieved if the work of the Advisory Committee proves to have a considerable influence on the work of the HRC. Therefore in the course of the review of HRC functions, increasing the meeting time of the Advisory Committee and giving it authority to adopt decisions and resolutions should be discussed. It is to be taken into account in this regard that the Advisory Committee proved to be capable of producing substantial results despite difficulties. However, it is to be noted that the HRC so far has been provided with a weaker expert advice than the CHR.

Concerning the complaint procedure the General Assembly did not avail itself of the opportunity to create a completely new procedure, built on the UN experiences in this regard since the establishment of the 1503 procedure, that could have functioned as something of an early warning system for emerging human rights situations in any part of the world. Considering the little interest among member states in further establishing this feature of the HRC during the institution-building phase it is rather questionable, if the upcoming HRC review will witness progress in this field. However, if the present author is proved wrong, the establishment of the possibility of injunctions and remedies constitutes an idea worth discussing, since thereby the procedure would be more suitable for victims.

Putting the Universal Periodic Review into operation, to a certain extent, is to be seen as a success itself, given the difficult political climate of the institutional-building phase. However, the marginal role of the troikas and NGOs, the insufficiencies concerning the allocation of speaking time and translations of Universal Periodic Review documents and the large number of purely political, and therefore unproductive, comments, which exacerbate the narrow timeframe, are to be noted as negative developments. Concerning the latter it must be stressed that according to the institution-building package “positive developments” are indeed to be assessed in the Universal Periodic Review as well – its main objective remains however “the improvement of the human rights situation on the ground.”

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267 Doc. A/HRC/RES/5/1 of 18 June 2007, para. 4 (a) and (b).
Periodic Review participants focus on bringing up and discussing what is going wrong instead of what is going well. Furthermore, too few state reports were preceded by a sufficient national human rights debate including independent civil society stakeholders and several NGOs participating in the review lacked the necessary independence from government positions. This manipulation of civil society contribution clearly undermines the Universal Periodic Review and needs to be prevented. It is to be noted that a substantial national human rights debate is one of the most important effects of the review since it has the most significant impact on the human rights situation on the ground.

In contrast, a number of positive effects on the UN human rights system have been identified that can be summarized as follows: the ratification of international human rights treaties, the reiteration of concluding observations of treaty bodies in the Universal Periodic Review process, the submission of overdue reports to the treaty bodies, the issuance of standing invitations to the special procedures and the establishment or strengthening of NHRIs by the state under review. Furthermore, the Universal Periodic Review mechanism proved to produce considerable results, provided that the state under review opened up for a comprehensive discussion of its human rights situation. The overall picture shows that this mechanism is indeed capable of making an important contribution to the UN human rights system and turning this reform project into a success. The unique basis of information of the UPR could even be expanded by incorporating human rights information on African and Inter-American regional human rights mechanisms, complementing the information already provided by the human rights organs of the Council of Europe. Moreover, the review by state representatives, compared to the review by independent experts, has the advantage that statements delivered also represent the position of the respective state concerning this matter. Pledges regarding human rights violations made to state representatives outweigh those expressed in front of independent experts. Unable to immediately shatter long-established dictatorships, of course, it will hereby at least be possible to draw a picture of which international human rights standards de facto enjoy the support of the international community and to what extent.

Nevertheless, states must tackle the identified problems while at the same time further developing the positive aspects of the Universal Periodic Review. Particular attention in this connection is to be paid to the implementation of Universal Periodic Review recommendations which will be of crucial importance. OHCHR and HRC are charged with the difficult task of developing a monitoring system that will require the
collection of an enormous amount of data on the ground in states that often lack the necessary capacities. A first step into this direction could be the creation of an OHCHR unit to assist in follow up Universal Periodic Review recommendations as proposed by the HRC at the thirteenth session on 4 March 2010. Open and productive discussions should be conducted during the review of HRC functions that take into account that the other components of the UN human rights system like the treaty bodies must be further developed as well, since this reform will only turn into a success, if the Universal Periodic Review complements rather than replaces these human rights organs. By establishing the HRC as a subsidiary organ of the General Assembly, increasing the meeting time and reducing membership to 47 states some of the problems of the CHR have been solved. The Universal Periodic Review now guarantees that all states come under review on a regular basis, so that membership can no longer be used as a shield against human rights scrutiny. The newly established election procedure, in contrast, is rather disappointing. Unable to attract a sufficient number of candidates running for membership, it fails to initiate the necessary competition to enable the intended selection among candidates. Correspondingly, not all states with bad human rights records were kept away from the HRC. Nor has the problem of an overly politicized atmosphere been solved, demonstrated by the conflict of supporters and opponents of country-specific mandates, the discussions surrounding special sessions on the middle-east crisis, several Universal Periodic Review sessions and the first no-action movement at the eleventh special session. But, concerning this problem, one has to ask, if it was, in any way to be expected, that a political organ like the HRC would be able to work purely objectively and entirely free from any politicization. It is important to keep in mind that it is not the institution itself but the acting protagonists – the governments – who are responsible for politicization. Thus it was the governments, rather than the HRC, who lost their credibility. In the same spirit Louise Arbour pointed out that “even an institution that is perfect on paper cannot succeed if the international community does not make the necessary change in the culture of defending human rights.” According to this, it appears that the roots for a failure of the HRC to meet the expectations in this regard rather lie in the fact that

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several states still perceive human rights as a domestic affair, covered by state sovereignty, rather than an international concern. Thus, the inevitably emerging politicization should not be used as an argument against the HRC, but as an impetus for a bigger commitment of those states claiming to be “human rights champions”. The new engagement of the United States could be such an impetus. The HRC so far proved to be the international human rights body of universal relevance. Nevertheless the problems identified have to be solved and its main functions have to be substantially strengthened and further developed. If the international community successfully and unconditionally carries out this task and refrains from further weakening and restricting the main functions in the upcoming review of the HRC, the HRC will be in the position to tap its full potential in the future and to mark in fact a milestone in the development of the UN human rights system.
International Law of Victims

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A. von Bogdandy and R. Wolfrum, (eds.),
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III. Conclusions
I. Some Previous Questions

1. The Approach of International Law to Victims

Traditionally, international law has paid insufficient attention to victims. An explanation for this can be found in the particular nature of international law. As is well known, and owing to the predominantly interstate structure of the international community, international norms are created to respond to states’ interests and goals. In this context attention to persons or individuals by states has only taken place in some particular fields of international law.

This is the case, for example, with human rights, international criminal law (with regard to international criminal responsibility of individuals)\(^1\) or international humanitarian law. But in each of these branches of international law the way in which victims are considered differs. So, in human rights law, victims are acknowledged when the state is the author of the breach of an international obligation, but this branch of international law does not consider the breach of international obligations by non-state actors.\(^2\) In international criminal law and in international humanitarian law on the other hand individuals may be regarded as victims as a consequence of acts perpetrated by individuals (even by individuals exercising public functions), as well as by non-state actors. In both cases, international responsibility rests only with the individuals and victims are recognised. Nevertheless, the way in which they are recognised is inadequate.\(^3\)

It can thus be concluded that, despite the relevance of this subject, victims have been either ignored or insufficiently considered by international norms. But this panorama began to change since different international norms related to victims have progressively been introduced. These are norms of an institutional or conventional nature, of a general or regional frame, all related to concrete categories of victims: victims of crime, victims of abuse of power, victims of gross violations

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\(^2\) Like terrorists, for example.

\(^3\) See in this respect the statutes of the ICC and of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.
of international human rights law and of serious violations of interna-
tional humanitarian law, victims of enforced disappearance, victims of 
violations of international criminal law, and finally victims of terrorism.
All these norms are generally characterised by a certain concept of the 
respective category of victim, as well as by the enumeration of a list of 
rights to which the category of victim in question is entitled to. At the 
same time, these rights constitute obligations on the part of states.

Most of these norms are of an institutional nature. This fact raises 
questions about their binding effects. Independently of this discussion 
and the doctrinal approaches traditionally related to it, it must be re-
membered that the absence of formalism in international law can also 
lead to international obligations stemming from institutional norms. 
From another perspective it should also be remembered that interna-
tional treaties are frequently preceded by institutional norms adopted 
on the same subject as that of the future treaty. This is why actual insti-
tutional norms relating to the different categories of victims could lead, 
in the future, to international treaties. In the meantime, they show the 
existence of a consensus, on the part of states, on the necessity of taking 
certain victims into account. They also demonstrate the recognition of 
the existence of victims by states and by international organisations.

These groups of institutional norms have legal effects on states. 
Above all, these institutional norms have been adopted without a vote, 
i.e., by consensus. Due to the numerous international norms related to

4 Such a procedure is frequent in the field of international human rights law. 
For example, the Convention Against Torture of 1984 was preceded by the 
Declaration on the Protection of All Persons from being subjected to Torture 
and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by A/RES/3452 (XXX) of 9 December 1975. Also the Interna-
tional Convention on the Elimination of All Forms of Racial Discrimina-
tion adopted and opened for signature by A/RES/2106 (XX) of 20 Decem-
ber 1965, which was preceded by the Declaration on the Elimination of All 
Forms of Racial Discrimination adopted by A/RES/1904 (XVIII) of 20 
November 1963. More recently, the International Convention for the Pro-
tection of All Persons from Enforced Disappearance adopted on 20 De-
cember 2006 by A/RES/61/177, which was preceded by the Declaration on 
the Protection of All Persons from Enforced Disappearance adopted by 

5 Actually, only two treaties exist and both concern victims of enforced dis-
appearance, the United Nations International Convention for the Protec-
tion of All Persons from Enforced Disappearance, 2006 (not yet in force), 
see note 4, and the Inter-American Convention on the Forced Disappear-
victims actually in existence another question arises: are we assisting the birth of a new branch inside traditional international law? That is, a new branch built upon different categories of individuals, all being victims of one kind or another and entitled to their own particular statute of rights which is inherent to such condition?

It seems that the different categories of victims entitled to certain rights and the resulting obligations of states shape a new international statute: the international statute of victims. But are there as many international statutes as categories of victims or, on the contrary, is there only one general international statute of victim?

2. International Norms related to Victims

Like the birth of the international human rights law, the relatively recent interest in victims finds its origin in the social situation created after World War II. As a consequence of this dramatic experience a legislative policy began to coordinate measures in order to revitalise the intervention of the victim, in particular, within the criminal proceedings. This initiative became more intense in the 1980s. States and international organisations began to codify law on the matter. An ensemble of international norms solely concerned with victims and their rights began to emerge. These are international norms of a different nature (most of them institutional norms). They are also norms of a different territorial range (general, universal or regional). Still most of the rights building the international statute of the victim are still rights enshrined in international treaties. Mainly human rights treaties ratified by the large majority of states.


In the frame of the United Nations there are, at the moment, three instruments relating to five categories of victims. First General Assembly Resolution 40/34 adopted on 29 November 1985, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.6

6 Adopted by A/RES/40/34 of 29 November 1985 it is based on article 18 of the Universal Declaration of Human Rights, adopted and proclaimed by A/RES/217 A (III) of 10 December 1948. Article 8 contains the right of everyone to an effective remedy by the competent national tribunals for
This Declaration contains several concepts of “victim” as well as a catalogue of rights to which victims are entitled to, mainly the right to access of justice and fair treatment, which is linked to reparation as well as to the establishment and strengthening of judicial and administrative mechanisms to enable victims to obtain redress. A few years later this Declaration was followed by the Declaration on the Protection of All Persons from Enforced Disappearance adopted by the General Assembly in its resolution A/RES/47/133 of 18 December 1992. On the same subject, on 20 December 2006 by resolution A/RES/61/177, the General Assembly adopted the International Convention for the Protection of All Persons from Enforced Disappearance.\footnote{See \texttt{http://www2.ohchr.org}.}

Contrary to the Declaration of 1992, the International Convention gives a definition of “enforced disappearance”. So, according to article 2, “enforced disappearance” is considered to be “the arrest, detention, abduction or any other form of deprivation of liberty by agents of the state or by persons or groups of persons acting with the authorization, support or acquiescence of the state, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”\footnote{Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance, see note 4. At the same time, article 1 of the Declaration states: “1. Any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field. 2. Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of International Law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life.”} Both, the Declaration of 1992 and the Convention of 2006, contain a catalogue of rights to which victims of enforced disappearance are entitled.
tled to. Basically, the mentioned right to justice (which includes the right to a prompt and effective judicial remedy), the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person,9 the right of access to all information concerning the person deprived of his liberty,10 the right to form and participate freely in organisations and associations concerned with attempting to establish the circumstances of enforced disappearances and the fate of disappeared persons,11 the right to assist victims of enforced disappearance,12 and last but not least, the right to obtain reparation and prompt, fair and adequate compensation.13 The question of reparation is conceived by the Convention of 2006 with a double effect. On the one hand, the right to obtain reparation covers material and moral damages. But on the other hand, this right “where appropriate” also covers other forms of repara-

9 Which includes exact information about the person(s) deprived of liberty; the authority that ordered the deprivation of liberty; the date, time and place where the person was deprived of liberty and admitted to the place of deprivation of liberty; the authority responsible for supervising the deprivation of liberty; the whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of deprivation of liberty, the destination and the authority responsible for the transfer; the date, time and place of release; elements relating to the state of health of the person deprived of liberty; and in the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains (see article 18 of the Convention).

10 According to article 18 of the Convention State Parties shall guarantee to any person with a legitimate interest in this information, such as relatives of the person deprived of liberty, their representatives or their counsel, access to at least the information quoted in the precedent footnote.

11 According to article 24 para. 7 of the Convention: “Each State Party shall guarantee the right to form and participate freely in organizations and associations concerned with attempting to establish the circumstances of enforced disappearances and the fate of disappeared persons, and to assist victims of enforced disappearance.”

12 See article 24 para. 7.

13 Article 24 paras 4 and 5 state: “4. Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation. 5. The right to obtain reparation referred to in paragraph 4 of this article covers material and moral damages and, where appropriate, other forms of reparation such as: (a) Restitution; (b) Rehabilitation; (c) Satisfaction, including restoration of dignity and reputation; (d) Guarantees of non-repetition.”
tion such as restitution, rehabilitation, satisfaction, including restoration of dignity and reputation, and guarantees of non-repetition.\textsuperscript{14}

The last norm adopted to date with regard to victims is Resolution 2005/35 of 19 April 2005 by the UN Commission on Human Rights, the Basic Principles and Guidelines of the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.\textsuperscript{15} It has to be remembered that the Basic Principles do not entail new international legal obligations. On the contrary, they only compile international legal obligations already in force of a general and regional character, as well as in international treaties.

This is already clearly described in the preamble of the 2005 Basic Principles and Guidelines according to which the principles and guidelines,

\begin{quote}
\textit{do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms.}\textsuperscript{17}
\end{quote}

Even though these institutional norms constitute a step forward in international law it is also true that no general international treaty on victims yet exists. In fact, there is only one treaty on victims in the framework of the United Nations related to the victims of enforced disappearance,\textsuperscript{18} which is not yet in force.

An international treaty related to the international legal status of the victim (in general) could serve not only to improve this field of international law but, more importantly, to accord to all victims a common denominator of rights on behalf of the states. Inspired by the international norms related to the different categories of victims and preceded by a general and broader definition of the term “victim” (including both di-

\begin{footnotes}
\item[16] The resolution was adopted within the Commission on Human Rights by a recorded vote of 40 votes to none, with 13 abstentions.
\item[17] Later this Resolution was endorsed by A/RES/60/147 of 16 December 2005, Annex, here in particular, para. 7 of the preamble.
\item[18] International Convention for the Protection of All Persons from Enforced Disappearance, see note 4.
\end{footnotes}
rect and indirect victims) the purpose of this treaty would be the listing of a catalogue of rights inherent to the condition of victims; a catalogue actually existing in the international norms relating to victims.

The advantage would be that much of the work has been done already because both the concept of victim and the catalogue of rights have already been envisaged by the international norms relating to victims. On the other hand, this does not stop states and international organisations from adopting and applying particular norms relating to particular categories of victims. Finally, neither institutional norms nor international treaties exist relating to victims of terrorism. This category of victims is still forgotten by states as well as international organisations. Only certain references can be found in some resolutions of the Security Council,\(^\text{19}\) the General Assembly\(^\text{20}\) and the Commission on Human Rights.\(^\text{21}\) In any case, they are insufficient and efforts should be made to build an international statute for this category of victims in line with the already existing categories of victims.\(^\text{22}\) It is a gap that should be filled urgently.

Independently of the fact that the international law of victims is mostly built upon institutional norms it should be underlined that most of the rights formulated in these norms are rights firmly enshrined in international law through international human rights treaties. These

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20 This is the case, for example, with all resolutions adopted by the General Assembly since resolution A/RES/49/185 of 23 December 1994, under the title “Human Rights and Terrorism”; all resolutions are limited to showing the General Assembly’s solidarity with victims of terrorism and to request that the Secretary-General seek the view of Member States on the possible establishment of a United Nations voluntary fund for victims of terrorism.

21 See resolution 2003/37 of the Commission on Human Rights adopted on 23 April 2003 and related to the establishing of an international fund to compensate victims of terrorist acts.

22 The following: victims of crime; victims of abuse of power; victims of gross violations of international human rights law and of serious violations of international humanitarian law; victims of enforced disappearance; victims of violations of international criminal law.
treaties can be considered to have a customary nature. The rights and freedoms codified by international human rights law are rights and freedoms to which any person is entitled to and states are under an obligation to ensure that individuals can effectively enjoy these rights and freedoms.

b. International Norms of a Regional Character

In the regional frame the situation differs. On the one hand the existing norms relating to victims in this regard are limited to Europe and to the Americas. At the same time, with regard to Europe, these norms come from two different organs: the Council of Europe and the European Union with the consequence that only the institutional norms adopted inside the European Union have a clear binding legal effect.

Concerning the American continent, there actually only exists one international norm on victims that was adopted by the OAS. It is a treaty that is related to a single category of victims the Inter-American Convention on Forced Disappearance of Persons. Further, the situation in the regional context is also different because of the categories of victims envisaged by the existing regional norms: victims of crime, victims of terrorism and victims of enforced disappearance.

aa. Europe: The Council of Europe and the European Union

In the European regional frame, as in its work in the field of human rights, the Council of Europe has also been pioneering with the European Convention on the Compensation of Victims of Violent Crimes adopted on 24 November 1983. It is the sole international treaty on

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23 This is the case at least with the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights, both adopted in 1966.


25 This Convention entered into force on 28 March 1996. That is, in accordance with its article XX, on the thirtieth day from the date of deposit of the second instrument of ratification.

26 European Convention on the Compensation of Victims of Violent Crimes, Convention No. 116, adopted on 24 November 1983, entered into force on 1 February 1998. This Convention is actually ratified by 27 of the 47 Member States of the Council of Europe. Italy, Greece and Poland are some of the states of the European Union that have not ratified the Convention.
victims existing in Europe although only related to one category: the victims of violent crimes. This Convention has been preceded by previous work of the Council of Europe which focused upon different international institutional norms related to victims. These are basically resolutions and recommendations. This is the case with Resolution (77) 27 on the Compensation of Victims of Crime adopted by the Committee of Ministers on 28 September 1977, which is based upon reasons of equity and social solidarity with the aim of laying down guiding principles with a view to harmonising national provisions in this field. Concerning compensation of victims of crime Resolution (77) 27 takes into account the fact that the possibilities of compensation that are available to victims of crime are often insufficient, in particular, when the offender has not been identified or is without resources. This is why it lays down a group of guiding principles (like those regarding the prompt compensation of victims of crime; the subsidiary compensation by the state when it cannot be ensured by other means, etc.) that will be developed by Member States. Later, in its Recommendation No. R (83) 7, adopted on 23 June 1983 On Participation of the Public in Crime Policy the Committee of Ministers underlined the need for a crime policy which takes account of victims’ interests and formulates some measures.27 After 1983 the Council of Europe moved forward by taking into account The Position of the Victim in the Framework of Criminal Law and Procedure through Recommendation No. R (85) 11, adopted on 28 June 1985.28 This Recommendation changes the perspective of the compensation of victims of violent crimes that is found in the 1983 European Convention on the Compensation of Victims of Violent Crimes and focuses on victims’ rights in the framework of criminal law and procedure. From this point of view, Recommendation No. R (85) 11 takes into account the traditional perspective of the legal justice system, focused on the relationship between the state and the offender, but it also

27 For the text see under <www.coe.int>. After the European Convention on the Compensation of Victims of Violent Crimes of 1983 the Committee of Ministers of the Council of Europe took other recommendations on victims. Cf., for example, the following: No. R (85) 11 E on the position of the victim in the framework of criminal law and procedure, adopted on 28 June 1985; No. R (87) 21 E on assistance to victims and the prevention of victimisation, adopted on 17 September 1987; No. R (93) 1 E on effective access to the law and to justice for the very poor, adopted on 8 January 1993; and No. R (97) 13 concerning intimidation of witnesses and the rights of the defence, adopted on 12 September 1997.

28 See under <www.coe.int>. 
focuses its attention on the needs and interests of victims through a catalogue of guidelines.

It recommends that Member States review their legislation and practice in accordance with a series of guidelines, all of which consider the position of the victim in the following fields: in respect of the police, in respect of the prosecution, in questioning of the victim, the information that should be given to victims in the framework of court proceedings, compensation of victims, the protection of victim’s privacy, as well as the special protection that should be given to victims against intimidation and the risk of retaliation by the offender whenever this appears to be necessary. On 17 September 1987 the Committee of Ministers adopted Recommendation No. R (87) 21 on the Assistance to Victims and the Prevention of Victimisation. By that it recommends a broad battery of measures to Member States. This institutional norm was followed in 2006 by Recommendation (2006) 8 of the Committee of Ministers On Assistance to Crime Victims which was adopted on 14 June. These Recommendations form the corner stones for the Council of Europe’s European Convention on the Compensation of Victims of Violent Crimes which expounds in its preamble on reasons of equity and social solidarity in order to deal with two situations. On the one hand, that of victims of intentional crimes who have suffered bodily injury or impairment of health and of dependants of persons who have died as a result of such crimes. On the other hand, and as a consequence of the precedent, the need to introduce or develop schemes for compensation for these victims by the state in whose territory such crimes were committed, in particular when the offender has not been identified or is without resources.

In order to achieve its objectives, the 1983 Convention contains “minimum provisions” to compensate victims of crimes. They consist of a general principle and some rules concerning the scope of victim’s compensation. According to that general principle compensation shall be paid by the state on whose territory the crime has been committed when compensation is not “fully available” from other sources. Concerning the scope of the victim’s compensation it shall cover “at least the following items: loss of earnings, medical and hospitalisation expenses and funeral expenses, and, as regards dependants, loss of mainte-

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30 Article 2, ibid.
The 1983 Convention allows States Parties, if necessary, to set for any or all elements of compensation “an upper limit above which and a minimum threshold below which such compensation shall not be granted.”

It also allows States Parties to reduce or refuse victim’s compensation on account of the applicant’s situation.

The victim’s compensation may also be reduced or refused in the following three situations: on account of the victim’s or the applicant’s conduct before, during or after the crime, or in relation to the injury or death; on account of the victim’s or the applicant’s involvement in organised crime or his membership in an organisation which engages in crimes of violence; or if an award or a full award would be contrary to a sense of justice or to public policy (ordre public).

Nevertheless the 1983 Convention does not cover all victims of crime. According to article 3 compensation shall be paid by the state on whose territory the crime was committed only to two groups of persons: a.) to nationals of the States Parties to the Convention; b.) to nationals of all Member States of the Council of Europe who are permanent residents in the state on whose territory the crime was committed.

As a result of this approach three groups of persons are excluded from a possible compensation even if they are victims of a crime committed on the territory of a State Party to the Convention: a.) the nationals of all Member States of the Council of Europe that are not parties to the Convention; b.) the nationals of all Member States of the Council of Europe that are not permanent residents in the state on whose territory the crime was committed; and c.) the nationals of third states. It should not be forgotten that the Council of Europe is an international organisation of cooperation. This means that the efficacy of its action is conditioned by the political will of Member States. With regard to the 1983 Convention this means that the efficacy of its objectives depends not only on the ratification of the treaty by the Member States of the Council of Europe but also on the adoption of all national measures necessary to implement the treaty by the relevant States Parties.

It is obvious that the step forward represented by the 1983 Convention is a weak one, as it excludes three groups of persons. Further, the

31 Article 4, ibid.
32 Article 5, ibid.
33 Article 7, ibid.
34 Article 8, ibid.
35 Because the 1983 Convention is not a self-executing one, see note 26.
reluctance of Member States in accepting and executing the resolutions and recommendations adopted by the Committee of Ministers should be remembered. In any case it should be recognised that the Council of Europe has been a pioneer in respect of the attention given to victims.  

The Council of Europe has also been a pioneer with regard to victims of terrorism. The only international norm actually entirely dedicated to victims of terrorism the Guidelines on the Protection of Victims of Terrorist Acts was adopted by the Committee of Ministers on 2 March 2005 with the aim of addressing the needs and concerns of the victims of terrorist acts “in identifying the means to be implemented to help them and to protect their fundamental rights while excluding any form of arbitrariness, as well as any discriminatory or racist treatment.”

But is it a binding norm? What kind of international norm is it? The answer is neither easy nor unequivocal. The Guidelines themselves underline the aim of inciting states to cooperate. The last paragraph of the preamble “invites member states to implement” the Guidelines and “ensure that they are widely disseminated among all authorities responsible for the fight against terrorism and for the protection of the victims of terrorist acts, as well as among representatives of civil society.” But despite this incited character that could lead someone to conclude that these guidelines are not binding, it is necessary to take into account other elements allowing the support of an affirmative conclusion on its binding effect upon Member States of the Council of Europe. One of these elements is the fact that the Guidelines just reiterate with regard to victims of terrorism a catalogue of rights most of which are actually in force. So, for most parts it is not dealing with rights ex novo (that in fact these guidelines do not create) but with international obligations strongly consolidated in many international treaties. Furthermore,

36 This is the case of the European Union. As a result of it, the Council Framework Decision (2001/220/JHA) of 15 March 2001 on the standing of victims in criminal proceedings (OJEC L 82 of 22 March 2001) and the Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims (OJEC L 261 of 6 August 2004) have been adopted. Unfortunately the United Nations have not yet formulated such action.


38 Para. h) of the preamble, ibid.

39 As said, this is the case in the general or universal frame for both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Also, in the regional frame of the European Convention on Human Rights, the American Con-
most of the rights proclaimed have a customary nature. As a result of this, and independently of the binding or not binding effect of this institutional norm it is possible to conclude that most of its content binds Member States.


The Council Framework Decision of 15 March 2001 is adopted under Title VI of the Treaty of the European Union (TEU): “Provisions on Cooperation in the Fields of Justice and Home Affairs”. With regard to its binding effects, its dispositions refer to article 34.2.b) TEU according to which the Council can adopt,

“framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect.”

As a result, all Member States are obliged to adopt all national measures that are needed to give effect to the standing of victims in criminal proceedings envisaged by this Council Framework Decision. It underlines its harmonising nature, “to the extent necessary to attain the objective of affording victims of crime a high level of protection, irrespective of the Member State in which they are present.”

40 Council Framework Decision 2001/220/JHA, see note 36.
42 Cf. para. 4 of the preamble of the Council Framework Decision 2001/220/JHA, see note 36.
responds to the needs underlined in the conclusions of the European Council meeting in Tampere on 15 and 16 October 1999, in particular point 32 thereof, that stipulated that “minimum standards should be drawn up on the protection of the victims of crimes, in particular on crime victims’ access to justice and on their right to compensation for damages, including legal costs. In addition, national programmes should be set up to finance measures, public and nongovernmental, for assistance to and protection of victims.”

The approaches taken by this Council Framework Decision are the following. First, it considers that the victim’s needs should be considered and addressed in a comprehensive, coordinated manner, avoiding partial or inconsistent solutions that may give rise to secondary victimisation. Second, it states that its provisions are not confined to attending to the victim’s interests under criminal proceedings but they also cover certain measures to assist victims before or after criminal proceedings, which might mitigate the effects of the crime. Third, the Council Framework Decision also considers that the rules and practices as regards the standing and main rights of victims need to be approximated, with particular regard to the right to be treated with respect, the right to provide and receive information, the right to understand and be understood, the right to be protected at the various stages of procedure and the right to have allowance made for the disadvantage of living in a different Member State from the one in which the crime was committed. Finally, the Council Framework Decision envisages the involvement of specialised services and victim support groups before, during and after criminal proceedings, as well as the fact that suitable and adequate training should be given to persons coming into contact with victims; a training that “is essential both for victims and for achieving the purposes of proceedings.”

Council Directive 2004/80/EC of 29 April 2004 constitutes the culmination on the European Union level of the initiative taken by the Council of Europe with its Convention on the Compensation of Victims of Violent Crimes, the object of both being the complete compensation of victims of crime. This is why both norms build up a system of coop-
eration between states to facilitate access to compensation to victims of crimes in cross-border situations. The victims of crime shall not be damaged by the fact of having suffered the crime in a state other than the state where the victim is habitually resident. It is obvious that this objective is easier to achieve with Council Directive 2004/80/EC than with the Convention of 1983 because the Council Directive is binding upon all Member States while the Convention of 1983 is only binding for States Parties and the Directive entered into force on the twentieth day following its publication in the Official Journal of the European Union. To achieve its objectives, Directive 2004/80/EC builds its action upon two fundamental principles. On the one hand, the principle according to which victims of crimes in the European Union should be entitled to fair and appropriate compensation for the injuries they have suffered, and this regardless of where in the European Union the crime was committed. Nevertheless, as in the European Convention of 1983 a gap remains because the Directive does not cover all victims not habitually resident in a Member State of the European Union.

The other principle is that of territoriality. According to it compensation shall be paid by the competent authority of the Member State on whose territory the crime has been committed. The idea behind this is the freedom of movement existing in the European Union linked to the objective of suppression between Member States of all obstacles to it. When European Union law guarantees to a person the freedom of movement, the protection of that person from any harm in the Member

49 A State Party to the Convention of 24 November 1983, see note 26, or a Member State of the European Union.

50 A principle which is mentioned in para. 6 of the preamble, Council Directive 2004/80/EC, see note 36: “Crime victims in the European Union should be entitled to fair and appropriate compensation for the injuries they have suffered regardless of where in the European Union the crime was committed”. It is also formulated in article 1: “Member States shall ensure that where a violent intentional crime has been committed in a Member State other than the Member State where the applicant for compensation is habitually resident, the applicant shall have the right to submit the application to an authority or any other body in the latter Member State.”

51 As said, the European Convention of 1983, see note 26, does not cover three groups of victims: nationals of all Member States of the Council of Europe not parties to the Convention; nationals of all Member States of the Council of Europe not habitually resident in the state in which the crime has been committed; and nationals of third states.

State in question, has to be guaranteed. This is the corollary of the freedom of movement.

This is why the Directive envisages several measures with the aim of realising the objective of an effective compensation.\textsuperscript{53} It constitutes “minimum standards on the protection of the victims of crime, in particular on crime victims’ access to justice and their rights to compensation for damages, including legal costs.”\textsuperscript{54} At the same time the Directive establishes a system of cooperation to facilitate the access of victims of crime to compensation in cross-border situations. This system of cooperation is structured upon the regime actually existing in most of the Member States being built upon the European Convention of 1983. The Directive adds to it a new mechanism of compensation in all Member States. Such a system of cooperation is based on two principles. On the one hand, it should be ensured that victims of crime could always turn to an authority in the Member State where they reside. Any practical and linguistic difficulties that occur in a cross-border situation should be eradicated; on the other hand, it should include the provisions necessary for the victim to find the information needed to make the application and to allow for efficient cooperation between the authorities involved.\textsuperscript{55}

\textit{bb. America: The Organization of American States (OAS)}

In the American regional sphere the only existing international norm related to victims – in this case to one category of victims – is the \textit{Inter-American Convention on Forced Disappearance of Persons} of 9 July 1994.\textsuperscript{56} It contains a definition of “forced disappearance” \textsuperscript{57} but not of “victim”. Thus the definitions existing in the other international norms may be useful. The Convention contains obligations of States Parties

\textsuperscript{53} Cf. CJEU, \textit{Cowan Case}, Case 186/87, European Court Reports 1989, 195.
\textsuperscript{54} Para. 3 of the preamble, Council Directive 2004/80/EC, see note 36.
\textsuperscript{55} Cf. paras 12 and 13, ibid.
\textsuperscript{56} For the text see <http://www.oas.org/juridico/english/treaties/a-60.htm>.
\textsuperscript{57} According to article II: “For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.”
many of which are also present in other international treaties such as, for example, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, namely the obligation to adopt the legislative measures that may be needed to define the forced disappearance of persons as an offence and to impose an appropriate punishment commensurate with its extreme gravity; the obligation not to consider the forced disappearance of persons a political offence for purposes of extradition; the obligation to include the forced disappearance of persons among the extraditable offences in every extradition treaty entered into between States Parties; the obligation of States Parties to take the necessary measures to establish its jurisdiction over the crime of forced disappearance when the alleged criminal is within its territory and it does not proceed to extradite it; the non admission of the defence of due obedience to superior orders or instructions that stipulate, authorise, or encourage forced disappearance as a cause of exclusion of individual criminal responsibility; the consideration of this Convention as the necessary legal basis for extradition with respect to the offence of forced disappearance when State Parties make extradition conditional on the existence of a treaty and receive a request for extradition from another State Party with which it has no extradition treaty; etc. As a novelty this Convention states that criminal prosecution for the forced disappearance of persons and the penalty judicially imposed on its perpetrator shall not be subject to statutes of limitations.

II. The International Categories of Victims

1. The International Concept of Victims: As many Concepts of Victims as Categories of Victims

The first thing that must be underlined is the non-existence of an international concept of victims. On the contrary, there are almost as many definitions as categories of victims envisaged by international norms. In any case, from the different elements present in such definitions it is possible to conclude the existence of a series of common denominators. As stated before the international norms actually related to victims concern several categories: victims of crime, victims of abuse of power, victims of gross violations of international human rights law and serious violations of international humanitarian law, victims of enforced disap-
pearance, victims of violations of international criminal law, victims of terrorism.

The different definitions of the concept of victims existing in these international norms will be examined in order to be able, to conclude the possibility of building or not building a general concept of victim that could be shared by all categories of victims independently of the definitions just quoted. Or, at least, the elements present in all of these definitions.

2. The Different International Categories of Victims

a. Victims of Crime

General Assembly A/RES/40/34 adopted on 29 November 1985 containing the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,\(^58\) focused on victims of crime and on victims of abuse of power. More recently other international norms belonging to the European regional frame pay attention to it.\(^59\)

General Assembly Resolution 40/34 contains a concept of “victim” that includes three categories of persons: first, persons who, individually or collectively, have suffered harm. Second, it includes the immediate family or dependants of the direct victim and third, persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation.\(^60\) According to the Declaration,

1. “Victims” means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship

\(^{58}\) See note 6.
\(^{59}\) This is the case of norms adopted by the Council of Europe and the European Union.
\(^{60}\) There is a similar definition in the ICC Rules of Procedure and Evidence as well as in the statute of the Court. They also envisage a special protection for victims in the procedures before the ICC.
between the perpetrator and the victim. The term “victim” also in-
cludes, where appropriate, the immediate family or dependants of
the direct victim and persons who have suffered harm in intervening
to assist victims in distress or to prevent victimization.61

They are, in all cases, victims acquiring this condition as a conse-
quence of acts or omissions that are in violation of criminal laws opera-
tive within Member States. As can be appreciated, criminal laws opera-
tive within Member States constitute the standard, the violation of
which gives cause for the acquisition of the condition of victim.62 From
this point of view the criminalisation in the domestic law of states of
conducts like terrorism, genocide, crimes of war and crimes against
humanity – as well as others – would make possible a much more ex-
panded concept of victims, as states’ domestic criminal law would lead
to the categorisation of victims as persons having suffered harm
through acts or omissions that are in violation of criminal laws opera-
tive within the concerned state. Consequently, it would be very helpful
for victims if states take all necessary steps and measures to ensure that
such acts (as well as others envisaged by the international norms relat-
ing to victims and not yet included as offences under national law) be-
come offences under national law.

Inside the European Union Council Framework Decision
(2001/220/JHA) of 15 March 2001,63 gives, for the first time, a concept
of “victim”. According to article 1. a) victim is,

“a natural person who has suffered harm, including physical or
mental injury, emotional suffering or economic loss, directly caused

61 The third paragraph of this definition adds: “3. The provisions contained
herein shall be applicable to all, without distinction of any kind, such as
race, colour, sex, age, language, religion, nationality, political or other opin-
ion, cultural beliefs or practices, property, birth or family status, ethnic or
social origin, and disability.”

62 In the same way article 1 para. 1 of Recommendation (2006) 8 of the Com-
mittee of Ministers adopted on 14 June 2006. For the purpose of this rec-
ommendation article 1 para. 1 states that: “Victim means a natural person
who has suffered harm, including physical or mental injury, emotional suf-
ferring or economic loss, caused by acts or omissions that are in violation of
the criminal law of a member state. The term victim also includes, where
appropriate, the immediate family or dependants of the direct victim.”

63 See note 36.
by acts or omissions that are in violation of the criminal law of a Member State." 64

Article 2 of the European Convention on the Compensation of Victims of Violent Crimes of 24 November 1983 states that when compensation is not fully awarded from other sources States Parties shall compensate,

a. those who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence;

b. the dependants of persons who have died as a result of such crime." 65

From the point of view of the legal obligations it can be underlined that all Member States of the European Union are also Member States of the Council of Europe; so two different situations occur: that of states bound by the Directive and by the European Convention and that of Member States bound only by the Directive.

b. Victims of Abuse of Power

This category of victims again falls under General Assembly Resolution 40/34. According to it, victims of abuse of power, are considered,

“persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic

64 It also contains a definition of “victim support organisation”. That is “a non-governmental organisation, legally established in a Member State, whose support to victims of crime is provided free of charge and, conducted under appropriate conditions, complements the action of the State in this area” (article 1 lit. b). Some time later, on 29 April 2004, the Council Directive 2004/80/EC relating to compensation of victims was adopted, see note 36. This Directive is founded upon the principles of subsidiarity and proportionality of article 5 para. 1 of the European Union Treaty. Para. 15 of the Directive’s preamble states: “Since the objective of facilitating access to compensation to victims of crimes of cross-border situations cannot be sufficiently achieved by the Member States because of the cross-border elements and can therefore, by reason of the scale or effects of the action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.”

65 This obligation to compensate victims of violent crimes persists even if the offender cannot be prosecuted or punished, see article 2 para. 2.
loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.\textsuperscript{66} From this definition it can be appreciated that in contrast to the concept of victims of crime just quoted, in the case of victims of abuse of power the standard of victimisation is constituted by the violation of norms relating to human rights.

c. Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

The UN Commission on Human Rights Resolution 2005/35 contains the Basic Principles and Guidelines of the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.\textsuperscript{67} Two categories of victims are envisaged,

\begin{quote}
“persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law.”\textsuperscript{68}
\end{quote}

Further,

\begin{quote}
“Where appropriate, and in accordance with domestic law, the term ‘victim’ also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”\textsuperscript{69}
\end{quote}

Here the conditions of victims exist regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the family relationship between the perpetrator and the victim.\textsuperscript{70}

\textsuperscript{66} A/RES/40/34, Annex, B. para. 18, see note 6.
\textsuperscript{67} See note 15.
\textsuperscript{68} Ibid, Annex, V. 8.
\textsuperscript{69} Ibid.
\textsuperscript{70} Ibid., V. 9.
d. Victims of Enforced Disappearance

In the frame of the United Nations two international norms related to victims of enforced disappearance have been built. On the one hand, the Declaration on the Protection of All Persons from Enforced Disappearance, on the other hand, the International Convention for the Protection of All Persons from Enforced Disappearance adopted on 20 December 2006 by resolution A/RES/61/177 of the General Assembly.71

The Declaration on the Protection of All Persons from Enforced Disappearance was preceded by resolution A/RES/33/173 of 20 December 1978, in which the General Assembly “... expressed concern about the reports from various parts of the world relating to enforced or involuntary disappearances, as well as about the anguish and sorrows caused by those disappearances, and called upon Governments to hold law enforcement and security forces legally responsible for excesses which might lead to enforced or involuntary disappearances of persons.”72

As a consequence, the General Assembly considered it necessary to adopt a specific legal instrument with the above mentioned result. But the legal answer to the seriousness of enforced disappearance is not only limited to the adoption of the International Convention. Both, the Declaration and the International Convention qualify the practice of

71 It is, until today, the only international treaty at the general or universal level relating to a category of victims even if it is not yet in force. The 1992 Declaration and the 2006 Convention, see note 4, contain the following catalogue of rights: right to justice (which includes the right to a prompt and effective judicial remedy); the right to know the truth regarding the circumstances of the enforced disappearance; the progress and results of the investigation and the fate of the disappeared person; the right of access to all information concerning the person deprived of liberty; the right to form and participate freely in organisations and associations concerned with attempting to establish the circumstances of enforced disappearances and the fate of disappeared persons; and, the right to obtain reparation and prompt, fair and adequate compensation.

enforced disappearance as a crime against humanity. The Declaration, in paragraph four of its preamble states,

“Considering that enforced disappearance undermines the deepest values of any society committed to respect for the rule of law, human rights and fundamental freedoms, and that the systematic practice of such acts is of the nature of a crime against humanity.”

The International Convention for the Protection of All Persons from Enforced Disappearance, in paragraph five of its preamble states that enforced disappearance always constitutes a crime and “in certain circumstances defined in International Law” enforced disappearance also constitutes “a crime against humanity.”

Paragraph 5 of the preamble of the International Convention for the Protection of All Persons from Enforced Disappearance, see note 4.

The conception and qualification of enforced disappearance as a crime against humanity is also considered in the General Comment of the Working Group on Enforced or Involuntary Disappearances. In its General Comment the Working Group underlines that a crime against humanity is always committed in a certain context, such as: the existence of an attack against any civilian population, the widespread and systematic character of this attack and the knowledge the perpetrator has of the attack. These are elements which can be found in article 7 of the statute of the ICC. Due to the fact that the ICC statute is actually

73 Para. 5 of the preamble of the International Convention for the Protection of All Persons from Enforced Disappearance, see note 4.

74 Article 7 para. 1 ICC statute states: 'For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fun-
ratified by more than a hundred states and has been incorporated into the statutes of other international criminal courts as well as international hybrid courts the Working Group concludes that the definition of the crime against humanity given in article 7 of the statute of the ICC “now reflects customary International Law and can thus be used for interpretation.”

With regard to the concept of victim, the International Convention for the Protection of All Persons from Enforced Disappearance qualifies as victim,

“the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.”

Consequently this Convention only envisages direct victims and, within this, two types of victims. On the one hand the disappeared person; on the other hand any individual who has suffered harm as the direct result of an enforced disappearance. Despite this limit and, in line with what was stated earlier, it is possible to enlarge this restricted concept of victim by resorting to other international norms relating to victims. However, in order to make this possible it is necessary to include the crime of enforced disappearance in the criminal code of the concerned state. Otherwise the restricted definition will persist.

75 See under <www2.ohchr.org/english/issues/disappear/index.htm>.
76 Article 24 para. 1, see note 4.
77 In the opinion of N. Fernández Sola this lack could also be covered through the way of the third category of victims envisaged by the UN Declaration of 1985, that is, “persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.” In his opinion this category could be helpful to protect persons, associations and groups engaged with human rights which become victims of attacks of forces or groups responsible for enforced disappearance, see N. Fernández Sola, “El derecho a la reparación de las víctimas de desaparición forzada: hacia la jus-
The Inter-American Convention on Forced Disappearance of Persons does not have a concept of “victim of forced disappearance”. As in other cases just quoted and as stated before this gap can be filled by resort to other existing international norms relating to victims of crime, in general, or to some crimes in particular.

e. Victims of Violations of International Criminal Law

International criminal law envisages victims of the following crimes: crimes of war, crimes against humanity and genocide. In contrast to other fields of international law already quoted here the crime is committed by a natural person and never a state because in international law the state is not criminally responsible. In consequence crimes are always committed by a natural person even if the person has committed the crime while exercising state functions. Immunity cannot be invoked to exclude international criminal responsibility. The aim of the immunity recognised by international law to persons exercising state functions is only to guarantee the exercise of state functions, i.e., to protect state sovereignty.78

Nevertheless despite the developments that have taken place in the recent years with regard to the immunity of heads of state, heads of government and ministers, this field of international law does not yet pay enough attention to the legal status of victims. Neither the statute of the ICC nor the statutes of the international criminal tribunals for the former Yugoslavia and Rwanda recognise any active locus standi of victims of crimes in order to initiate criminal proceedings before these tribunals or to become parties in the proceeding. Despite these shortcomings, the statute of the ICC constitutes an advance with regard to the current situation of victims. It recognises victims’ rights more actively than the statutes of the criminal tribunals for the former Yugoslavia and Rwanda which merely envisaged victims as witnesses. Article

19.3 of the ICC statute e.g. authorises victims to submit observations to the Court.79

In relation to the concept of victim, the very wide concept contained in Rule 85 of the Rules of Procedure and Evidence of the ICC should be underlined. This definition is wider compared to other categories of victims made in other international norms previously quoted. According to the Rule 85,

“For the purposes of the Statute and the Rules of Procedure and Evidence:

(a) “Victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;

(b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.”

The difference here is that the wide-ranging concept present in Rule 85 does not demand that the victim becomes the direct object of the criminal offence. This is why some authors considered that the concept just quoted in Rule 85 covers all natural and legal persons who have directly or indirectly suffered harm as a result of the commission of any crime within the jurisdiction of the ICC.80

As stated, in contrast to the international criminal tribunals for the former Yugoslavia and Rwanda, the statute of the ICC, and the Rules of Procedure and Evidence of the ICC, expressly envisage victims.81 The ICC statute refers to victims in arts 68, 75 and 79.82 The Rules of Pro-

79 Article 19 para. 3 states: “The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court”.

80 So, for example, M.H. Gozzi/ J.P. Laborde, “Les Nations Unies et le droit des victimes du terrorisme”, Revue Internationale de Droit Pénal 76 (2005), 297 et seq.

81 The Rules of Procedure and Evidence of the ICC are an instrument for the application of the ICC statute.

82 Related to the protection of victims and witnesses and their participation in the proceedings (article 68), the reparations to victims (article 75) and to the Trust Fund that should be established for the benefit of victims of crimes
procedure and Evidence envisage victims and witnesses in Section III of Chapter 4. According to article 15, the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court. If certain conditions are fulfilled, and the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorisation of an investigation, together with any supporting material collected. This is the moment when an intervention of victims in form of representations to this Chamber takes place in accordance with the Rules of Procedure and Evidence. Afterwards, if upon examination of the request and the supporting material given to it by the Prosecutor as well as the observations made by victims, this Pre-Trial Chamber considers that there is a reasonable basis to proceed with an investigation, and the case appears to fall within the jurisdiction of the Court, it shall authorise the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.\(^3\)

Article 19 para. 3 also authorises victims to submit observations to the Court when a question regarding the jurisdiction of the Court or the admissibility of the case is challenged. In the same way article 68 para. 3 of the statute states that where the personal interests of the victims are affected, the Court shall permit, their views and concerns to be presented and considered at stages of the proceedings deemed to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. As a consequence, the legal representatives of the victims may present such views and concerns where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

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and of families of such victims within the jurisdiction of the ICC (article 79). In respect of these articles see, for example, the commentaries of D. Donat-Cattin, “Article 68. Protection of victims and witnesses and their participation in the proceedings”, 1275 et seq.; “Article 75. Reparation to victims”, 1399 et seq.; M. Jennings, “Article 79. Trust Fund”, 1439 et seq., in: O. Triftterer, *Commentary on the Rome Statute of the International Criminal Court—Observers’ Notes, Article by Article*, 2008.

\(^3\) In accordance with article 15 para. 3, which states: "If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. *Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.*" (emphasis added)
According to article 43 para. 6 of the statute, the Registrar of the ICC shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, “protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses.” As a general principle Rule 86 establishes that the needs of all victims and witnesses shall be taken into account during the procedure before the ICC.

Article 68 of the statute as well as Rules 87 and 88 are dedicated to the protection of victims and witnesses. According to article 68.1 the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. So, in line with article 68 para. 2, Rules 87 and 88 allow in camera proceedings, as well as other measures such as those relating to prevent the release of the identity or the location of a victim.

84 The reference to victims is precise: “in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence.” According to Rule 86: “A Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence.”

85 According to Rule 87 para. 1: “Upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure.”

86 It is an exception with regard to the principle of public hearings of article 67 of the statute.

87 Rule 87 para. 3 states: “A Chamber may, on a motion or request under sub-rule 1, hold a hearing, which shall be conducted in camera, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness by ordering, inter alia: (a) that the name of the victim, witness or other person at risk on account of testimony given by a witness or any information which could lead to his or her identification, be expunged from the public records.
On the other hand, in line with article 68 para. 2, Rule 88 states that upon the motion of the Prosecutor or the defence, or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, it is possible for the Court, to take into account the views of the victim or witnesses, to order special measures. Similarly, the Court can order that a counsel, a legal representative, a psychologist or a family member shall be permitted to attend during the testimony of the victim or the witness. Finally, apart from the special measures envisaged in Rule 88, also included is the duty that the Court, takes into consideration that violations of the privacy of a witness or victim may create risk to his or her security. The Court will be vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation, paying particular attention to attacks on victims of crimes of sexual violence.

Victims can also participate actively in the proceedings. According to article 68 para. 3 “where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings deemed to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.” Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence. Rule 89 adds that the victim or a person acting with the consent of the victim, or a person acting on behalf of a victim can present the views and concerns through written application to the Registrar, who shall transmit the application to the relevant Chamber.

Victims can freely choose a legal representative but where there are a number of victims, for the purposes of ensuring the effectiveness of the proceedings, the Court may request the victims or particular groups of victims, to choose a common legal representative or representatives. It
is also envisaged that, when a victim or group of victims lack the necessary means to pay for a common legal representative chosen by the Court, it may receive assistance from the Registrar, including financial assistance when this is required.\textsuperscript{88}

According to Rule 91 para. 2 the victim and his legal representative attend and participate in the proceedings. The victim can also request the questioning of a witness, an expert or the accused; questioning which must be requested by the Court.\textsuperscript{89} Moreover, victims as well as the legal representative shall be notified of all the proceedings before the Court. Therefore, in order to allow victims to apply for participation in the proceedings in accordance with Rule 89, the Court shall notify victims concerning the decision of the Prosecutor not to initiate an investigation or not to prosecute pursuant to article 53.\textsuperscript{90} Consequently, the Court shall notify victims regarding its decision to hold a hearing in order to confirm charges. With regard to the competences of the Secretary of the ICC, the latter shall notify victims or their legal representatives who have already participated in the proceedings or, as far as possible, those who have communicated with the Court in respect of the case in question, about all proceedings before the Court. Rule 93 authorises the Chamber to seek the views of victims or their legal representatives on any issue. It also can seek the views of other victims, as appropriate.

One of the most innovative aspects of the statute of the ICC concerns victims compensation envisaged in article 75 of the statute. Victims can request reparation for any damage, loss or injury\textsuperscript{91} and reparation can adopt the following forms: restitution, compensation or rehabilitation. Before the ICC statute came into force the only international treaty relating to the compensation of victims was the European Convention on the Compensation of Victims of Violent Crimes of 24 Nov-

\textsuperscript{88} See Rule 90.
\textsuperscript{89} See Rule 91 para. 3.
\textsuperscript{90} See Rule 92 para. 2.
\textsuperscript{91} According to article 75 of the statute of the ICC the request for reparation can be made by the victim as well as by the Court. Rule 96.1 states that, the Registrar shall, insofar as practicable, notify the victims or their legal representatives and the person or persons concerned. The Registrar shall also, having regard to any information provided by the Prosecutor, take all the necessary measures to give adequate publicity of the reparation proceedings before the Court, to the extent possible, to other victims, interested persons and interested states.
vember 1983, i.e., a regional treaty limited to one category of victims, victims of violent crimes. The ICC statute being an international treaty also envisages a unique category of victims, victims of international crimes or, which is the same, victims of serious violations of international criminal law. According to article 75 para. 1 of its statute the ICC shall establish principles relating to reparations to, or in respect of, victims or the families of such victims. Here, reparation includes restitution, compensation and rehabilitation. On the basis of such principles the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting. The Court may also make an order directly against a convicted person specifying appropriate reparations. But before taking a decision concerning reparation, article 75 para. 3 of the statute states that the Court may,

“either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting”.

The Rules of Procedure and Evidence of the ICC correspond with these findings. The determination of the value of the reparation rests with the ICC. Thus, Rule 97 establishes that the ICC,

“taking into account the scope and extent of any damage, loss or injury, … may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both.”

In order to do so, at the request of victims or their legal representative, or at the request of the convicted person, or on its own motion, the Court may appoint appropriate experts to assist it in determining the scope and extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations. If required, the Court shall invite victims or their legal representatives, the convicted person as well as interested persons and interested states to comment on the reports of the experts. In order to make it possible to provide reparation for victims, article 79 of the statute of the ICC creates a Trust Fund for the benefit of victims which is obtained from money and other property collected through fines or forfeiture to be transferred. The individual awards for repar-

92 Article 75 para. 2 states that, where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.
tion shall be made directly against a convicted person, whose goods may have been confiscated. The amount of reparation can be paid through the Trust Fund and, in order to make this possible, the ICC may order that an award for reparations of a convicted person be deposited with the Trust Fund when, at the time of making the order, it is impossible or impracticable to make individual awards directly to each victim. But the Court may also order that an award for reparations against a convicted person be made through the Trust Fund when the number of the victims and the scope, forms and modalities of reparations make a collective award more appropriate. In addition, following consultations with interested states and the Trust Fund, the Court may order that an award for reparations be made through the Trust Fund to an inter-governmental, international or national organisation approved by the Trust Fund. Finally, according to article 79 of the statute of the ICC, Rule 98 para. 5 envisages that resort to other resources of the Trust Fund may be used for the benefit of victims.

As can be seen the way in which the statute of the ICC and, moreover, the Rules of Procedure and Evidence envisage victims of international criminal law constitutes a significant advance in international law. Its recognition of the victim as an actor in the criminal proceedings is innovative. As mentioned, in contrast to the statute of the ICC, the statutes of the two criminal tribunals give victims a more reduced prominence, conceiving them only as witnesses. More concretely, as witnesses of the Prosecutor, they cannot receive any compensation from these tribunals. Both tribunals do not envisage a particular status to the victims. Still it must be added that a major role of victims in these tribunals becomes difficult due to the nature of, both, crimes of war and crimes against humanity that were committed; crimes that concern a great number of victims. But it also is difficult because of the accusatory legal nature of the proceedings, so that an active role for the victims in the proceedings could have a negative effect on the role given to the Prosecutor in both statutes.

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93 Concerning this question Rule 98 para. 2 states that the award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible.

94 See Rule 98 para. 4.

95 In this respect see C. Jorda, “L’accès des victimes à la justice pénale internationale” and C. Tournaye, “L’apport des Tribunaux ad hoc pour la répression du terrorisme”, in: SOS Attentats, see note 6, 416 et seq.
f. Victims of Terrorism

The answer of international law to terrorism has been, for a long time, very weak. Consequently, until recently, neither interest nor attention has been paid by the international community to victims of terrorism. Proof of this is the fact that until the 1993 Vienna World Conference on Human Rights the relationship between terrorism and human rights did not attract the attention of the United Nations. Since 1994 the UN General Assembly’s resolutions concerning terrorism appear under the title “human rights and terrorism.” At the same time the resolutions adopted on the matter are characterised by the affirmation “that the most essential and basic human right is the right to life”, as well as the General Assembly’s concern about the “gross violations of human rights perpetrated by terrorist groups.” They also declare the General Assembly’s solidarity with victims of terrorism and request the Secretary-General of the UN to seek the views of Member States on the possible establishment of a United Nations voluntary fund for victims of terrorism as well as the ways and means to rehabilitate the victims of terrorism and to reintegrate them into society.

From 1994 onwards the UN Human Rights Commission also began to adopt resolutions under the title “human rights and terrorism”; resolutions containing references to victims of terrorism. It also requested

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96 From 1972 to 1991 the General Assembly examined this matter under the title: “Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes.”

97 The starting point was A/RES/49/185 of 23 December 1994.


the Sub-Commission on the Promotion and Protection of Human Rights to undertake a study on the issue of terrorism and human rights in the context of its procedures. The Special Rapporteur stated in this respect,

“102. Terrorist acts, whether committed by States or non-State actors, may affect the right to life, the right to freedom from torture and arbitrary detention, women’s rights, children’s rights, health, subsistence (food), democratic order, peace and security, the right to non-discrimination, and any number of other protected human rights norms. Actually, there is probably not a single human right exempt from the impact of terrorism.”

The same connection between terrorism and human rights is made by the High Commissioner for Human Rights in his report to the General Assembly according to Resolution 48/142 entitled “Human rights: a unity framework report.”

It states that terrorism “is a threat to the most fundamental human right, the right to life” and that “the essence of human rights is that human life and dignity must not be compromised and that certain acts, whether carried out by State or non-State actors, are never justified no matter what the ends.”

By now it is clearly established that terrorism is a violation of human rights. In this context it must be added that terrorism is not an ordinary violation of human rights. On the contrary, it is an international crime. This is why victims of terrorism request the inclusion of this crime among the crimes coming under the jurisdiction of the ICC or, as

Commission had even condemned “the violations of human rights by the terrorist groups Sendero Luminoso and Movimiento Revolucionario Tupac Amaru” in Peru (resolution 1993/23).


102 Ibid., paras 2 and 5.

103 The High Commissioner for Human Rights states that terrorism is a crime against humanity in para. 4 of the report, see note 101.
another alternative, to judge its most serious aspects (murder, torture, enforced disappearance of persons, persecution and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health) as crimes against humanity. This course of action is possible, because as underlined by the President of the ICC,

“although the Statute of the ICC does not include terrorism among the crimes within the jurisdiction of the Court, this crime could be considered a crime against humanity of the type of those envisaged in Article 7 of the Statute of the ICC ... ”

The fact of not dealing with terrorism either as an independent crime or as type of a crime against humanity leads to impunity and denies victims of terrorism their effective right to justice when the state will not or cannot guarantee it. In consequence, it is the responsibility of the United Nations itself to urge and promote international norms recognising and guaranteeing victims of terrorism the effective enjoyment of their human rights. This is especially true for their effective right to justice and to redress. This is why victims of terrorism call for such actions.

Have victims of terrorism therefore been forgotten by the United Nations? The answer seems to be positive. Although the Commission on Human Rights has reiterated “its unequivocal condemnation of all acts, methods and practices of terrorism, regardless of their motivation, in all their forms and manifestations, wherever, whenever and by whomever committed, as acts aimed at the destruction of human rights, fundamental freedoms and democracy.” And although bearing in

104 P. Kirsch, “Terrorisme, crimes contre l’humanité et Cour pénale internationale”, in: SOS Attentats, see note 6, 111. See also note 74.

105 For example, when the crime of terrorism has been annedsted or has been prescribed according to domestic law and the prescription has taken place as a consequence of the unwillingness of the state to investigate the crime or in the instruction of the indictment. Impunity takes also place e.g. in case of failed states. The causes are many and all lead to impunity.

106 See V. Bou Franch/ C. Fernández de Casadevante Romani, La inclusión del terrorismo entre los crímenes internacionales previstos en el Estatuto de la Corte Penal Internacional. (Una propuesta del Colectivo de Víctimas del Terrorismo en el País Vasco, COVITE, para la Conferencia de Revisión del Estatuto de la Corte Penal Internacional), 2009.

107 For example, in resolutions 2002/35 and 2004/44 about “Human Rights and Terrorism” and in resolutions 2003/68 and 2004/87 about “Protection
mind that "the most essential and basic human right is the right to life", as well as "profoundly deploring the large number of civilians killed, massacred and maimed by terrorists in indiscriminate and random acts of violence and terror, which cannot be justified under any circumstances", nothing has really happened. Only some insufficient actions have been taken.

Fact is that, unlike the Council of Europe, the United Nations has paid far less attention to victims of terrorism and that this attention has been limited to expressions of mere courtesy deprived of any legal obligation. So, although terrorism is an international crime that seriously violates human rights, the paradox is that, unlike other categories of Human Rights and Fundamental Freedoms while Countering Terrorism, the United Nations has remained silent on the matter.

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108 So, for example, in resolutions 2002/35 and 2004/44, see note 107.
109 Ibid.
110 See note 19.
112 The attention of the Council of Europe to victims of terrorism is specified in its Guidelines on the Protection of Victims of Terrorist Acts adopted by the Committee of Ministers on 2 March 2005. It contains measures and services that are granted independently of the identification, arrest, prosecution or conviction of the perpetrator of the terrorist act. They concern emergency and continuing assistance, investigation and prosecution, effective access to law and to justice, administration of justice, compensation, protection of the private and family life of victims of terrorist acts, protection of the dignity and the security of victims of terrorist acts, information for victims of terrorist acts, specific training for persons responsible for assisting victims of terrorist acts and the possibility for states to increase protection of this category of victims (Council of Europe, Committee of Ministers-CM/Del/Dec(2005)917).
113 Contrary to the silence of the United Nations with regard to victims of terrorism it has frequently – and correctly – been pointed out the obligation of states to respect human rights when combating terrorism. In this line the Commission on Human Rights on 21 April 2005 appointed, for a period of three years, a Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while countering terrorism. This shows a clear and concrete endorsement by Member States of the need to make the honouring of human rights commitments an integral part of the international fight against terrorism.
of victims, no international norm on victims of terrorism and their rights has yet been adopted.

Concerning the other types of victims, several international norms have been adopted as has been shown to take into account most of the different categories of victims. In order to change this situation it is urgent that in particular the United Nations, in line with the actions concerning the five categories of victims being mentioned, and like the acts carried out by the Council of Europe, promote an international norm affirming the status of victims of terrorism. That is to say, a statute made up of a catalogue of rights inherent to the condition of victims of terrorism based upon the effective right to justice and the prevention of impunity, connected to the jurisdiction of the ICC. It is the only way in which the “universal” right of each victim of terrorism to justice can be guaranteed.114

The progressive emergence of victims within the framework of the European Union, analysed in the preceding pages, took a further step with the Council Framework Decision of 13 June 2002 on Combating Terrorism (2002/475/JHA).115 In its article 10, it takes into account the protection and assistance given to victims of terrorism. According to this article and related to the concept of “terrorist offences” which is developed in the long list of article 1 of this Council Framework Decision, article 10 states that Member States shall ensure that investigations into, or prosecution of, offences covered by this Framework Decision are not dependent on a report or accusation made by a person subjected to the offence, “at least if the acts were committed on the territory of the Member State.”116 Furthermore, on 2 March 2005 the Committee of Ministers adopted the Guidelines on the Protection of Victims of Terrorist Acts.117 These Guidelines are based on the principle that states “should ensure that any person who has suffered direct physical or psy-

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114 Without the intervention of the ICC most victims of terrorism would lack, de facto – as is the situation today – their right to justice because its effective exercise depends upon the correct functioning of state structures and presently many states affected by terrorism are either failed states or states in which the effective exercise of this right is impossible because of the weakness of the existent state structures. In such conditions the right to re-dress is also impossible. As a consequence many victims of terrorism lack basic human rights.

115 OJEC L 164 of 22 June 2002.

116 Article 10 para. 1, ibid.

117 See note 37.
psychological harm as a result of a terrorist act as well as, in certain circumstances, their close family, can benefit from the services and measures prescribed" by these Guidelines. These measures and services which are granted independently of the identification, arrest, prosecution or conviction of the perpetrator of the terrorist act. They include emergency and continuing assistance, investigation and prosecution, effective access to the law and to justice, administration of justice, compensation, protection of the private and family life of victims of terrorist acts, protection of the dignity and security of victims of terrorist acts, information for victims of terrorists acts, specific training for persons responsible for assisting victims of terrorist acts, as well as the possibility for states of adopting more favourable services and measures than described in these Guidelines.

aa. The Concept of Victim of Terrorism and the Concept of Terrorism as Such

Due to the clear link between both concepts, before dealing with the question relating to the concept of victim of terrorism, it will be dealt with the definition of terrorism.

On the occasion of the international fight against terrorism and, more precise and as an example, for the qualification of terrorism as a crime against humanity by the statute of the ICC, as well as the concept of “victims of terrorism”, the difficulty of this task is always alleged due to the fact that a binding definition of terrorism does not exist. Still practically all forms of terrorism are prohibited by the thirteen international conventions on terrorism actually existent as well as by customary international law. Indeed, in international law there is no field or sector in which terrorism is not forbidden. It is a prohibition that exists independently of the context in which the terrorist activity takes place: in time of war or in time of peace. In time of war the inter-

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118 The concept of a “victim of terrorism” chosen by these Guidelines is a broad one.
119 Regarding this question see Bou Franch/ Fernández de Casadevante Romani, see note 106.
120 This aspect is also underlined by the Report of the High-level Panel on Threats, Challenges and Change. Again it was stated that practically all forms of terrorism are prohibited by the thirteen international conventions on terrorism actually existent as well as by customary international law, the Geneva Conventions or the ICC statute, see Press Release SG/SM/8891 of 23 September 2003.
national norms applied to international and non international armed conflicts expressly prohibit the resort to terrorism against combatants and civilians. Such a prohibition derives clearly from the Geneva Conventions of 1949\footnote{In this regard see arts 27, 33 and 34 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949. As an example, article 33 states: “No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Pillage is prohibited. Reprisals against protected persons and their property are prohibited.” See also article 51 para. 2 of Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977, and arts 4 and 13 of Additional Protocol II to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977.} as well as the additional Protocols of 1977.\footnote{So, for example, article 51 para. 2 of Protocol I, see note 121, which states, “The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.” Also article 13 para. 2 of Protocol II, see note 121.}

In time of peace terrorism is an international crime that is prohibited. The thirteen existing international treaties actually relating to terrorism\footnote{Security Council Resolution S/RES/1377 (2001) of 12 November 2001 obliges states to rapidly ratify these treaties.} cover most of the various forms of terrorism and oblige states to take the necessary measures to ensure that such acts are defined as offences under national law. It has to be remembered that the Geneva Conventions as well as their Protocols and the thirteen international treaties specifically related to terrorism are complementary.

To complete this description, it is necessary to add that terrorism is also envisaged by international criminal law.\footnote{In this respect see A. Cassese, \textit{International Criminal Law}, 2008, 162 et seq.; M.D. Bollo Arocena, \textit{Derecho Internacional Penal. Estudio de los Crimes internacionales y de las técnicas para su represión}, 2004.} Terrorism is one of the most serious international crimes. Even if it is not expressly qualified as a crime under the jurisdiction of the ICC, much of the conducts envisaged by the international treaties relating to terrorism are, at the same time, conducts appertaining to the “crime against humanity”.\footnote{International legal doctrine and jurisprudence agree on this matter. In this line also the president of the ICC, see note 104. In Spain, the Criminal Code has been just reformed in order to avoid the prescription of crimes of
In order to prosecute before the ICC those terrorist conducts actually defined as crimes against humanity, according to article 7 of the ICC statute, it would be necessary that the Prosecutor proves the four elements which constitute a crime against humanity. Firstly, the commission of certain acts; second, that those acts have been committed as a part of a widespread or systematic attack. Third, that the attack was directed against any civilian population in application or execution of the politics of a state or of an international organization. Finally, the knowledge the author of such acts had of the fact that such acts were part of a widespread or systematic attack.\footnote{Kirsch, see note 104. In practice only some acts of terrorism are excluded from the jurisdiction of the ICC, e.g. those committed in time of peace which do not fulfill the constitutive elements of the qualification of a crime against humanity. G. Doucet, “Terrorisme: définition, juridiction pénale internationale et victims”, Victimes et Terrorisme, Revue International de Droit Penal 76 (2005), 271 et seq.} As an international crime the principle \textit{aut dedere aut iudicare} applies.

It can be concluded that acts of terrorism are generally envisaged, defined and incriminated,\footnote{See Doucet, see note 126.} which will be further examined now.

- \textbf{The Frame of the United Nations}

Even though Resolution 1566 (2004) adopted by the Security Council on 8 October 2004\footnote{S/RES/1566 (2004) of 8 October 2004.} does not contain a general definition of “terrorism”, it lists several conducts being considered terrorism. The quoting of such conducts is made by reference to the existing international treaties on terrorism. This list of conduct in Resolution 1566 is made “Acting under Chapter VII of the Charter of the United Nations”, i.e., in exercise of the Security Council’s primary responsibility for the maintenance of international peace and security conferred upon it by Article 24 of United Nations Charter and with the binding effects that resolutions adopted under Chapter VII of the Charter have. The Security Council in op. para. 3,

“Recalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general terrorism. This reform, made by a bill (the Ley Orgánica 5/2010 of 22 June) concerns the non prescription of terrorist offences with the result of death or serious injuries.
public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.”

As may be seen in this paragraph there is no definition *stricto sensu* of terrorism. Operative para. 3 of Resolution 1566 (2004) presents several aspects. It is the first time that this organ of the United Nations refers to terrorism so detailed. An analysis of op. para. 3 reveals that it embraces all *criminal acts* including those against civilians as well as against the military. These acts are committed with the intent to cause death or serious bodily injury, or the taking of hostages. They are committed with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act. These acts constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism. Finally, they are criminal acts, that are under no

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129 In the opinion of L.M. Hinojosa Martínez this definition is not technically precise, see his work L.M. Hinojosa Martínez, *La financiación del terrorismo y las Naciones Unidas*, 2008, 604, footnote 222.

130 Even though there is no express reference to military personnel it can be included since resort to terrorism is prohibited in International Humanitarian Law, see note 121. See also article 4 para. 2 lit. d of Additional Protocol II, see note 121, according to which acts of terrorism against “all persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted”, are and shall remain prohibited at any time and in any place whatsoever.

circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature. Consequently, the Security Council calls upon all states to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.

Concerning the reference to international conventions and protocols relating to terrorism it should be mentioned that some of these treaties, even if they do not directly refer to terrorism, name a series of conducts actually considered being terrorism. This is the case with wrongful acts against the safety of the civil aviation and wrongful acts at airports serving international civil aviation;\textsuperscript{132} and the use of unmarked and undetectable plastic explosives.\textsuperscript{133}

Together with these international conventions there are others that directly envisage terrorist conducts. According to them the following acts are qualified as terrorist acts,

1.- the “intentional commission of a murder, kidnapping or other attack upon the person or liberty of an internationally protected person, a violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger this person or his liberty”, “a threat to commit any such at-

\textsuperscript{132} That constitutes the subject of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971, UNTS Vol. 974 No. 14118.

\textsuperscript{133} That constitutes the subject of the Convention on the Marking of Plastic Explosives for the Purpose of Detection, see note 131. Its object is to control and limit the use of unmarked and undetectable plastic explosives (negotiated in the aftermath of the 1988 Pan Am flight 103 bombing). With this aim States Parties are obliged within their respective territories to ensure effective control over “unmarked” plastic explosives.
tack”, “an attempt to commit any such attack” and “an act constituting participation as an accomplice in any such attack;”\textsuperscript{134}

2.- the seizure, detention and threat of a person “to kill, to injure or to continue to detain another person in order to compel a third party, namely a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage;”\textsuperscript{135}

3.- the unlawful and intentional deliverance, placement, discharging or detonating of “an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility” with the intent to cause death or serious bodily injury or with the intent to cause extensive destruction of such a place, facility or system, “where such destruction results in or is likely to result in major economic loss;”\textsuperscript{136}

4.- the possession of radioactive material or the making or possession of a device with the intent to cause death or serious bodily injury or with the intent to cause substantial damage to property or to the environment, as well as the use in any way of radioactive material or a device, or the use or damage of a nuclear facility in a manner which releases or risks the release of radioactive material with the intent to cause death or serious bodily injury or with the intent to cause substantial damage to property or to the environment; or with the intent to compel a natural or legal person, an international organisation or a state to do or refrain from doing an act;\textsuperscript{137}

5.- the intentional commission of “an act without lawful authority which constitutes the receipt, possession, use, transfer, alteration, or dispersal of nuclear material and which causes or is likely to cause death or serious injury to any person or substantial damage to property.”

\textsuperscript{134} See article 2 para. 1 lit. a of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons of 14 December 1973, UNTS Vol. 1035 No. 15410.

\textsuperscript{135} Article 1 para. 1 of the International Convention against the Taking of Hostages of 17 December 1979, UNTS Vol. 1316 No. 21931.


\textsuperscript{137} Article 2 para. 1 of the International Convention for the Suppression of Acts of Nuclear Terrorism of 13 April 2005, see note 131. This Convention includes as an offence the threat to commit the offences just quoted (see article 2 para. 2).
Also the theft or robbery of nuclear material in order to compel a natural or legal person, international organisation or state to do or to refrain from doing any act, as well as the attempt to commit any of the offences just described;\textsuperscript{138}

6.- the provision or collection of funds “with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out an act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex”\textsuperscript{139} or “any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act;”\textsuperscript{140}

7.- the unlawful and intentional seizure or exercise of control over a ship by force, threat or any other form of intimidation in order to commit an act of terrorism; to perform an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship; to place a destructive device or substance aboard a ship; and other


acts against the safety of ships.\textsuperscript{141} Also, the use of a ship as a device to further an act of terrorism; the transport on board a ship of various materials knowing that they are intended to be used to cause, or in a threat to cause death or serious injury or damage to further an act of terrorism; as well as the transporting on board a ship of persons who have committed an act of terrorism;\textsuperscript{142}

8.- the unlawful and intentional seizure or exercise of control over a fixed platform by force or threat thereof or any other form of intimidation; the performance of an act of violence against a person on board a fixed platform if that act is likely to endanger its safety; the destruction of a fixed platform or the causing of damages to it which is likely to endanger its safety; the placement or causing to be placed on a fixed platform, by any means whatsoever, of a device or substance which is likely to destroy that fixed platform or likely to endanger its safety; the injuring or killing of any person in connection with the commission or the attempted commission of any of the offences just described.\textsuperscript{143}

Consequently, although there is no generally accepted definition of terrorism, it is possible to build an objective definition of terrorism based upon the commission of concrete acts that comprehend the great majority of terrorist acts. Such concrete acts and conducts are those envisaged by the international conventions quoted above.\textsuperscript{144} Despite the value of this catalogue of conducts considered as criminal offences that is made by reference to the international treaties on terrorism, it should be added that such catalogue does not cover all forms of terrorism. In other words, there are forms of terrorism other than those envisaged in the treaties just quoted. Such is the case of urban violence, extortion or political prosecution which were denounced e.g. by the Human Rights Commissioner of the Council of Europe in his report regarding his visit to the Autonomous Basque Community.\textsuperscript{145}


\textsuperscript{142} See the Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 14 October 2005.


\textsuperscript{144} Hinojosa Martínez, see note 129, 60.

\textsuperscript{145} Cf. Council of Europe, The Commissioner for Human Rights, Report by Mr. Álvaro Gil-Robles, Commissioner for Human Rights, on his visit to
-The Concept within the European Union

As stated above, in the frame of the European Union the non-existence of a generally accepted concept of terrorism is to some extent covered by the qualification as “terrorist offences” of the conducts listed in Council Framework Decision (2002/475/JHA) of 13 June 2002. Article 1 lists a series of intentional acts which are considered “terrorist offences” and oblige Member States to take the necessary measures to ensure that such acts are defined as offences under national law.146

Such acts are:147

- seriously intimidating a population,
- unduly compelling a government or international organisation to perform or abstain from performing any act,
- seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.

According to article 1 the following intentional acts shall be deemed to be “terrorist offences”:

(a) attacks upon a person’s life which may cause death;
(b) attacks upon the physical integrity of a person;
(c) kidnapping or hostage taking;
(d) causing extensive destruction to a government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place


146 According to article 1 of the Council Framework Decision 2002/475/JHA, “Each Member State shall take the necessary measures to ensure that the intentional acts referred to below in points (a) to (i), as defined as offences under national law, shall be deemed to be terrorist offences.”

147 Article 4 also envisages the fact of inciting or aiding or abetting an offence referred to in article 1 para. 1 and in arts 2 or 3.
or private property likely to endanger human life or result in major economic loss;

(e) seizure of aircraft, ships or other means of public or goods transport;

(f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;

(g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;

(h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;

(i) threatening to commit any of the acts listed in (a) to (h).

As can be seen, terrorism is not exhaustively described. This is why Council Framework Decision (2008/919/JAH) of 28 November 2008, provides “for the criminalisation of offences linked to terrorist activities in order to contribute to the more general policy objective of preventing terrorism through reducing the dissemination of those materials which might incite persons to commit terrorist attacks.” By this states are obliged to take the necessary measures to ensure that offences linked to terrorist activities include the following acts:

(a) public provocation to commit a terrorist offence;

(b) recruitment of terrorists;

(c) training of terrorists;

(d) aggravated theft with a view to committing one of the offences listed in article 1 (1) of the Council Framework Decision (2002/475/JHA) of 13 June 2002, on combating terrorism, just quoted;

(e) extortion with a view to the perpetration of one of the offences listed in article 1 (1) of the Council Framework Decision (2002/475/JHA) of 13 June 2002, on combating terrorism, just quoted;

(f) drawing up false administrative documents with a view to committing one of the offences listed in article 1 (1)(a) to (h) and article 2

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148 Some criminal conducts present in the terrorist acts of ETA remain outside this catalogue. This is the case with political prosecution (which can lead to exile). Extortion is covered by the revision made by the Council Framework Decision 2008/919/JHA of 28 November 2008.

149 Para. 7 of its preamble, OJEU L 330 of 9 December 2008.

**bb. There are Sufficient Elements to Build a Concept of Terrorism**

In the frame of the United Nations as well as in the regional frame of the European Union there are sufficient elements to conclude which conducts may be actually qualified as terrorism. In the case of the United Nations, Resolution 1566 (2004) of the Security Council states that terrorist acts are criminal acts committed against civilian and militaries with a concrete intentional element: that of causing death or serious bodily injury, or taking of hostages. These are acts with a concrete purpose: that of provoking a state of terror in the general public or in a group of persons; intimidating a population or compelling a government or an international organisation to do or to abstain from doing any act. Such criminal acts committed against civilian and militaries are under no circumstances justifiable. Such criminal acts committed against civilian and militaries with the intention and purpose just quoted actually constitute criminal offences which are defined as such in international treaties on terrorism; treaties which comprehend the great majority of terrorist conduct.\(^\text{150}\)

In the case of the European Union the benefits deriving from Council Framework Decisions (2002/475/JHA) of 13 June 2002, and (2008/919/JAH) of 28 November 2008 are more obvious because they oblige Member States to take the necessary measures to ensure that the intentional acts referred to become punishable as criminal offences. This is why it is possible to conclude that the legal frame built in the European Union constitutes a great advance both from the point of view of the definition of terrorism and of its consequences in the legal field.

**cc. The Lack of a Concept of “Victim of Terrorism”: Proposals**

The lack of a concept of “victim of terrorism” can be filled with the definitions and the common elements present in the different international norms analysed in the preceding pages. Besides, and with regard to the European Union, Council Framework Decision (2002/475/JHA)

\(^{150}\) They are annexed to Security Council Resolution S/RES/1566, see note 128.
of 13 June 2002 on combating terrorism allows a more intense particularisation with regard to the conducts closely linked to terrorism.

Accordingly two kinds of victims could be envisaged: direct and indirect victims. The concept of direct victims is based upon the following elements:

– They are natural persons (individual or collectively);
– They have suffered harm, including physical or mental injury, emotional suffering or
– economic loss, and
– such harm has been directly caused by acts or omissions that are in violation of the criminal law of the concerned state.\(^151\)

On the other hand, two kinds of persons are considered indirect victims:

– The relatives or dependants having an immediate relationship with the direct victim;
– Persons who have suffered harm while intervening to assist victims in distress or to prevent victimisation.\(^152\)

Consequently, although there is a lack of a specific concept of “victim of terrorism” it is possible to resort to the general concept of “victim” envisaged by the international norms quoted in this work in order to include them into a more specific concept. This would also allow the inclusion of victims of terrorism.

It is sufficient to define as criminal offences under national law conducts such as terrorism, genocide, crimes of war and crimes against humanity – or others – to arrive at a more expanded concept of victim.

\(^{151}\) Instead of that general concept of direct victim, “victims of abuse of power” are “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights” (para. 18 of the Declaration, see note 6).

\(^{152}\) With regard to the question of indirect victims the Draft Guidelines on the Protection of Victims of Terrorist Acts adopted by the Committee of Ministers of the Council of Europe on 2 March 2005 quoted case-law of the European Court of Human Rights in order to include the concept of “indirect victims” as regards the family of a disappeared person (see European Court of Human Rights, Cyprus v. Turkey, Judgement of 10 May 2001, Reports of Judgments and Decisions ECtHR 2001-VII, 1 et seq.).
And this, in the triple dimension adopted by the different international norms related to victims: persons who have suffered harm; relatives or dependants having an immediate relationship with the direct victim, as well as persons who have suffered harm while intervening to assist victims in distress or to prevent victimisation.

This holds true independently of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the family relationship between the perpetrator and the victim\textsuperscript{153} and observes the principle of non discrimination.\textsuperscript{154} The Guidelines on the Protection of Victims of Terrorist Acts adopted by the Committee of Ministers of the Council of Europe on 2 March 2005 add a third principle. According to it, “States must respect the dignity, private and family life of victims of terrorist acts in their treatment.”\textsuperscript{155}

### III. Conclusions

Victims have become the object of international law, albeit belatedly. Since 1985 a plurality of norms of different legal nature and territorial

\textsuperscript{153} This principle is present in the following international norms: Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, see note 6; Guidelines on the Protection of Victims of Terrorist Acts adopted by the Committee of Ministers of the Council of Europe on 2 March 2005; European Convention on the Compensation of Victims of Violent Crimes of 24 November 1983; Recommendation (2006) 8 of the Committee of Ministers of the Council of Europe on the assistance to victims of crime.

\textsuperscript{154} According to which the rights linked to the condition of victim shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.

\textsuperscript{155} This principle is laid down in para. 4 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, see note 6: “Victims should be treated with compassion and respect for their dignity.” Also in article 2 para. 1 of the Council Framework Decision, see note 36: “Each Member State shall ensure that victims have a real and appropriate role in its criminal legal system. It shall continue to make every effort to ensure that victims are treated with due respect for the dignity of the individual during proceedings and shall recognise the rights and legitimate interests of victims with particular reference to criminal proceedings.”
Fernández de Casadevante Romani, International Law of Victims

scope envisage different categories of victims: victims of crime, victims of abuse of power, victims of gross violations of international human rights law, victims of serious violations of international humanitarian law, victims of enforced disappearance, victims of violations of international criminal law and, finally, victims of terrorism. As a consequence, most of these categories of victims have their own definitions of “victim” related to the category concerned as well as a catalogue of listed rights. Nevertheless, despite the diversity in all these definitions there are common elements upon which it is possible to build an international concept of victim (in general) including both direct and indirect victims, as well as the members of such groups. These common elements are also useful in order to cover the gaps existing in some definitions of the related categories of victims. In the same way, it must be taken into account that all categories of victims have in common the fact of becoming a victim of a crime. From this perspective they are at the same time victims of crime as well as victims of the category concerned.

The catalogue of rights recognised to the different categories of victims by the international norms related to each of them builds the legal status of each category of victim. At the same time these rights constitute obligations on the part of states because they have implemented those rights. Despite the diversity and despite the particularisation with regard to the category of victim concerned, it is possible to conclude that a common legal status of victim (in general) which is composed of most of these rights exists. At least, of all those rights firmly enshrined in the existent human rights treaties. Moreover, it must not be forgotten that the victim is a natural person and, as such, is entitled to the rights that international treaties on human rights recognise for “everyone”. These rights are lex lata. At the same time, these are rights that states shall safeguard and make effective.

The most important lack in this field of international law related to victims concerns victims of terrorism. Only the Council of Europe has paid attention to it by way of an institutional norm. The European Union has only included certain references in its Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism. As the United Nations has paid attention to all other categories of victims in the form of international norms it is all the more surprising that this is not the case with victims of terrorism. Although it has recognised that terrorism is an international crime that seriously violates human rights no international norm on victims of terrorism and their rights has yet been adopted by the United Nations. The responsibility of such a de-
fault rests with the United Nations and its Member States and it is their responsibility to change this situation. Furthermore, it is urgent that the United Nations and its Member States promote an international norm affirming the international status of victims of terrorism in line with the action of the Council of Europe, as well as with the action of the UN itself and concretised in the international norms it has encouraged with regard to the other categories of victims.

An international treaty of a general character related to the international legal status of the victim (in general) could serve to improve this field of international law. This treaty, actually non-existent, could be inspired by the international norms relating to the different categories of victims. Preceded by a general and broader definition of the term “victim” (including both direct and indirect victims) the object of this treaty would be the listing of a catalogue of rights inherent to the condition of a victim; a catalogue actually already existing in the international norms relating to victims. Such a treaty would also be useful to recognise for all victims a common denominator of rights that states have to ensure, safeguard and make effective. At the same time, a treaty of this kind would not hinder the further adoption of particular norms related to special categories of victims and from applying to these individualised categories the international norms actually existing. Both lines of action would be complementary.
The UN Collective Security System and its Relationship with Economic Sanctions and Human Rights

Eugenia López-Jacoiste

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I. Introduction

The UN collective security system is based on the complementary nature of two fundamental structural criteria. First, “In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security ...” (Article 24 UN Charter). Second, “All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security” (Article 43 UN Charter). After sixty-five years neither of these fundamental ideas has been implemented in full. Nevertheless, the Security Council understands its delegated powers in a dynamic way, and therefore has not hesitated to authorise many different measures under Chapter VII.

During the last two decades, UN economic sanctions have come under harsh criticism. The experience of the sanctions imposed on Iraq by the UN Security Council in the 1990s, and still in place, shows the ethical and legal concerns of sanctions. The humanitarian problems caused by economic sanctions against Iraq illustrate their adverse impact on the population. For a long time, different UN organs and hu-
Manitarian agencies have called for an end to many of the sanctions in order to facilitate a greater flow of food and medicines. The UN General Assembly’s debate emphasised the need to lift the sanctions in order to end human suffering in Iraq, although the international community must ensure compliance with the sanctions imposed by the Security Council as measures to restore international peace and security. Many lessons have been learned from the economic sanctions against Iraq and the implementation of the oil for food program, as the sanctions have affected the civilian population more than the Iraqi Government. Indeed, the Government of Iraq pointed to sanctions as the primary cause of suffering in Iraq, while others blamed the authorities in Baghdad. A reliable assessment right at the beginning could have identified the processes which affected humanitarian conditions, and could therefore have assisted in mitigating the unintended negative consequences of the sanctions.

For these reasons, reliable assessments are needed to evaluate humanitarian conditions, to identify whether and how sanctions cause harm, to improve the quality of people’s lives by anticipating potential negative consequences, and to get maximum humanitarian benefit from available resources. A reliable assessment methodology will help to address these needs. Economic sanctions by the international community, have a stronger impact on the target country than a unilateral embargo.

4 UN Press Release GA/9618 of 30 September 1999.
respectively sanction. Nevertheless, multilateral action cannot overrule the principle of proportionality and the respect for human rights which are enshrined within the UN collective security system.

To date, the international community’s efforts to combat international terrorism are an excellent illustration of the difficulties faced by the UN collective security system. The effort to maintain international peace and security on the one hand and the principle of proportionality and the need to protect human rights on the other. The Security Council, being the legitimate authority in matters of collective security, by adopting the necessary measures to prevent acts of terror or any breach of the peace is duty-bound to minimise “collateral damage” by considering the specific means to be applied in each case.

The collective security system of the United Nations will be more efficient, robust and credible if, in order to address threats to the international peace and security, it deals with each situation on an individual basis. Its effectiveness depends ultimately not only on the legality of its decisions but also on the common perception of their legitimacy, their being taken on solid evidentiary grounds and for the right reasons, morally as well as legally. As noted by the High-level Panel on Threats, Challenges and Change, “if the Security Council is to win the respect it must have as the primary body in the collective security system, it is critical that its most important and influential decisions, those with large-scale life-and-death impact, be better made, better substantiated and better communicated. In particular, in deciding whether or not to authorize the use of force, the Council should adopt and systematically address a set of agreed guidelines, deciding not whether force can legally be used but whether, as a matter of good conscience and good sense, it should be.”

The Report of the Secretary-General “In Larger Freedom: Towards Security, Development, and Human Rights For All”, outlines that “the task is not to find alternatives to the Security Council as a source of authority but to make it work better,” within the competences of Chapter VII. The language of Chapter VII is inherently broad enough, and has been interpreted broadly enough, to allow the Security Council to approve any chosen coercive action, including military action, against a state when it deems this “necessary to maintain or restore international peace and security.” For these reasons the UN General Assembly has

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8 Article 42 UN Charter.
called upon the Security Council “to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exceptions.” Precisely what constitutes “fair and clear procedures” is contested, however, and its determination will necessarily rely on both legal and political arguments. To determine the exact scope, one should assess the powers, procedural guarantees and authority of the institution involved.

This article focuses on the UN sanctions regime in the recent practice of the Security Council and its compatibility with human rights. It has to be emphasised that this article does not question the legitimacy of economic sanctions as an instrument for enforcing Security Council decisions or as a response to grave human rights violations. It does not analyse the issue of who has the right to decide whether the Security Council has acted *ultra vires* or not. Instead, it is based on the premises that the Member States can reject the legality of a Security Council decision at the moment of its individual or regional implementation and thus refuse to implement it as a “right of last resort”. In essence, this article only questions how UN economic sanctions, adopted in accordance with the UN Charter, must simultaneously be in accordance with general human rights law, thereby showing that international law and the United Nations Charter are adapting to the new international context and challenges.

The article begins by briefly defining the powers of the UN Security Council, examining how the Security Council is bound by human rights, and summarising the recent UN sanctions practice. It then examines if and to what extent the Security Council may limit human rights norms. The article agues that the Council’s limitations must be in ac-

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10 De Wet, see note 5, 280. As emphasised by de Wet, the refusal to implement a Council’s decision as a “right of last resort” must, however, only be exercised in extreme situations where there is a strong case that the measures are illegal. The refusal of implementation may be possible also as “a collective right of last resort”, when an international binding decision is to be applied in a regional or national legal order. G. Nolte, “The Limits of the Security Council’s Powers and its Functions in the International Legal System: Some Reflections”, in: M. Byers (ed.), *The Role of Law in International Politics*, 2000, 318. Nolte indicates that Member States, acting alone or within a representative group of other Member States, could be the ultimate interpreters of the legality of a Security Council action.
Pérez-Jacoste, The UN Collective Security System

In accordance with international law, in particular human rights law and shows how the Council is learning to deal with numerous difficulties. It should be noted that the debate on the human rights conformity of Security Council resolutions imposing sanctions is not an isolated incident of public criticism of UN actions, but rather an important aspect of a broader and increasing debate on the accountability of international organisations in general, and on the accountability of the United Nations, in particular.11

II. The UN Collective Security System and the Security Council

Article 2 (4) of the Charter states that “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, or in any other manner inconsistent with the Purposes of the United Nations.” Further, Article 2 (7) adds that “this principle shall not prejudice the application of enforcement measures under Chapter VII.” Hence, the Security Council has the primary responsibility for the maintenance of international peace and security (Article 24 (1)).

The Security Council is a political body; entitled to adopt measures having legal consequences. The competence granted to the Council by the Charter is a normative one. Under Chapter VII it can take enforcement action to maintain or restore international peace and security. Such measures range from economic sanctions to military interventions in case the Security Council has previously established the existence of “any threat to the peace, breach of the peace or act of aggression” under Article 39 of the Charter. This is of utmost importance, as the drafters of the Charter refused to define what constitutes “any threat to the peace” and, on the contrary, agreed that a responsible and capable Council should determine whether there was a threatening situation or not, on a case by case basis.12 Thus, after a decision under Article 39 stating that a situation constitutes any threat to, or breach of the peace, the Security Council can order states to undertake provisional measures under Article 40, measures under Article 41 – normally referred to as sanctions – and finally, military action under Article 42, against the en-

12 15 P/3, 1 UNCIO, Words of the United States Representative at the Opening of the Conference in San Francisco, 124.
tity responsible for the threat or breach.\textsuperscript{13} The Security Council seldom states explicitly on which article it is basing its resolution, but confines itself to state that it is “acting under Chapter VII of the Charter.”\textsuperscript{14} The fact that a situation constitutes a threat to the peace does not prejudice the objective nature of the specific situation. The general concept of international peace and security can cover all kinds of situations.\textsuperscript{15}

1. The Wide Margin of Appreciation within the Framework of Chapter VII

According to Article 39 of the UN Charter, the Security Council “shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken ... ”. This means that on the basis of actual facts, the Council will decide the severity of the situation. Its very wide discretion is not arbitrary;\textsuperscript{16} any situation contrary to international peace and security may potentially be determined. This wide margin of appreciation cannot be delegated;\textsuperscript{17} however, the competence of the Council is not unlimited. This conception of the discretion of the Security Council has two limits. On the one hand, it is obliged to act on real


\textsuperscript{15} ICTY Appeals Chamber Tadić Decision 1995 IT-94-1-AR72, para. 28.


\textsuperscript{17} Sarooshi, see note 1, 33. On the contrary, some authors do not deny that under specific circumstances the General Assembly may exercise such functions, see D. Zaum, “The Security Council, the General Assembly and War: the Uniting for Peace Resolution”, in: A. Roberts/ D. Zaum (ed.) \textit{Selective Security. War and the United Nations Security Council since 1945}, 2008, 154 et seq.
and imminent threats.\textsuperscript{18} On the other, it serves as a curb on the abuse of power.

The end of the Cold War and the disappearance of the political blocs have led to a closer co-operation among the permanent members of the Security Council. In some circumstances, China and the Russian Federation have preferred to abstain, rather than exercise their right to veto, thereby allowing the Council to develop an intense executive, regulatory and disciplinary activity within Chapter VII.\textsuperscript{19} Traditionally not only armed conflicts between states have been identified as a threat to international peace and security\textsuperscript{20} but under certain circumstances also direct or indirect support by one state for armed rebel groups operating in another state.\textsuperscript{21} However, the living conditions of civilians and respect for human rights have not always been considered essential elements of peace and security. Until 1990 the protection of human rights was regarded as an internal affair of states.

\textsuperscript{18} Doc. A/59/565, see note 6, where the High-level Panel Report outlines that the main 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 (para. 188). Thus, the international community has to be concerned about nightmare scenarios combining terrorists, weapons of mass destruction and irresponsible states, and much more besides, which may conceivably justify the use of force, not just reactively but preventively and before a latent threat becomes imminent (para. 194).

\textsuperscript{19} G. Nolte, “The different functions of the Security Council with respect to Humanitarian Law,” in: Roberts/ Zaum, see note 17, 519 et seq. (520-521).


\textsuperscript{21} In the Nicaragua case the Court stated “... that the US had to have effective control of the operations in order to be responsible” and that was finally denied, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), ICJ Reports 1986, 14 et seq. (101 et seq., para. 191) which analyses the customary nature of the rule prohibiting the use of force and recognises that “(...) it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms.” S/RES/1343 (2001) of 7 March 2001 and S/RES/1497 (2003) of 1 August 2003, on the situation in Liberia.
Taking into account article 31 3. b) of the Vienna Convention on the Law of Treaties, the Security Council recognises that certain domestic situations (e.g. civil wars or serious violations of human rights) can be considered threats to international peace and security and, therefore, fall under its primary responsibility. The early Council enforcement actions against violations of human rights and the humanitarian intervention in internal affairs were considered innovative and not always peacefully accepted. It was e.g. the magnitude of the repression perpetrated against the Kurdish civilian population of northern Iraq and the masses of refugees and displaced persons with cross-border incursions which threatened the peace and security in the region and thus, led the Security Council to authorise humanitarian intervention in Iraq. Subsequently, it also authorised military action in similar situations e.g. in the former Yugoslavia, Somalia, Rwanda, Kosovo, Côte d'Ivoire, and East Timor. In other instances, the Council has estimated that the dismantling of a state’s institutions, particularly the police and the judiciary, the breakdown of law and public order, or the illegal exploitation

27 Indeed, the violence in the province of Kosovo was spreading into the Federal Republic of Yugoslavia. Under these circumstances the Security Council adopted resolution S/RES/1160 (1998) of 31 March 1998, condemning the Serbian security forces for excessive power abuse committed against civilians and the Army for the Liberation of Kosovo for terrorist acts. After the armed intervention and as a result of it, the Federal Republic of Yugoslavia and the Kosovo came to an agreement. In S/RES/1244 (1999) of 10 June 1999 the Council endorsed the agreement of the parties and the G8, and, acting under Chapter VII, established a security force for Kosovo.
of natural resources are threats to the international peace and security. The Council has also enabled the system of collective security against the failure to protect civilians during armed conflict, to control the risks of small arms trafficking, against the recruitment of child soldiers, to stop child abuse and to ensure the safety of its staff. The continuous violation of international law has also provoked institutional intervention imposed by the Council. Therefore, the Security Council decided to intervene in Haiti, Somalia, Afghanistan, Liberia, Sierra Leone, Sudan, Iraq and the Democratic Republic of the Congo.


42 S/RES/1070 (1996) of 16 August 1996, the Council adopted new measures under Chapter VII of the Charter because the Sudanese Government had not responded to the requests made in op. para. 4 of Resolution S/RES/1044 (1996) of 31 January 1996, as reaffirmed in op. para. 1 of Reso-
In all these cases the Council attempted to rebuild the status quo.\(^{45}\)

Once the Security Council determines that a particular situation poses a threat to the peace or that there exists a breach of the peace or an act of aggression, it enjoys a wide margin of discretion in choosing the course of action. It can exercise its exceptional powers under Chapter VII to choose between the particular measures provided for in Arts 41 and 42 of the Charter.

A question arises in this respect as to whether the choice of the Security Council is limited to the measures provided for in Arts 41 and 42 of the Charter (as the wording of Article 39 suggests), or whether it has even broader discretion in the form of general powers to maintain and restore international peace and security under Chapter VII. In the latter case one does not have to find every measure decided by the Security Council under Chapter VII within the confines of Arts 41 and 42, or possibly Article 40. Whatever the case, under both interpretations, the Security Council has broad discretion in deciding on the course of action and evaluating the appropriateness of the measures to be taken. The wording of Article 39 is quite clear as to the channelling of the very broad and exceptional powers of the Security Council under Chapter VII through Arts 41 and 42. These two articles leave the Security Council a wide choice. This consideration is reinforced by the fact that the Security Council is not a “law enforcement organ”, but it enjoys unfettered discretions as a political one. Indeed, the UN Charter recognises

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the Council’s powers and tasks as those of a political organ enjoying a wide margin of discretion regarding “how to maintain or restore international peace and security”. This idea was stressed by Kelsen, stating that “the purpose of the enforcement action under article 39 is not to maintain or restore the law, but to maintain, or restore peace, which is not necessarily identical with the law.”

The broad scope of action has enabled the Council to act against non-state actors such as rebel groups or mercenaries and against specific individuals which can be individually identified. Whatever the case, when adopting any measure under Article 41 of the Charter, the Security Council should be guided by the approach taken in Annex II of General Assembly Resolution 51/242 (Supplement to an Agenda for Peace), which indicates that sanctions should be resorted to only with the utmost caution, when other peaceful options provided by the Charter are inadequate. The reasons that necessitate the imposition of sanctions should be identified and stated in advance.

UN sanctions is the common denomination to designate non-military measures decided by the UN Security Council following Article 41 of the UN Charter, despite the fact that the word “sanction” does not appear in the Charter. It is, moreover, an open question whether Article 41 measures are really “sanctions” as a matter of international law, i.e. reprisals or countermeasures. It should be noted that Article 41 has evolved over time. Undoubtedly nowadays sanctions are still an important tool under the Charter of the United Nations in order to maintain international peace and security without recourse to force. The feasibility of interrupting postal, telegraphic and radio communications was challenged by Member States at various times, and such severances have rarely occurred. Some of the measures adopted by the Se-

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50 A/RES/64/115 of 15 January 2010.
curity Council are not expressly mentioned in Article 41, although in some respects, the Council has clearly gone beyond these stipulations.

Some writers consider an alternative view of UN sanctions under Article 41, at least potentially, as a kind of economic warfare, i.e. non-forcible measures regularly undertaken in wartime alongside (or instead of) armed measures, for the purpose of harming or defeating the enemy, rather than as peacetime countermeasures.\textsuperscript{51} Subsequently, the list of Article 41 is non-exhaustive.\textsuperscript{52} The most frequently adopted sanctions have covered prohibitions of export and import,\textsuperscript{53} selective embargoes,\textsuperscript{54} prohibitions of service,\textsuperscript{55} prohibitions of movement of funds and freezing of funds and assets,\textsuperscript{56} prohibition of air, sea and land communi-


\textsuperscript{56} In Resolution S/RES/883 (1993) of 11 November 1993, the Security Council tightened sanctions, approving the freezing of Libyan funds and financial resources in other countries and the prohibition on providing equipment to Libya for oil refinery and transport. With regard to Bosnia and Herzegovina, see S/RES/820 (1993) of 17 April 1993; Libya S/RES/883 (1993) of 11 November 1993; Bosnian Serbs S/RES/942 (1994) of 23 September 1994; against Osama bin Laden, the Taliban and other entities,
cation, severance or reductions of diplomatic and other official relations, and restrictions on movement of persons as a means to enforce the effectiveness of its other measures. The sanctions resolutions also usually contained humanitarian and other exceptions, medical equipment and foodstuffs in humanitarian circumstances being generally excepted, although the resolutions have shown great inconsistency.


For instance, in Resolution S/RES/1070 (1996) of 16 August 1996, the Security Council decided to impose an air embargo on Sudan; however, the sanctions measures adopted, which were to enter into force pending a decision by the Council within 90 days after the date of the adoption of Resolution S/RES/1070 (1996), was not imposed, for humanitarian reasons.
in other types of exceptions. In short, the network of sanctions spans all continents and covers all types of content.

2. Legal Limitations to the Security Council’s Measures under Chapter VII

In asking whether there are many specific humanitarian and human rights limits to the exercise of the Security Council’s power to impose economic sanctions, one has to focus on whether – in absence of any treaty obligations – general international law binds the United Nations and thus one of its principal organs, the Security Council. In other words, the apparently widespread acceptance of the proposition that international organisations are bound by general international law must be considered. While the United Nations is certainly an international organisation, its special status and responsibilities, coupled with the specific functions and powers conferred on it by the Charter, have cast doubt on whether this proposition also holds true for the organisation itself. One must ask whether the organisation can act as if it were the organ of world governance, and thus override international law and state sovereignty wherever it sees fit. The debate on the scope of the Council’s powers in particular has been ongoing since the establishment of the United Nations. As already said, the Council’s powers under Chapter VII are quite broad, but nevertheless are also subject to limita-


There are two types of possible limits to the Security Council’s action, one being substantive, and the other formal. Herdegen has recently suggested a number of substantive limits to the actions of the Security Council. Gowlland-Debbas has also drawn up a list of rules and principles which the Council may not violate. Both authors suggest a balance between the powers of the Security Council to undertake an authoritative concretisation of its own powers and the most basic human rights standards. Nolte has doubts about this theoretical substantive approach, insisting that the point at which an excessive use by the Council of its powers becomes manifest must be determined by reference to all the factors of the specific case.

Some other commentators have argued that the Security Council can act above international law and therefore no legal substantive limits exist on measures adopted by it under Chapter VII. This interpretation is based on the wording of Arts 25 and 103 of the UN Charter. According to Article 25 of the UN Charter, the UN Members “agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” Specifically, Article 103 states that “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

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68 Nolte, see note 10, 321.

69 Oosthuizen, see note 64, 549.
Charter shall prevail.” Therefore, it has been argued that Article 103 of the UN Charter allows states to disregard e.g. human rights treaty obligations in the execution of Security Council resolutions. There are, however, opposing views, for instance, those of Alvarez, according to whom Article 103, makes the Council decision prevail over both treaty and customary law. But according to the clear wording of Article 103 the Charter shall only prevail in the event of a conflict between an obligation of a Member State under the present Charter and its obligation under any international agreement, but not under general international law. Whatever the merits of this argument, Article 103 could never override the operation of norms that have peremptory status. As Judge Lauterpacht’s Separate Opinion points out, even if the Charter prevails over other international agreements, the “relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decision and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to a conflict between a Security Council Resolution and jus cogens.” As the core human rights are part of jus cogens, Article 103 would not allow a Council decision to prevail over, for instance, the prohibition of genocide and torture or other inhumane treatment.

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70 The prevalence of the UN Charter over the ICCPR with regard to article 1 was declared by the United Kingdom upon signature (<http://www.unhchr.ch/html/menu3/b/>). The United Kingdom in its derogation of 18 December 2001 did not explicitly refer to Article 103. Indeed it based its derogation on article 4 of the ICCPR. But it made reference to SC Resolution S/RES/1373 (2001) of 28 September 2001 requiring all states to take measures to prevent terrorist attacks.


72 R. Bernhardt, “Article 103”, in: Simma, see note 65, 1300.


The interpretation that Article 103 obligations prevail over both treaty and customary law cannot be accepted for the following reasons. First of all, according to Article 24 (1), read together with Arts 1 and 2 of the UN Charter, the Council’s decisions must be in accord with the purposes and principles of the United Nations. Promoting and encouraging respect for human rights and fundamental freedoms are among these purposes, and therefore the Council must always take them into account when acting under Chapter VII. Since, as argued by some legal commentators, humanitarian law can be perceived as “human rights in armed conflicts”, the Council is also bound by rules of international humanitarian law.

Another limitation is imposed by legal norms regarded as *jus cogens*. The key question is which human rights have the status of *jus cogens*. Article 53 of the widely ratified Vienna Convention on the Law of Treaties provides a definition of *jus cogens*, namely “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm.” The ICJ endorsed the concept of *jus cogens* in the case of Armed Activities on the Territory of the Congo, considering that the *jus cogens* nature of the prohibition of genocide was well established and that the status of *jus cogens* creates rights and obligations *erga omnes*. Norms regarded as *jus cogens* are non-derogable, and it is generally accepted that these standards also apply to Security Council enforcement measures adopted under Chapter VII of the UN Charter. As the hard core of human rights and international humanitarian law constitute *jus cogens*, these norms apply to measures imposed by the Security Council under Chapter VII. This view is also supported by the statement of Judge Weeramantry in the Lockerbie case stating that “the history of the United Nations ... corroborates the view that a limitation on the plenitude of the Security Council’s power is that those powers must be exercised in accordance with the well-established principles of international law.” Finally, the Security

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78 Gill, see note 1, 79.
79 ICJ, Order with regard to the request for the Indication of Provisional Measures in the Case Concerning Questions of Interpretation and Applica-
Council, as laid down in Arts 24-26 of the UN Charter, is to bear responsi-

bility for the maintenance of international peace and security. It would be contrary to its role if the Council disregarded the rule of law, since a peaceful world order can only be realised through respect for the rule of law. Consequently, the Security Council cannot have the discretionary power to disregard one of the founding principles of a peaceful international order: the rule of law.

As Reisman argues, the UN collective security system was intended to operate in accordance with the will and discretion of the permanent members of the Security Council. While it is true that the powers of the Security Council are based on political as much as legal factors, its decisions are binding as legal norms. The ICJ solved this issue by stating, that the political character of the organ of an international organisation does not release it from the observance of legal provisions which constitute limitations on its powers or criteria for its judgments. As Judge Jennings categorically states in the Lockerbie case,

“The first principle of the applicable law is this: that all discretionary powers of lawful decision-making are necessarily derived from the law, and are therefore governed and qualified by the law. This must be so if only because the sole authority of such decisions flows itself from the law. It is not logically possible to claim to represent the power and authority of the law and, at the same time, claim to be above the law.”

Other authors have also suggested that the principle of good faith constitutes a limit to the enforcement powers of the Security Council. See V. Gowlland-Debbas, “Security Council Enforcement Action and Issues of State Responsibility”, ICLQ 43 (1994), 93 et seq.


Orakhelashvili, see note 73, 146.

ICJ Reports 1948, 57 et seq. (64) on the conditions of admission of a State to Membership in the United Nations.

Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya
Therefore, the key to understanding the powers of the Council lies in understanding their delegated nature because they are regulated in the UN Charter as “constitutions of delegated powers”. It should be remembered that in conferring on the Council primary responsibility for the maintenance of international peace and security, the Member States agree that the Council acts on their behalf. Thus, the UN Charter constitutes an act of common will of the Member States which transfers certain limited powers to the Council, so that the resulting legal product cannot acquire more power than its creator.

The Council thus acts as the agent of all the members and not independently of their wishes; it is bound by the purposes and principles of the organisation, so that it cannot, in principle, act arbitrarily, unlettered by any restraints. From Article 39 UN Charter it is clear that the Security Council plays a pivotal role and exercises very wide discretion. And as has been seen consistently in international literature and case law, this wide discretion does not mean that its powers are unlimited. As the International Criminal Tribunal for the former Yugoslavia recognised in the Tadić case,
“The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as legibus solutus (unbound by law).”  

For all these reasons, after having made the determination that a specific situation is a threat to peace, the Security Council is bound by some legal norms in exercising coercive measures as a consequence of its determination. Like every other organ of an international organisation, the Security Council is bound by its mandate, and by general international law, in particular humanitarian law and human rights law.

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92 Tadić, see note 15, para. 28.
95 Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, ICJ Reports 1980, 73 et seq. (80).
97 Committee on Economic, Social and Cultural Rights, General Comment 8, 5 December 1997; I. Brownlie, "Decisions of the Political Organs of the UN and the Rule of Law", in: R.St.J. McDonald (ed.), Essays in Honour of Wang Tieya, 1993, 102. The Secretary-General considered it “axiomatic that the International Tribunal [for Yugoslavia, established by the Council] must fully respect internationally recognized standards regarding the rights of the accused at all … in particular … article 14 of the ICCPR”, a conclu-
Moreover, the Security Council, when resorting to enforcement measures of any nature, is bound by the principle of proportionality, which is commonly inferred from the reference to “necessary” measures in Arts 41 and 42 of the UN Charter. Proportionality is, however, a limitation even on measures which may be justified. The principle of proportionality thus forms part of the positive law of the Charter, and any measures employed under Chapter VII. The proportionality principle is twofold: that the measures adopted are necessary, and that they provide an adequate response to the behaviour of the target state. From this principle it follows that the Security Council should impose extreme measures such as sanctions only after exhausting all other measures, in particular those outlined in Article 40. The Security Council should notify the target state before the implementation of sanctions, as the imminent threat of a sanctions regime may itself be sufficient to alter the state’s behaviour.

To fulfil the requirement of necessity, a sanctions regime must be designed in such a way that it can reasonably be expected to achieve its objectives: to alter the behaviour of the target entity and to bring it in compliance with the legal prescriptions. As such, sanctions must be directed towards the actor responsible for the disturbance of international peace and must create an appropriate and effective degree of coercion. This latter requirement can be deduced from Article 1 (1) of the Charter, which empowers the UN to “take effective collective measures for the prevention and removal of threat to the peace ...”. Since the Security Council, by virtue of Article 24 (2) of the Charter, is bound to act in accordance with the purposes and principles of the UN, effectiveness arguably functions as one of its guiding principles in imposing

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99 A. Randelzhofer, “Article 51”, in: Simma, see note 13, 788, 805.
100 G. Abi-Saab, “The Concept of Sanctions in International Law”, in: Gowland-Debbas, see note 93, 29, 39.
coercive measures under Chapter VII. The Security Council has a wide margin of discretion in ensuring the adequacy of a sanctions regime during the entire length of its imposition. But, if the omission of certain humanitarian safeguards would ipso facto render a sanctions regime inadequate (and thus disproportionate), the proportionality principle would require the Security Council to include such safeguards.

In addition to the proportionality principle, fundamental human rights principles also set the outer limits of the Security Council’s discretion in employing sanctions. First and foremost, the Security Council is bound by the jus cogens norms, including the right to life. On a formal level, the Council is limited by jus cogens. De Wet has convincingly shown that the delegation of powers to the United Nations by its Member States should be understood as an ongoing interaction, so that the delegated powers continue to be limited by developments in jus cogens.\textsuperscript{102} Notwithstanding these intrinsic limits to the Security Council’s powers, the UN Member States have implicitly accepted the supremacy of the Security Council when they created the UN Charter, which does not provide for any body with explicit powers to monitor and control it. And they also accepted the clear obligation under the UN Charter to comply with Security Council decisions i.e. sanctions adopted under Chapter VII.

In general, it can be affirmed that international law does not accept that national law be put as an excuse for the failure to comply with international obligations.\textsuperscript{103} The only explicit limit on the power of the Security Council is Article 24 (2). These principles and purposes figure prominently in more specific obligations. For example Article 55 creates a specific mandate that the UN shall promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” Article 56 then provides the corresponding commitment on the part of Member States to “pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in article 55.” The Principles and Purposes of the Charter, including the adherence to human rights, are certainly broad and perhaps imprecise. The scope of human rights mentioned as a purpose of the United Nations is very vague, and the purposes and principles of the Charter were designed to provide guidelines for the organs of the


\textsuperscript{103} Arts 26 and 47 of the Vienna Convention on the Law of Treaties.
United Nations in a flexible manner. But this is largely a reflection of the state of international human rights development at the time of the Charter’s adoption. The UN Charter, which was meant to govern in the wake of the development of stronger international legal regimes, including human rights, must be interpreted with an evolving human rights referent in mind. Support for this idea can be found in both the practice and scholarship that interpret Charter concepts in the light of modern human rights law, most of which was actually sponsored by the United Nations. It is the Security Council which has Kompetenz-Kompetenz in the matter of compliance: there should be no possibility of assessment as to whether its sanctions violate human rights, since either a United Nations norm, or a norm of general international law, would be overruled by a legal body. The Security Council under Chapter VII is not meant to be fettered by law.

III. New Approaches to Economic Sanctions

1. Legal Framework

After determining the prerequisites of Article 39 of the UN Charter, the Security Council can make recommendations or decide what measures...

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104 R. Wolfrum, “Article 1”, in: Simma, see note 65, 40.
105 De Wet, see note 5, 284; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), see note 91, 57, para. 131: “One could argue that the Security Council is, in principle, bound to respect all human rights contained in the Universal Bill of Human Rights. This includes the United Nations Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights ... and the International Covenant on Economic Social and Cultural Rights. Although the UN is not a party to these Treaties by means of ratification, they represent the elaboration upon the Charter’s original vision of human rights found in its purposes (Art. 1(3) and Arts. 55 and 56.)”, ICJ Report 1982, 3 et seq. (42 et seq., para. 91), in the case concerning United States Diplomatic and Consular Staff in Teheran, the Court also held that “to deprive human beings of freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.” Racial discrimination is “a flagrant violation of the purposes and principles of the Charter.”
106 Reinsch, see note 93, 865 and references therein.
are to be taken in order to maintain or restore international peace and security.\textsuperscript{107} The power of the Security Council to impose sanctions is based on Article 41 of the Charter. It must be stressed, however, that Article 41 of the Charter empowers the Security Council to adopt measures not involving the use of force. Sanctions are the Security Council’s main instrument for maintaining international peace and security. The sanctions list of Article 41 is not a closed list, on the contrary, it is open to possible further action provided it does not involve the use of force. Any individual measure can be resorted to alternatively and/or cumulatively.\textsuperscript{108} What has to be certain is that any authorised action is necessary in itself.\textsuperscript{109}

Sanctions aim to modify the behaviour of the target state, party, individual or entity threatening international peace and security, and not to punish or otherwise exact retribution. For this reason all sanctions regimes should be commensurate with these objectives. Measures not involving the use of armed force can vary considerably, but basically one can distinguish between a general trade embargo against one or more states, an economic embargo directed against a particular entity, and a range of lesser “targeted” measures. Economic embargoes are traditional and customary measures in the Council’s practice, as in the case of Somalia,\textsuperscript{110} Sierra Leone,\textsuperscript{111} Liberia,\textsuperscript{112} the Democratic Republic of the Congo (DRC),\textsuperscript{113} Eritrea and Ethiopia,\textsuperscript{114} Iraq,\textsuperscript{115} Afghanistan,\textsuperscript{116} Libya\textsuperscript{117} or North Korea.\textsuperscript{118}

\textsuperscript{108} Gill, see note 1, 48.
\textsuperscript{109} Froexin, see note 13, 621.
\textsuperscript{115} Notwithstanding the general embargo against Iraq, the oil for food program allowed some transaction under specific international supervision and control. It was finished with the S/RES/1472 (2003) of 28 March 2003.
\textsuperscript{116} S/RES/1267 (1999) of 15 October 1999 op. para. 4 a): “deny permission for any aircraft to take off from or land in their territory if it is owned, leased or operated by or on behalf of the Taliban”. This prohibition was in force
But in most of these cases sanctions have unintentionally contributed to the emergence of black markets, creating huge profit-making opportunities for ruling elites and their collaborators.\textsuperscript{119} Worst of all, economic sanctions tend to hit the wrong targets; instead of the regime, the population at large and particularly the weakest in society become the true victims. Faced with these situations scholars have condemned economic sanctions as being inhumane and destructive diplomatic measures that jeopardise human rights in target countries.\textsuperscript{120} Such criticism is based on the negative effects of economic sanctions on the population at large in countries targeted by sanctions.\textsuperscript{121} Thus, such criticism concerning the effects of economic sanctions is no longer limited to NGOs and humanitarian organisations. The UN Human Rights Commission through its various Sub-commissions had also voiced concern about the adverse consequences of economic sanctions on the enjoyment of human rights.\textsuperscript{122} The General Assembly itself took the lead until S/RES/1388 (2002) of 15 January 2002 and S/RES/1390 (2002) of 16 January 2002.

\textsuperscript{119} 2005 World Summit Outcome, see note 9, para. 50.
in passing resolutions questioning unilateral economic sanctions and in particular their extraterritorial effects. Meanwhile, however, various UN bodies have become rather outspoken in criticizing multilateral sanctions imposed by the Security Council. Already in 2000 the Sub-Commission on the Promotion and Protection of Human Rights recommended to the Security Council that, “as a first step, it alleviates sanctions regimes so as to eliminate their impact on the civilian population by permitting the import of civilian goods, in particular to ensure access to food and medical and pharmaceutical supplies and other products vital to the health of the population in all cases.”

For this reason, since the late 1990s, the Security Council has increasingly preferred targeted sanctions in the form of blacklisting of individuals and private entities and the freezing of their assets instead of general trade embargoes as means of maintaining international peace and security. These new sanctions should be carefully targeted in support of clear and legitimate objectives under the Charter and be implemented in ways that balance effectiveness to achieve the desired results against possible adverse consequences, including socio-economic and humanitarian consequences, for populations and third states.

This new approach of targeted sanctions is a result of several factors. Three international initiatives have been undertaken to develop political approaches for the targeting of sanctions, with the goal of increasing effectiveness. The United Nations itself promoted a general review of

\[ \text{Footnotes:} \]


125 The first of these, the Interlaken Process, was initiated by the Swiss Government in 1998 and focused on targeted financial sanctions. Consultations during the Process identified the role of humanitarian exemptions in designing targeted financial sanctions and briefly mentioned the role of hu-
collective sanctions and the functioning of the Sanction Committees, encouraged by some academic institutions and academic opinions. Consequently, the Security Council and the General Assembly adopted the Best Practices and Guidelines for all kinds of sanctions, as discussed in the 2005 World Summit as a guide to the elaboration and implementation of sanctions regimes, notwithstanding its ongoing improvement.


2. The New Merits of Targeted Sanctions

There is no generally accepted definition of “targeted” sanctions. Targeted sanctions are also sometimes referred to as “smart sanctions”, or “designer sanctions”.130 Nevertheless there is a common consensus that any “targeted” or “smart” sanction should be implemented and monitored effectively with clear benchmarks and should, as appropriate, have an expiration date or be periodically reviewed with a view to lifting or to adjusting it, taking into account the humanitarian situation and depending mainly on the fulfilment by the target state as well as other parties. Sanctions should remain in place for as limited a period as necessary to achieve their objectives and be lifted once their objectives have been achieved.131 Taking into account all these elements, it is reasonable to believe that target or smart sanctions are another attempt to minimise humanitarian costs.132

While typically states are sanctioned, non-state entities and individuals have recently also become targets. With regard to individuals and entities, sanctions regimes should ensure that the decision to list such individuals and entities is based on fair and clear procedures, including, as appropriate, a detailed statement of the case provided by Member States, and that regular reviews of names on the list are conducted; they should also ensure, to the highest possible degree, maximum specificity in identifying individuals and entities to be targeted; and also that fair and clear procedures for de-listing exist. Listed individuals and entities should be notified of the decision and of as much detail as possible in the publicly releasable portion of the statement of the case. There should be an appropriate mechanism for handling individuals’ or entities’ requests for de-listing.

Smart sanctions are usually assumed to include the following measures: the freezing of financial assets; the suspension of credits and aid; the denial and limitation of access to foreign financial markets; trade embargoes on arms and luxury goods; flight bans and a ban on international travel, visas and educational opportunities. But not all Security Council sanctions regimes involve targeting named individuals. When sanctions are targeted on individuals, this is primarily done by means of a “blacklist”. For example, one only need to recall Resolution 1267 (1999) of 15 October 1999 and its monitoring mechanism Committee 1267. Generally the Security Council delegates the task of drawing up a list of blacklisted persons to a sanctions committee.

As compared to general sanctions, targeted sanctions limit the collateral damage on the civilian population, and they are intended as a more effective means of coercion to change undesirable behaviour. Significantly, targeted sanctions are also much less costly to impose in terms of politics and economy. Targeted sanctions thus offer the tempting possibility of being seen to be doing something without incurring the costs associated with traditional sanctions, not to mention the use of force. Targeted sanctions further provide the Security Council with the means to act in situations that would otherwise have been beyond its reach, such as international terrorism by non-state entities. It is also relevant whether one assesses the effectiveness of a sanctions regime solely on the basis of its immediate coercive impact, or whether one takes its long-term impact into account. Ultimately, the purpose of invoking economic enforcement measures is to maintain international peace. This suggests that in assessing the effectiveness of sanctions ex ante, the Council should consider their long-term effects in addition to their immediate coercive impact. Given their complex and often partially or wholly unforeseeable side effects, sanctions can seriously undermine the maintenance of international peace. Thus, viewed from a long-term perspective, humanitarian safeguards protecting against se-


vere, adverse side effects can actually increase the effectiveness of a sanctions regime in promoting international peace. Carefully targeted sanctions, it is argued, can also reduce the harm done to third-party states, thus removing incentives to defy the sanctions, as has recently occurred in Africa, with many countries ignoring the travel ban against the Libyan Arab Jamahiriya. Use of the six-prong test to ensure proper targeting, clearly defined goals, a definitive exit clause, and regional unanimity, could make sanctions regimes effective while not harming the civilian population. It is up to the international community to demand that the Security Council introduces such changes.

3. Targeted Sanctions in Current Practice

Keeping in mind all these reasonable key elements of targeted sanctions, most commentators welcome the new practice of the Security Council, although such targeted sanctions do not avoid all possible collateral damage. Despite the criticism of economic sanctions by scholars and lawyers, others have argued that these same sanctions have strengthened international human rights law by fostering the growth of international human rights norms.136

Targeted sanctions offer the Security Council practical opportunities for acting in situations it considers as detrimental to peace and security.137 But in some cases, targeted sanctions also have had some direct and unexpected or indirect adverse effects on the humanitarian conditions of a civilian population, and a serious negative impact on the development capacity and activity of the targeted countries. For this reason, it is worth noting that the Security Council undertakes to consider, as appropriate when imposing measures under Article 41 of the Charter, the economic and social impact of sanctions on individuals with a view to provide appropriate humanitarian exemptions that take account


of their specific needs and their vulnerability, and to minimise any negative impact.\footnote{L. Minear et al., \textit{Towards More Humane and Effective Sanctions Management: Enhancing the Capacity of the United Nations System}, 1998.}

UN targeted sanctions are not an exclusively terrorism-related phenomenon. It is, however, in the context of counter-terrorism that they have become most clear-cut and have attracted the most attention in the last few years. By the above mentioned Resolution 1267 (1999) of 15 October 1999, the Security Council imposed targeted sanctions on individuals, groups, undertakings or entities associated with Al-Qaida or the Taliban, or those controlled by their associates. These individuals and entities, included on the consolidated list of the 1267 Committee, are subject to financial and travel sanctions as well as to an arms embargo. However, apart from the fight against terrorism, the Council has not hesitated to impose arms embargoes, travel restrictions and the freezing of funds and other financial resources against individuals, rebel armed groups and other entities, for example, in situations such as the DRC, Sierra Leone, Somalia, Liberia, Sudan, Côte d’Ivoire, and Iraq-Kuwait.\footnote{The Security Council Committee was established pursuant to Resolution S/RES/1518 (2003) of 24 November 2003 as the successor body to the Security Council Committee established pursuant to Resolution S/RES/661 (1992) of 6 August 1990 concerning Iraq and Kuwait.} The different scope of these examples will briefly be analysed.

freeze\(^{(142)}\) and broadened the criteria under which individuals and entities could be designated as subject of those measures. Such criteria are, a.: persons and entities acting in violation of the arms embargo; b.: political and military leaders of foreign armed groups operating in the DRC, or Congolese militias receiving support from abroad, which impede the process of disarmament, demobilisation, repatriation, resettlement, and reintegration; c.: political and military leaders recruiting or using child-soldiers, and individuals violating international law involving the targeting of children; d.: individuals operating in the DRC and committing serious violations of international law involving the targeting of children or women in situations of armed conflict, including killing and maiming, sexual violence, abduction and forced displacement; e.: individuals obstructing the access to or the distribution of humanitarian assistance in the eastern part of the DRC; and f.: individuals or entities supporting the illegal armed groups in the eastern part of the DRC through the illicit trade of natural resources. The consolidated travel ban and assets freeze list is maintained and regularly updated by the relevant Sanctions Committee.\(^{(143)}\) The 1533 Committee was established to oversee the relevant sanctions measures\(^{(144)}\) and to undertake the tasks set out by the Security Council in op. para. 15 of Resolution 1807 (2008) of 31 March 2008, op. para. 6 of Resolution 1857 (2008) of 22 December 2008 and op. para. 4 of Resolution 1896 (2009) of 30 November 2009. The Sanctions Committee is supported by a Group of Experts.\(^{(145)}\) Its mandate was further expanded to include the task of producing recommendations to the Committee for the exercise of due


diligence by importers, processing industries and consumers regarding the purchase, sourcing, acquisition and processing of mineral products from the DRC.\textsuperscript{146} However, pursuant to op. para. 5 of Resolution 1807 all states are under an obligation to notify the Committee in advance regarding any shipment of arms and related materiel for the DRC, or any provision of assistance, advice or training related to military activities in the DRC, except those referred to in subparas (a) and (b) of op. para. 3 of the resolution, and are encouraged to include in such notifications all relevant information, including, where appropriate, the end-user, the proposed date of delivery and the itinerary of shipments.

Concerning the situation in Sierra Leone, the Council established the 1132 Committee\textsuperscript{147} in order to undertake tasks related to travel restrictions and petroleum and arms embargoes.\textsuperscript{148} Among its tasks, the 1132 Committee adopted and maintained a regularly updated list of leading members of the former Military Junta in Sierra Leone (Armed Forces Revolutionary Council – AFRC) whose entry into or transit through other states was to be prevented in accordance with op. para. 5 of Security Council Resolution 1132 (1997). That travel ban was subsequently re-imposed and expanded to also include leading members of the Revolutionary United Front (RUF).\textsuperscript{149}

In the case of Somalia, by its Resolution 1844 (2008) of 20 November 2008, the Security Council decided to impose individual targeted sanctions, i.e. on financial assistance, for individuals and entities; a travel ban on individuals;\textsuperscript{150} and an assets freeze on individuals and entities,\textsuperscript{151} as designated by the Committee established pursuant to Resolution 751 (1992) of 24 April 1992. Among other issues the Committee is competent\textsuperscript{152} “to amend these guidelines to facilitate the implementa-

\textsuperscript{147} S/RES/1132 (1997) of 8 October 1997, op. para. 10.
\textsuperscript{148} Ibid. op. paras 5-6. These sanctions were subsequently terminated and replaced by the arms embargo and travel restrictions contained in op. paras 2 and 5 of Resolution S/RES/1171 (1998) of 5 June 1998.
\textsuperscript{151} Ibid., op. para. 4. All states shall freeze without delay funds, other financial assets and economic resources owned or controlled by individuals and entities designated by the Committee.
tion of the measures imposed by Resolution 1844 and keep these guidelines under active review as may be necessary”, “to consider and decide upon requests for exemptions from the General Arms Embargo, which are set out in paragraph 3 of Resolution 1356 (2001), in paragraphs 6 (b) and 7 of Resolution 1744 (2007) and reiterated in paragraphs 11 (b) and 12 of Resolution 1772 (2007) (the “General Arms Embargo Exemptions”), as well as by paragraph 12 of Resolution 1846 (2008)” and “to designate individuals and entities on the basis of the additional criteria as they may be developed by the Security Council, and to consider listing submissions, de-listing requests and proposed updates to the existing information.”

The Security Council Committee pursuant to Resolution 1521 concerning Liberia was established on 22 December 2003 to oversee the relevant sanctions measures and to undertake the tasks set out by the Security Council in op. para. 21 of the same resolution. Resolution 1521 (2003) imposed an embargo, a travel ban against Charles Taylor and his family, close associates and all officials of the regime and decided that all states shall freeze without delay funds, other financial assets and economic resources owned or controlled directly or indirectly by Charles Taylor, Jewell Howard Taylor, and Charles Taylor Jr. and/or those other individuals designated by the Committee for inclusion on the Assets Freeze List on the basis of the criteria set out in op. para. 1 of Resolution 1532 (2004). The 1521 Committee published its guidelines for the conduct of its work, including the listing and de-listing procedures as well as some criteria for exemptions in case of necessity according to op. para. 4 of Resolution 1521 (2003).

The Security Council Committee pursuant to Resolution 1591 concerning the Sudan was established on 29 March 2005 to oversee the relevant sanctions measures and to undertake the tasks set out by the Security Council in sub-para. 3 (a) of the same resolution. On 30 July 2004 with the adoption of Resolution 1556, the Security Council first

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imposed an arms embargo on all non-governmental entities and individuals, including the Janjaweed, operating in the states of North Darfur, South Darfur, and West Darfur. The sanctions regime was modified and strengthened with the adoption of Resolution 1591 (2005) which expanded the scope of the arms embargo and imposed additional measures including a travel ban and an assets freeze on individuals designated by the Committee.155 These sanctions target those who impede the peace process, constitute a threat to stability in Darfur and the region, violate international humanitarian or human rights law, conduct offensive military over-flights in Darfur, and/or violate the arms embargo.

The Security Council Committee pursuant to Resolution 1572 (2004) concerning Côte d’Ivoire was established on 15 November 2004 to oversee the relevant sanctions measures and to undertake the tasks set out by the Security Council in op. para. 14 of the same resolution. Until 31 October 2010, all states shall take the necessary measures to prevent the entry into or transit through their territories of individuals designated by the Committee for inclusion on its consolidated travel ban and assets freeze list on the basis of the criteria summarised in op. para. 12 of Resolution 1727 (2006) of 15 December 2006. In similar temporal terms, all states shall freeze without delay funds, other financial assets and economic resources owned or controlled by individuals and entities designated by the Committee for inclusion on its consolidated travel ban and assets freeze list on the basis of the criteria summarised in op. para. 12 of Resolution 1727 (2006). The consolidated travel ban and assets freeze list is maintained and regularly updated by the 1572 Committee. Exemptions from these measures can be requested from the Committee pursuant to op. paras 12 and 14 of Resolution 1572 (2004). The procedure to request such exemptions, as well as listing and de-listing procedures can be found in the Committee’s guidelines for the conduct of its work. Moreover, given the deterioration of the situation in Côte d’Ivoire, the Council emphasised that it is fully prepared to impose targeted measures against persons, to be designated by the Committee, who are determined to be a threat to the peace and national reconciliation process in that state; who are responsible for attacking or obstructing the actions of the UN forces in Côte d’Ivoire, the Special Representative of the Secretary-General, the Facilitator or his Special Representative in Côte d’Ivoire; those who are obstacles to the freedom of movement of the UN forces and the French forces; as

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well as for serious violations of human rights and international humanitarian law, for inciting public hatred and violating the arms embargo.\textsuperscript{156}

The Security Council Committee pursuant to Resolution 1518 (2003) was established on 24 November 2003 as the successor to the Security Council Committee established pursuant to Resolution 661 (1990) of 6 August 1990 concerning \textit{Iraq and Kuwait}. The 1518 Committee was established to continue to identify senior officials of the former Iraqi regime and their immediate family members, including entities owned or controlled by them or by persons acting on their behalf, who are subject to the measures imposed by op. para. 23 of Resolution 1483 (2003) of 22 May 1983, i.e. an arms embargo and an assets freeze and transfer. As in other cases, to facilitate the work of the Committee and the Member States in implementing the assets freeze and transfer measures imposed by op. para. 23 of Resolution 1483 (2003), the Committee has published the guidelines of its operations, describing how the lists of individuals and entities are assembled and disseminated, and the delisting-guidelines describing how individuals and entities included on the lists can seek the removal of their names.

In all named cases, and generally speaking, the Council facilitates the work of the specific Committee and the Member States in implementing the assets freeze and transfer measures imposed by its resolutions, adopting procedural guidelines in each case.\textsuperscript{157} In all these Sanctions Committees, the level of comprehensiveness of published guidelines and procedures vary.

For example, the DRC Committee does not have public guidelines or procedures – beyond information on relevant resolutions – for the application and administration of the 1533 List. In contrast, the guidelines for the working of the 1518 Committee for Iraq and the 1132 Committee for Sierra Leone are public and are reviewed regularly. Currently, the 1591 Sudan Committee has listed guidelines under active consideration. The Sudan Committee oversees travel and financial sanctions, although no individuals or entities had been listed as of March 2006; but in its latest update of August 2007, there were already four


persons registered. Although the criteria for listing obviously vary depending on the situation, virtually all the committees require a broad description and justification for each listing.

What this means in practice varies considerably across the committees and within them. For example, the 1267 Committee statements tend to be one and a half pages long, while the Liberia Committee delivers two or three paragraphs. The DRC Committee has an explanatory column for proposed designations. Most criteria for listing are overly broad, i.e. “obstructing the peace process”, 158 “any economic resources owned or controlled directly or indirectly” 159 or “associated with Al-Qaida and the Taliban.” 160 Additionally, there is often little transparency concerning the sources of information cited in statements of case.

To varying degrees, the three committees with published guidelines concerning delisting requests – Al Qaida/Taliban, Liberia, and Côte d’Ivoire – all provide that petitioners submit a justification for delisting requests and offer relevant information. More specific guidance as to what constitutes an adequate justification for delisting and the degree of information required is not available, by any Committee, with the exception of the 1636 Lebanon Committee. The current procedures not only lack specific guidance from the respective committees on justifications for delisting, but they are also complicated since the criteria and concerns of the state originally proposing the listing are generally unknown. On this point the Security Council adopted new mechanisms in Resolution 1904 (2009) of 17 December 2009, in order to improve their operation and specify, throughout its sixteen pages, issues such as the assistance of a Monitoring Team and sharing of information among Member States through the INTERPOL database.

This growing use of targeted sanctions represents a significant improvement in the Security Council’s practice in order to protect individual human rights and, therefore, to attempt to reduce the negative impact of economic measures. But a closer reading is needed to identify several problems with their effective implementation. One of the most frequently cited criticisms of targeted sanctions concerns the perceived lack of an adequate process by which individuals or entities may peti-

tion for their removal from the list.\textsuperscript{161} Although the guidelines of several Sanctions Committees include procedures for removing names, these guidelines vary from committee to committee, with differing standards as to the requirements for information and criteria upon which to base delisting decisions, and the timeframe for responding to such requests. In some cases the criteria for delisting are unspecified, which means that they will be negotiated bilaterally between the committee and every state, as in the Al-Qaida/Taliban, Sierra Leone, and Iraq cases. To varying degrees, the three Sanctions Committees with published guidelines concerning delisting requests – Al Qaeda/Taliban, Liberia, and Côte d’Ivoire – all provide that petitioners submit a justification for delisting requests and offer relevant information. More specific guidance as to what constitutes an adequate justification for delisting and the degree of information required is not available, with the exception of the 1636 Committee (Lebanon).

Responding to the criticism of the de-listing procedure, in December 2006, the Security Council directed the Secretary-General to establish “a focal point” within the Secretariat to receive petitions for delisting for the first time directly from individuals or groups.\textsuperscript{162} The re-


\textsuperscript{162} S/RES/1730 (2006) of 19 December 2006. The focal point became operational on 30 March 2007. Report of the Security Council Committee Established Pursuant to Resolution 1267 Concerning Al-Qaeda and the Taliban and Associated Individuals and Entities, Doc. S/2008/25 of 17 January 2008, 3 (hereinafter Sanctions Committee Report). The Sanctions Committee amended its Guidelines to specify the procedure before “the focal point,” (Sanctions Committee Report, 2-3). To improve the effectiveness of the sanctions the Sanctions Committee’s Chairman and the Monitoring Team have been visiting states and the Committee has sought to increase contacts not only with states but also with Interpol and other international
sulting focal point procedures, however, do not allow for the individual to participate either in person or through a personal representative or legal counsel in the process of re-evaluation, nor do they require the UN or any government to provide the petitioner with any information other than the status and disposition of the delisting request. If the publicly available descriptions are any indication, the resolution of any such individual petition is still essentially a diplomatic one. Although these efforts aim to be more transparent and compatible with human rights standards – at least with European human rights standards – such a process is not always conducted with any reasonable understanding of individual rights.

Another criticism of the current delisting procedures is that even though some committees have time limits for consideration of delisting requests, since they are not subject to objection procedures, in practice, such requests can carry on indefinitely. States may either object without specifying a reason, or demand a technical delay that places the request on indefinite hold. For example, the 1267 Al Qaida/Taliban Committee uses a five day timeframe for the delisting request if there is no objection; only three days with no objections in case of the 1518 Iraq/Kuwait Committee. In the case of the Liberia Committee, the delisting request of travel bans listed individuals can take at least two days and another two days if there are no objections for the delisting in case of assets freeze. Recognizing the fact that only a few committees have some temporal criteria for the delisting request, most states undertake bilateral negotiations before submitting such a request.

A final criticism against targeted sanctions is that most of the Sanctions Committees do not foresee any mechanisms to mitigate collateral damage. These negative consequences could be eased to some degree by exemptions to cover basic needs, as appropriate, to be administered by the relevant Sanctions Committee. Although they are focused on individuals or entities, targeted sanctions can also have significant collat-

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eral effects on the families of targeted individuals, or on the employees of targeted entities, or on the users of their services. That is why Sanctions Committees have made significant progress in adopting standardised definitions of basic needs, establishing general criteria for exemptions, and recognising the need to consider extraordinary expenses on a case-by-case basis. The number of exemption requests varies from committee to committee, but the 1267 Sanctions Committee receives approximately one petition per week (including listing, delisting, and exemption requests).

Nevertheless, the Watson Institute Report confirms some variation across existing committees. UN Security Council resolutions appropriately vary, and some committees have fewer possibilities to grant exemptions for liens and judgments than others. As a result, only half of the committees surveyed exempt payments for outstanding financial obligations, such as liens or judgments from judicial proceedings. Similarly, less coordination exists in respect of guidelines specifying the information required for exemptions. Most exemptions are for basic living expenses “including payment for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges, or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services, or fees or service charges for routine holding or maintenance of frozen funds, other financial assets and economic resources.” These resolutions also allow, on a case-by-case basis, for additional exemptions for extraordinary expenses.165 Only the Al Qaida/Taliban and the Lebanon Sanctions Committee spell out the identifying information required for a financial waiver, and only the Liberia, Côte d’Ivoire, and Lebanon Sanction Committees specify the type of information needed for an exemption to the travel ban.166 It should be highlighted that the Sudan Sanctions Committee, currently has guidelines under active review. Security Council Resolution 1591 (2005) of 29 March specifies that payments of liens or judgments should be exempted from financial assets freeze. Travel exemptions specified under Resolution 1591 include religious and/or humanitarian needs, as well as travel in furtherance of regional peace and stability.


166 Watson Institute, see note 127, 31.
Nonetheless, there is a broadly based perception that current procedures are not adequately “fair and clear,” which one defines in the most general terms to include both procedural fairness (impartial application of measures, proportionality, the right to be informed and to be heard) and an effective remedy for wrongly listed parties. Therefore, some Member States have indicated an increasing reluctance to add names to the lists of individuals and entities targeted by Security Council sanctions.

IV. The Security Council and Human Rights

1. The Security Council’s Duty to Respect General Human Rights Law

In conferring primary responsibility for the maintenance of international peace and security on the Security Council, the UN Member States agreed that the Council acts on their behalf. As mentioned above Member States are bound by *jus cogens* norms and as they cannot transfer more power than they themselves are permitted to exercise, the Security Council is also bound by *jus cogens*.\(^\text{167}\) The relevance and force of *jus cogens* with respect to the Security Council is also discernible in the UN Charter. As also mentioned above according to Article 24 (2) of the Charter, the Security Council is bound to act in accordance with the purposes and principles of the United Nations. These purposes and principles are formulated broadly and, specifically, as they relate to human rights, they can be understood in light of *jus cogens* norms. As basic statements of the most fundamental human values, those human rights norms that have acquired *jus cogens* status directly influence the purposes and principles of the United Nations.\(^\text{168}\) In this context, the Security Council is, at least, bound to respect the right to life, which is not only non derogable under the ICCPR,\(^\text{169}\) but which has also ac-

\(^{167}\) Gill, see note 1, 82.

\(^{168}\) V. Gowlland-Debbas, “U.N. Sanctions and International Law: An Overview”, in: Gowlland-Debbas, see note 93, 16.

quired *jus cogens* status.\textsuperscript{170} In support of this position, a UN working paper on the criteria for imposing sanctions stipulated “decisions on sanctions must not create situations in which fundamental human rights not subject to suspension even in an emergency situation would be violated, above all the right to life, the right to freedom and the right to effective health care and medical services for all … Sanctions regimes must correspond to the provisions of international humanitarian law and international human rights norms.”\textsuperscript{171} In its recent practice, the Council directly recognises the binding force of human rights law by implementing its resolutions, for example, stating clearly that “States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.”\textsuperscript{172}

As analysed above, the Security Council undoubtedly has to act in accordance with the purposes and principles of the United Nations,\textsuperscript{173} and the promotion of respect for human rights is one of the purposes of the United Nations.\textsuperscript{174} Since they form part of the purposes of the organisation as set out in Article 1 (3) of the Charter, the Security Council’s complete disregard for them would violate the Charter. Therefore, Chapter VII measures cannot disregard the concerns embodied in basic international human rights and humanitarian law. “[H]umanitarian law and human rights norms, rather than establishing precise limits to Chapter VII powers, form guidelines in the exercise of those powers. However, it is up to the [Security Council] to strike the concrete balance between humanitarian and human rights concerns and the goal of

\begin{itemize}
\item \textsuperscript{172} S/RES/1456 (2003) of 20 January 2003, op. para. 6
\item \textsuperscript{173} Article 24 para. 2 UN Charter.
\item \textsuperscript{174} Article 1 para. 3 UN Charter.
\end{itemize}
maintaining peace ...".\textsuperscript{175} Hence, the Security Council is, as already shown above, principally bound by human rights law.\textsuperscript{176}

It should be noted, however, that with regard to the more specific individual rights spelled out in the ICCPR, the ICESCR, and the Universal Declaration of Human Rights (UDHR), the Security Council’s legal obligations are less clear,\textsuperscript{177} as the United Nations has not yet become a party to any of the human rights treaties currently in force.\textsuperscript{178} Nonetheless, numerous considerations weigh in favour of adherence to these treaties,\textsuperscript{179} although specific considerations of human rights in the overall work of the Security Council remain vague and are evidenced unsystematically.\textsuperscript{180} International human rights law itself generally recognises this balancing act, as, for example, in the emergency principle embodied in article 4 of the ICCPR.\textsuperscript{181} Taking into account that every state and the international community itself must do everything possible to protect at least the core content of human rights, it should also be recalled that the ICESCR has been ratified by three of the five permanent members of the Security Council (United Kingdom, the Russian Federation, and France) and signed by the United States and China. One could therefore argue that organs of the United Nations, including

\textsuperscript{175} J. Frowein/ N. Krisch, “Introduction to Chapter VII” in: Simma, see note 65, 711.


\textsuperscript{178} Geiss, see note 101, 178.


\textsuperscript{180} This concept is illustrated in a 1999 presidential statement, SCOR 54th Sess., Doc. S/PRST/1999/34 (1999) of 30 November 1999, Statement by the President of the Security Council, 1: “The Council emphasizes the need fully to respect and implement the principles and provisions of the Charter ... and norms of international law ... The Council also affirms the need for respect for human rights and the rule of law.”

the Security Council, have to actively stop behaviour that violates the rights protected in these treaties.\textsuperscript{182}

The ICCPR contains mainly negative rights (actions the government cannot take against you). Examples include, the right to life (article 6), the right to be free from slavery and forced labour, (article 8); the right to liberty and security, (article 9) and the right to a fair and public hearing by an impartial tribunal (article 14). Rights protected by the ICCPR are not always immediately enforceable, and state parties must “adopt such legislative or other measures as may be necessary to give effect to the rights recognized” in the Covenant according to article 2 (2). Perhaps this last criteria could be helpful for the Security Council’s resolutions. At the same time, the ICESCR, unlike the ICCPR, includes mainly positive rights (things the government must do for you). Because of the positive nature of economic, social and cultural rights, it is difficult to assess whether they have been violated. Some scholars examining the UN’s development of economic sanctions against states, for example, have criticised that the Security Council has a record of “almost complete failure to consider international law standards …”\textsuperscript{183}

Each Member State and the community as a whole, should undertake in conformity with article 2 (1) of the ICESCR to, “take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means ...”\textsuperscript{182}. And, similarly, according to article 2 (2) ICCPR, “[w]here not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” In the implementation of both Covenant obligations, States Parties are required to utilise “all appropriate means, including particularly the adoption of legislative measures.” Each State Party has a margin of appreciation in assessing which measures are most suitable to meet its specific circum-

\textsuperscript{182} Akande, see note 170, 323. M. Fraas, \textit{Sicherheitsrat der Vereinten Nationen und Internationaler Gerichtshof}, 1998, 82.

stances. The obligation of State Parties to promote progressive realisation of the relevant rights to the maximum of their available resources clearly requires governments to do much more than merely abstain from taking measures which might have a negative impact on individuals’ rights. In other terms, the obligation is to take whatever steps are necessary to ensure everyone enjoys individual rights and to reduce structural disadvantages, as soon as possible. Hence, both Covenants, impose a duty on each State Party to take positive measures.

The full meaning of the phrase in article 2 (1) “to take steps”, implies that the complete achievement of the relevant rights may be achieved progressively, and steps towards that goal must be taken within a reasonably short time after the Covenant’s entry into force for the states concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in both Covenants and mainly will involve legislation. However, the adoption of legislative measures, as specifically foreseen by the Covenant, is by no means exhaustive. Rather, the phrase “by all appropriate means” points into another direction. Among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable. The Committee on Economic, Social and Cultural Rights has noted, for example, that the enjoyment of the rights recognised, without discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies. Indeed, those State Parties which are also parties to the ICCPR are already obliged, by virtue of article 2 (1), (3) and arts 3 and 26 of that Covenant, to ensure that any person whose rights or freedoms (including the right to equality and non-discrimination) recognised in the Covenant are violated, “shall have an effective remedy” (article 2 para. 3 (a)). In addition, there are a number of other provisions in the ICESCR, including arts 3, 7 (a) (i), 8, 10 para. 3, 13 para. 2 (a), paras 3 and 4 and 15 para. 3 that can be applied directly by judicial organs. This will depend on the different national legal systems.\footnote{Doc. HRI/GEN/1/Rev. 9 (Vol. I), 27 May 2008, 16, General Comment No. 4: The right to adequate housing (Art. 11 (1) of the Covenant).}

The UN Human Rights Committee pointed out that the requirement under article 2 para. 2 ICCPR, to take steps to give effect to the Covenant rights is not further qualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to
political, social, cultural or economic considerations within the state.\footnote{185} Similarly, the Security Council is obliged to respect and to act according to the core individual human rights. As Cameron points out, the Security Council, as such, is only bound by those rights that have passed into general international law, and, conceivably, those rights that can be seen as authoritative interpretations of the human rights obligations in the UN Charter, which circumscribe the powers of the Security Council. According to Cameron, the core contents of the two Covenants are authoritative interpretations of the Charter and are in effect binding on the Security Council as such, but this is open to debate.\footnote{186}

The main issue, however, is to determine how far the Council may affect or limit human rights when acting under Chapter VII of the UN Charter under the consideration that the measures under Article 41 must be chosen by the Council in such a way as “to give effect to its decisions” and must adjust its measures in a proportionate way.\footnote{187} Only in this context it can be understood that UN sanctions contribute to and advance respect for international human rights law by defining and reinforcing international human rights norms. If the UN responds with sanctions to a violation of international human rights law, it reinforces a commitment to international norms that such behaviour is unacceptable. In addition, its actions must respect those human rights whose imposition it demands, and not diminish their effectiveness.

2. The Impact of Targeted Sanctions on Certain Human Rights

To date, the Security Council’s practice in adopting economic sanctions shows a tendency to adhere to human rights standards. With regard to the prompt and effective implementation of the measures imposed by its Resolution 1267 (1999), the Council underlines that its sanctions are


\footnote{186}{Cameron, see note 16, 167.}

not aimed at the Afghan people, but are imposed against the Taliban because of its non-compliance with its resolution, and reaffirms its decision to assess the impact, including the humanitarian implications of the measures imposed by that resolution.\(^{188}\) Therefore it encourages the 1267 Committee to report on this matter and explicitly recognises the “necessity for sanctions to contain adequate and effective exemptions to avoid adverse humanitarian consequences.”\(^{189}\) Undoubtedly, it can be assumed that the Security Council has repeatedly signalled its willingness to consider the humanitarian impact of sanctions on the civil population in general, and on vulnerable groups, including children, in particular, in a systematic and consistent manner.\(^{190}\) Like comprehensive sanctions,\(^{191}\) targeted sanctions can impinge upon several kinds of hu-


\(^{190}\) In op. para. 13 (a) of its Resolution S/RES/1343 (2001) of 7 March 2001, the Security Council requested the Secretary-General “to provide, six months from the date of the adoption of the resolution, a preliminary assessment of the potential economic, humanitarian and social impact on the Liberian population of possible follow-up action by the Security Council in the areas of investigation indicated in paragraph 19 (c) of the resolution”. S/RES/1333 (2000), op. para. 15 (d), imposing further sanctions against the Taliban, the Council decides “(…) to review the humanitarian implications of the measures imposed by this resolution and Resolution 1267 (1999), and to report back to the Council within 90 days of the adoption of this resolution with an assessment and recommendations, to report at regular intervals thereafter on any humanitarian implications and to present a comprehensive report on this issue and any recommendations no later than 30 days prior to the expiration of these measures (…)”. At the same time, in Doc. A/55/163 – S/2000/712 of 12 July 2000, Secretary-General’s report on Children and Armed Conflict, para. 27.

\(^{191}\) Comprehensive economic sanctions create obligations for states, but these requirements do not directly affect the respect for all internationally recognised human rights. Sometimes, they may mainly affect civil and political rights such as those codified in the ICCPR and certain internationally or regionally protected economic rights. It is important to note that economic sanctions potentially infringe upon multiple other human rights as well. Because of their very nature as economic enforcement measures, general economic sanctions may especially infringe upon the right to food and the fundamental right to be free from hunger under article 11 of the ICESCR; the right to the enjoyment of the highest attainable standard of physical and mental health under article 12 of the ICESCR; the right to education
man rights. When the Security Council imposes smart sanctions on individuals, it forces states to take action in a way that might infringe human rights. In recent practice the most common sanctions are general arms embargoes, targeted travel restrictions and the freezing of assets or funds and any sources of terror financing. These sanctions may affect specific individual rights and freedoms, i.e. the free movement of people, the right to property and the right to a fair trial and an effective remedy. But in this context it is worth identifying the scope of all these rights, whether they should be added to this list of non derogable rights and finally, whether these rights and freedoms could be lawfully limited under specific circumstances and procedures.

a. Travel Bans and the Freedom of Movement

In recent practice, the Security Council usually decides that states shall take the necessary measures to prevent the entry into or transit through their territories of individuals designated by each Sanctions Committee. These travel bans imposed in the cases of Al-Qaida, Sierra Leona, Liberia, the DRC, Côte d’Ivoire or Sudan interfere primarily with the freedom of movement as is guaranteed in article 12 ICCPR and article 2 of Protocol 4 to the European Convention on Human Rights (ECHR).

As is well-known, there is no universal human right that gives individuals a claim to enter any other country than that of their own nationality. Of course, the Security Council does not require states to deny their own nationals entry into their territory, although in some cases it must state so clearly. On the contrary, the individuals listed by the specific committees are required not to live in their own country

under article 13 of the ICESCR; and the right to work under article 6 of the ICESCR.

without authorisation of the respective committee,\footnote{S/RES/1132 (1997) of 8 October 1997.} because the liberty of movement and the freedom to choose a residence are rights that are granted only in the country of nationality or residence. Article 12 para. 3 ICCPR provides for exceptional circumstances in which rights under paras 1 and 2 may be restricted. This provision authorises the state to restrict these rights only to protect national security, public order (ordre public), public health or morals and the rights and freedoms of others.

In general terms, permissible restrictions must be provided by law, be necessary in a democratic society for the protection of these purposes and be consistent with all other rights recognised in the Covenant. According to the Human Rights Committee,\footnote{Doc. HRI/GEN/1/Rev. 9 (Vol. I) of 27 May 2008, 225, General Comment No. 27: article 12 (Freedom of movement) ICCPR.} the laws authorising the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution. Faced with this provision, the working guidelines of the different committees provide specific exceptions under humanitarian and religious concerns, as well as the general interest for peace and security within the region.\footnote{Exemption clauses were used in the context of the Iraq-Kuwait crisis in relation to sanctions on Iraq (e.g. S/RES/687 (1991) of 3 April 1991: exemptions to the sanctions regime could be made in cases of “essential civilian need”) and also with regard to sanctions on Yugoslavia (Serbia and Montenegro) (e.g. S/RES/757 (1992) of 30 May 1992: exemptions to the sanctions regimes could be made in cases of “essential humanitarian need”). Exemption clauses were already included in the 1960s in the sanctions regime imposed on Southern Rhodesia with respect to food and educational materials, see e.g. S/RES/253 (1968) of 29 May 1968, op. paras 3 (d) and 4.} In this context, it is worth examining how these travel ban restrictions are consistent with other human rights guaranteed in the Covenant, i.e. freedom of religion according to article 18 ICCPR as well as article 9 ECHR. These are the most common exceptions in the studied cases, such as Côte d’Ivoire,\footnote{S/RES/1572 (2004) of 15 November 2004, op. para. 10.} DRC\footnote{S/RES/1807 (2008) of 31 March 2008, op. para. 10.} and Lebanon.\footnote{S/RES/1636 (2005) of 31 October 2005, op. para. 2 (i) of the Annex.} In case of the 1267 Al-Qaida/Taliban Committee, there are two specific and possible exemptions from the travel ban.\footnote{S/RES/1822 (2008) of 30 June 2008, op. para. 1 (b).} First, that the travel ban shall not apply where entry or transit is necessary for the fulfilment of a
judicial process, and second, when the Committee determines on a case-by-case basis that entry or transit is justified. Under this last type of exemption – case by case – it is possible to apply for an exemption from the travel ban for necessary travel needs, including medical treatment abroad and the performance of religious obligations. The Committee determines, on this basis, that entry or transit is justified after a written request is submitted with all pertinent information and in accordance with procedures set out in Section 11 of the Committee guidelines.

Like any other human rights restriction, in adopting laws providing for restrictions permitted by article 12 para. 3 ICCPR, states – and in this case the Security Council through its Sanctions Committees – should always be guided by the principle that the restrictions must not impair the essence of the right (article 5 para. 1 ICCPR) and that the relation between right and restriction, between norm and exception, must not be reversed. The meaning and scope of article 12 para. 3 ICCPR, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. And in doing so, restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.

In all cases mentioned, the different Committee guidelines foresee special procedures for seeking waivers to travel restrictions, so restrictions can be neither unlimited nor indefinite. Unfortunately, these are not hypothetical examples.206 In the case of the Sierra Leone sanctions regime, the Sanctions Committee was requested to lift the travel ban on humanitarian grounds for one of the listed persons, namely Foday Sankoh, so that Sankoh, who was in the custody of the Special Court for Sierra Leone, could receive medical treatment in Accra, Ghana. Sankoh died while the Sanctions Committee deliberated for months over the request, and also asked for written assurances that Sankoh be kept in custody and that the request be accompanied by more specific information, such as details about the purpose of travel and dates of departure and return.207

206 Watson Institute, see note 127, 10.
Finally, the application of permissible restrictions under article 12 para. 3 ICCPR needs to be consistent with the other rights guaranteed in the Covenant, i.e. the right to respect the private and family life, according to article 17 of the ICCPR, which protects individuals’ privacy, family, home or correspondence, honour and reputation. However, every restriction needs to be consistent with the fundamental principles of proportionality, equality and non-discrimination.

b. Assets Freeze and the Right to Property

In all the cases studied, the Council decided that all states should freeze without delay funds, other financial assets and economic resources owned or controlled by individuals and entities designated by the respective committees. In very similar terms and conditions to the travel bans, the Committee guidelines foresee criteria and procedures to implement the measures.

Freezing funds and other sources of financing, as well as any financial sanctions have an impact on property rights e.g. article 1 of Protocol 1 to the ECHR and may affect a person’s privacy, reputation, and family rights (article 17 ICCPR, article 8 of the ECHR). Only in extreme cases could such financial sanctions conceivably violate the right to life (article 6 ICCPR and article 2 ECHR).

As already seen, permissible restrictions must be provided by law and must be consistent with all other rights recognised in the Covenants or regional human rights treaties. A legal justification must be provided especially in cases where financial funds remain frozen indefinitely. Unless those funds or other financial assets or economic resources are themselves the subject of a prior judicial, administrative or arbitral judgment. In those cases such funds shall be transferred, in the case of Iraq, to the Development Fund for Iraq.

c. The Right to a Fair Trial and an Effective Remedy

Currently, the most pressing human rights concerns regarding targeted sanctions relate to the perceived difficulty for the individual to challenge the sanctions taken against him. Hence, the central set of human rights that is affected by sanctions against individuals is the set of pro-
cedural rights. If sanctions are wrongly imposed on listed individuals without granting these individuals the possibility of being heard or of challenging the measures taken against them, there may also be a violation of the right of access to court and the right to a fair trial (article 14 ICCPR and article 6 ECHR). When the right to a fair trial is violated, the contracting state or authority must offer an effective remedy and the competent authorities should enforce such remedies when granted. Within this general appreciation, the meaning and the scope of the right to a fair trial, on the one hand, and the requirements of an effective remedy, on the other, should be emphasised.

On the one hand, some authors consider the right to a fair trial as *jus cogens* and the UN Human Rights Committee does not reject the idea that the “fundamental principles of fair trial” are similar to *jus cogens*. While reservations to particular clauses of article 14 ICCPR may be acceptable, a general reservation to the right to a fair trial would be incompatible with the object and purpose of the Covenant. Moreover, in order to resist sanctions, affected individuals must have access to a body that can review the measures in an effective way. The right to an effective remedy is included in article 2 para. 3 ICCPR and directly protected in article 13 ECHR. The wording of article 14 ICCPR and article 6 ECHR is similar in regard to the “the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.” But these provisions differ in one crucial aspect. Article 14 ICCPR states that “… 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 …” (emphasis added). Article 6 ECHR covers the right to a fair trial, “in the determination of his civil right and obligations or of any criminal charge against him, every-

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212 Doc. HRI/GEN/1/Rev. 9 (Vol. I) of 27 May 2008, 248, General comment No. 32: Right to equality before courts and tribunals and to a fair trial, Ninetieth session (2007), para. 6. While article 14 is not included in the list of non-derogable rights of article 4 para. 2 of the Covenant, states derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. The guarantees of a fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights.
one is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law” (emphasis added). Prima facie article 14 ICCPR would be only applicable where the determination of a “criminal charge” is involved, or where “rights and obligations in a suit at law” are at stake. The question is whether the listing and the imposition of sanctions such as travel restrictions and assets freeze can be qualified as either civil or criminal matters and therefore come within the realm of article 14 ICCPR and/or article 6 ECHR, or whether they are rather administrative measures or measures of a sui generis character that remain outside the scope of both provisions.

With regard to the 1267 Committee, targeted individuals are listed on the basis of their association with a terrorist organisation. This criterion for listing bears a criminal law connotation, as in the case of the Côte d’Ivoire sanctions, in which individuals can be listed on the basis of the relevant information that they are responsible for serious violations of human rights and international humanitarian law or that they publicly incite towards hatred and violence.213 But the fact that in some Committees’ guidelines there may be a criminal law connotation for the listing criteria does not mean that the economic sanctions should be characterised as criminal sanctions. However, the European Court of Human Rights (ECtHR) ruled that the concept of criminal charge bears an “autonomous meaning,” which is independent of the characterisation of a measure pursuant to national law. Moreover, the ECtHR has not given general guidelines to determine whether civil rights or obligations are involved in certain cases, but has chosen to deal with this issue on a case-by-case basis. Actually, the Human Rights Committee has not defined these two concepts in detail (criminal charge – civil rights) and therefore, the doctrine argues different positions.214

At the same time, according to article 14 ICCPR and article 6 ECHR, the right to a fair trial is not an absolute one, but may be subject to limitations in extreme cases. Such limitations are permitted by implication since the right of access, by its very nature, calls for regulation by the state. Taking into account the lack of such regulation at an international level and considering that in this respect the contracting states enjoy a certain margin of appreciation, one could conclude that the Security Council, within its prerogatives for the maintenance of international peace and security, could regulate some specific and very ex-

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214 Cameron, see note 16, 182; Watson Institute, see note 127, 14.
ceptional restrictions, in any case, or by acting under Chapter VII of the Charter could derogate it completely. On the contrary, even assuming that the application of Chapter VII of the UN Charter offers ground to declare a state of emergency, there should be at least some access to a court. Indeed, in times in which fundamental rights are increasingly restricted for the sake of security in the broadest sense of the word and due to the “war on terror”, it is extremely important that the ECtHR signals to the Security Council, the European Commission and the Member States that there are core fundamental rights that must always be respected. The right to be heard, access to justice and independent full judicial review are of such fundamental importance that they must be respected also in times of emergency. Certain limitations of fundamental rights must be accepted, but never their complete disregard. This understanding is widely accepted at the European level after the Kadi and Yusuf cases.\footnote{\textit{As analyzed in Cameron, see note 16, 193-195; G. de Búrca, “The European Court of Justice and the International Legal Order After Kadi”, \textit{Harv. Int’l L. J.} 51 (2010), 1 et seq.; M. Zgonc-Rozej, “European Court of Justice judgment on the European Community’s enforcement of UN Security Council Sanctions regulations”, \textit{AJIL} 103 (2010), 305 et seq.; L. Herik/N. Schrijver, “Eroding the Primacy of the UN System of Collective Security: the Judgment of the European Court of Justice in the Cases of Kadi and Al Barakaat”, \textit{International Organisations Law Review} 5 (2008), 329 et seq. N. Lavrano, “Judicial Review of UN Sanctions by the European Court of Justice”, \textit{Nord. J. Int’l L.} 78 (2009), 343 et seq. (357).}}

From an international as well as European perspective, the right to a fair trial sets high standards – “fair and public hearing,” “within a reasonable time”, and “by an independent tribunal established by law.” Thus, the right to a fair trial would require judicial review of the sanctions, but one can ask whether that right is applicable to the administrative procedures by which UN sanctions are imposed.

The Security Council is a political body; it does not receive complaints directly from individuals and does not have juridical functions. The ICJ is the only juridical organ at UN level, but its jurisdiction is restricted to states. The many Sanctions Committees are subsidiary bodies of the Security Council, political bodies, with no jurisdiction. Hence the requirement of an “independent tribunal established by law” is a utopia.

For example, the 1267 Committee shows this problem clearly. The original procedure for the production of the list consisted basically in...
the exchange of information between the states and the 1267 Committee on individuals or groups associated with Al-Qaida in order to include them on the list, together with any other relevant information.\textsuperscript{216} This procedure was modified in November 2006, February 2007 and December 2008, with the introduction of significant distinctions in the guidelines for the conduct of the Committee. Among the innovations one can highlight the proposal to create some type of national procedure for the better identification of suspects.\textsuperscript{217} On the subject of these “methods of identification”, each state must ensure that such methods guarantee the right to defence of the affected parties, their right to be heard by the proper authorities, and the right to be informed about the reasons why the state has proposed their inclusion on the Consolidated List. Furthermore, para. 6 h) of the most recent guidelines for the conduct of the committee reminds all states that once their petition is included on the Consolidated List, the states must notify the interested party of the situation and apply the corresponding economic sanction in each case. States present justified proposals and present proof of the links with Al-Qaida, data on the origin of the proof, whether this has been obtained by the intelligence services, police or judiciary, even if there is evidence from the subject himself or any graphic documentation.\textsuperscript{218} The request for new inclusions on the list does not require the state to have presented charges against that person.

The 1267 Committee decides behind closed doors, although the presence of a representative of the petitioning state is permitted at the meeting.\textsuperscript{219} The decision to include the suspect on the List is taken by consensus and in writing, and is sent to every committee member so that, within the time determined by its President, any possible objections may be presented; if this is not done before the deadline, the decision is ratified.\textsuperscript{220} Once inclusion on the List is accepted, notification is sent to the country or countries where the person or entity is thought to be, and, in the case of individuals, the respective country is in-

\textsuperscript{219} Guidelines 2008, see note 217, para. 12 e).
\textsuperscript{220} Ibid., para. 3 b).
formed. But the Sanctions Committee has no direct relation with the affected person or entity only inasmuch as each state can undertake, that they “take, in accordance with their domestic laws and practices, all possible measures to notify or inform in a timely manner the listed individual or entity of the designation.”

The original mechanism for the de-listing of individuals and groups from the List was based on a petition from the person in question to his state of residence, or of his citizenship. The state was entitled to ask the 1267 Committee for a revision through diplomatic channels, but the individual had to provide the appropriate reasons. The new Focal Point introduces the possibility of certain direct communication between the committee and the individual, but without mentioning the obligation to respect the right of the targeted person to be heard. The new de-listing procedure – as amended in Resolutions 1730 (2006) of 19 December 2006 and 1822 (2008) of 30 June 2008 – introduces a point by which the petitioner must justify the de-listing request and, in particular, why he no longer fulfills the criteria of being on the list. Within three months, the Focal Point only informs the petitioner of the committee’s decision to grant or refuse the petition for de-listing, but without giving him the opportunity to review the decision.

In this context, it may be understood that all claims presented to the European Court of Justice suffer from the same common defect, in that, at the time when the UN sanctions were applied to the Community regulations, the Consolidated List was directly incorporated into Annex I of the regulations, without a mechanism to guarantee the right to be heard and the right to defend oneself. Therefore, the affected

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individual's lack of information, the non-communication of the data used against him as a basis for the restrictions imposed, and the absence of a reasonable time period after the imposition of the restrictions for the registered individuals to become aware of their situation, all imply a violation of article 6 ECHR and therefore a violation of the European legal order.

Then again, with regard to the right to an effective remedy, article 2 para. 3 (a) ICCPR provides the general and positive obligation for each State Party of the Covenant “to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.” Hence, at the international level there is no direct right to an effective remedy. This provision does not have a general scope; on the contrary, it is only applicable when another right of the Covenant is involved. Moreover, article 2 para. 3 of the ICCPR foresees a remedy only if it is determined by the competent judicial, administrative, or legislative authority, which grants more room for non-judicial remedies. With very similar wording, article 13 ECHR recognises the right to an effective remedy also applicable only when another individual guaranteed right is involved, i.e. the right to property according to Protocol 1 of the ECHR. Furthermore, as article 2 para. 3, article 13 of the ECHR does not require a judicial remedy, but speaks instead of a national authority, which appears to grant more room for non-judicial remedies.

In view of this situation and the European experience of claims against the listing procedure and the consequent sanctions, the Security Council cannot and should not turn a blind eye and continue to allow a dramatic impact of its sanctions on the rights recognised in international law. The very different listing and delisting mechanisms set up by the Security Council for the effective implementation of its smart sanctions do not seem to be totally in line with international human rights standards, i.e. with the right to be heard and the right to a fair trial. Therefore, the Security Council has modified the Committee’s guidelines several times. And recently, Resolution 1904 (2009) of 17 December 2009 set up the new Office of the Ombudsperson, and the Security Council is looking forward to an early appointment to this post as

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a step to continue enhancing due process guarantees for persons on the Consolidated List of the Security Council. This last initiative is welcomed by the UN Human Rights Council. In contrast, it is likely that the right to an effective remedy was already applicable at least at the European level with regard to the right of property. This right leaves more room for different types of remedies, provided that they are as effective as possible in the context of the situation in which they apply.

V. Conclusion

International law and the United Nations Charter are adapting de facto to the new international context, without undertaking formal reform. This process is based on an extensive, controversial, but indispensable new approach to the Security Council’s primary responsibility for the maintenance of international peace and security. The Security Council plays a significant role in the international legal system. It does so, not so much as an original source of law, but as an organ in charge of implementing the law, and more precisely the Charter of the United Nations. Although the Security Council does not have the power to create law, it does have the power to create rights and obligations for the Member States of the United Nations. Therefore, the Security Council has made wide use of its powers. It acts on the basis of the Charter that it interprets and implements. The Security Council has adopted truly innovative measures; its resolutions can therefore have a certain impact on the international legal order. Based on a hypothetical Article 41 bis of the Charter, the Council has adopted this new type of economic sanctions, which, until recently, had only been used against states. However, this new reading of the Charter permits targeted measures against individuals and entities. Consequently, these non-state actors become the subject of binding decisions that states must implement.

The Security Council interprets the Charter for its own purpose only. It does not work in an abstract or context-neutral way, but rather selects the interpretation that is most appropriate for the circumstances with which it is confronted. As Halberstam and Stein argued, there are several potential routes by which the United Nations in general, and the Security Council, in particular, might be legally bound to observe

fundamental principles of fairness in order not to implement too grave measures.

One idea is that, as the Security Council’s discretionary powers and scope of operations expand, the Council might create its own fundamental rights principles by constitutional absorption, that is, by incorporating some of the principles that underpin the legitimacy of its members (both domestically and internationally) into the governing law of the UN Charter. That avenue of fundamental rights protection, however, still remains largely speculative.

At the present time, more traditional considerations may ground the UN’s requirement to abide by internationally recognised human rights. As was argued, whether by virtue of the Charter itself, the UN international legal personality, or some version of functional succession, the United Nations Security Council is already now legally bound to observe customary international human rights law. The Security Council operates within a considerable margin of appreciation under Chapter VII, but it must, nonetheless, remain within the limits of human rights laws.\footnote{Halberstam/ Stein, see note 161, 70.} As a result of the actions carried out by non-state actors on the international level, the Council adopts new economic targeted sanctions to punish the behaviour of those non-state actors, notwithstanding the fact they may – directly or indirectly – affect some human rights. This has \textit{de facto} quasi-imperative or quasi-jurisdictional relevance.\footnote{Cameron, see note 16, 182, 191.}

In all the cases studied – the DRC, Sierra Leone, Liberia, Sudan, Côte d’Ivoire, Iraq, Al-Qaida /Taliban – the Council has established Sanctions Committees to assess the travel ban restrictions and the freezing of funds and other financial assets of targeted persons and entities registered on the Consolidated Lists. However, several improvements have been made to the listing and delisting system originally introduced in each resolution. The listing and delisting guidelines also have the consequence that the nominating state is known, which at least allows the target to institute whatever proceedings might exist in the courts of that state to challenge the decision. And the delisting consultation procedure allows the target’s state to raise the issue of mistaken blacklisting, which would hopefully encourage the designating state to at least double-check all its sources.\footnote{Ibid., 201.}
There is a very important “democratic deficit” in this new smart sanctions system, notwithstanding the improvements that have already been made. The administrative rules governing the listing and delisting procedures are not compatible with general human rights, i.e. with the right to a fair trial and an effective remedy, the right to be heard or the right to defence as recognised in several international conventions. According to article 14 ICCPR and article 6 ECHR, the right to a fair trial and an effective remedy requires some form of review mechanism to consider the listing and delisting requests. Given the extraordinary nature of the Security Council’s role in promoting international peace and security, some margin of appreciation or flexibility in interpretation as to what constitutes an effective remedy is appropriate. Thus, procedures ensuring effective remedy may be different in such circumstances involving the security of a state, or where international peace and security may be at stake, and the criteria for effective remedy may vary. To date, there is no satisfying remedy. A review mechanism under the authority of the Security Council – Monitoring Team, Ombudsperson, or Panel of Experts’ proposals – vary in their degree of independence and would not meet the criteria of ability to grant relief, unless that authority were delegated by the Security Council. The extent to which the review mechanism’s decisions are made public, however, could constitute a form of relief and only if in those cases the affected individual could bring the arguments and evidence as his defence before the court or the panel.

With its Kadi judgment, the European Court of Justice firmly rejected the Kadi/Yusuf judgments of the Court of First Instance. The Court made unambiguously clear that European Community law, in particular its basic, core fundamental right values, prevail over any international law obligations of the European Union and its Member States, including the UN Security Council Resolutions and the UN Charter. As a consequence thereof, individuals targeted by UN sanctions must have access to full judicial review in order to be able to ensure the effective protection of their fundamental rights, including procedural rights as guaranteed by the ECHR. Thus, the European Court of Justice proved that the Community is indeed based on the rule of law and that the fight against terrorism – however important it may be – cannot be used as a justification for completely abrogating European constitutional law values as guaranteed within the European Community and its Member States. Although this is doubtlessly a possible implication of the Kadi and Al Barakaat case, the European Union Court
has, pointedly, not said that the targeted UN sanctions would be incompatible with international law.\footnote{Stenhammar, see note 51, 133.}

To sum up, the implementation of UN Security Council targeted sanctions is a delicate business. If states are not wholehearted in their implementation, if the customs authorities, the export control agencies, the national inspection units, and national police are less than enthusiastic, then the sanctions are very easily undermined. Nevertheless, the UN targeted sanctions implementation demands in all cases – not least at the European level – the fullest respect for human rights. This is a new challenge for the international community, which should complete the UN collective security system in the light of new demands by the international community. Indeed, a delicate balance is required between the need for sanctions in order to maintain international peace and security, on the one hand, and the rule of law and human rights standards in all cases, on the other. In short, the re-adaptation of the international order to the new international realities and demands is \textit{in fieri}, it is still being carried out, it is precarious, and for the moment, only a partial re-adaptation has been achieved. However, it lacks – at the present time – effective means for the protection of the respective individuals, at least from the perspective of the standards of protection in Europe.
The Case of Ángela Poma Poma v. Peru before the Human Rights Committee

The Concept of Free Prior and Informed Consent and the Application of the International Covenant on Civil and Political Rights to the Protection and Promotion of Indigenous Peoples’ Rights

Katja Göcke

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I. Introduction

On 27 March 2009 the Human Rights Committee decided the case of Angela Poma Poma v. Peru.¹ The case concerned a dispute over the exploitation of natural resources, more precisely the allocation of water. Due to the building of wells, water had been diverted from the Peruvian highlands to a coastal city as a result of which the indigenous Aymara people traditionally living in the highlands had been deprived of their access to underground springs. Since this water was essential for their traditional activity of grazing and raising llamas and alpacas – an activity on which their whole livelihood depended – the lack of water seriously affected their only means of subsistence.

Ultimately, the Human Rights Committee decided in favour of the complainant, Ms. Poma Poma, who is a member of the affected Aymara people. Yet the outcome of the case and the reasoning of the Human Rights Committee are not only of relevance to the state of Peru and the individuals directly affected by the diversion of water. The Committee’s decision is also of immense importance to indigenous peoples worldwide and to all states having an indigenous population since it will most likely set the course for future decisions by the Human Rights Committee. On the one hand, the outcome of the complaint procedure seems to be advantageous for indigenous peoples since the Human Rights Committee – for the first time ever – expressly promoted and thus strengthened the principle of free, prior and informed consent in cases where indigenous peoples are affected by resource exploitation. Yet on the other hand, the Human Rights Committee adhered to its classification of indigenous peoples as “minorities” pursuant to article 27 of the International Covenant on Civil and Political Rights² (ICCPR) instead of treating them as “peoples” pursuant to article 1 ICCPR, thus making indigenous peoples suffer a setback in their long-standing struggle for the protection and promotion of their right to self-determination.

Hence, at first glance, the outcome of the decision seems ambivalent. Though the Human Rights Committee ultimately decided in favour of the complainant and endorsed the concept of free, prior and informed consent, the case failed, at the same time, to set a precedent regarding

the international recognition of indigenous peoples as peoples – a main objective of indigenous peoples worldwide. Therefore, in order to be able to assess the implications of the decision of Ángela Poma Poma v. Peru, and whether its outcome will ultimately promote or harm the indigenous peoples’ struggle for the protection and promotion of their rights, the decision needs to be analysed in detail.

To this end, this article is structured as follows: first, the work of the Human Rights Committee will briefly be analysed (Part II.). Then the factual background of the case will be described in so far as it is necessary for understanding the issues dealt with in this article, and the decision of the Human Rights Committee will be presented in detail (Part III.). In a next step, the decision and its relevance for the protection and promotion of indigenous peoples’ rights will be evaluated (Part IV.). Finally, a conclusion will be offered (Part V.).

II. The Human Rights Committee

The Human Rights Committee as a United Nations treaty body is responsible for the supervision of the Member States’ compliance with their obligations laid down in the ICCPR. The Human Rights Committee consists of 18 experts, who are nominated by the Member States but do not represent them. During its four-week sessions taking place three times a year, the Human Rights Committee considers the reports submitted by the Member States on their compliance with the ICCPR. Yet, the Human Rights Committee also acts as a quasi-judicial organ. Besides receiving and reviewing periodical state reports, the Human Rights Committee is also mandated to receive and consider communications filed by individuals if the respective State Party has ratified the First Optional Protocol to the ICCPR (Optional Protocol I).

3 Currently 165 states are members to the ICCPR. The relevant list is available at: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en>.
4 See arts 28–29 and 38 ICCPR.
6 Adopted 16 December 1966, entered into force 23 March 1976, UNTS Vol. 999 No. 302. The First Optional Protocol to the ICCPR currently has 113
However, since the Human Rights Committee is not an international court, its decisions are not binding but merely constitute recommendations. These recommendations can nevertheless develop a great persuasive power and put the respective state under pressure by the international community to comply with the recommendations of the Human Rights Committee. Furthermore, decisions of the Human Rights Committee can provide guidance for the decision of future national and international cases with a similar factual background; hence they can contribute to the development of customary international law.

In addition to reviewing state reports and giving recommendations on communications filed by individuals, the Human Rights Committee has also elaborated and issued several so-called General Comments specifying the individual rights and states’ obligations under the ICCPR in respect of the implementation of the convention. These General Comments define the Human Right Committee’s position and provide guidance for States Parties on their obligations under the ICCPR. Although the General Comments are not binding, neither for the Human Rights Committee itself nor for the States Parties, they are of high practical relevance and can be used as an additional means to clarify the contents of the obligations of states under public international law.

III. The Case of Ángela Poma Poma v. Peru

1. Factual Background of the Case

The communication in the case Ángela Poma Poma v. Peru was filed in December 2004 by Ms. Ángela Poma Poma via her counsel, Mr. Tomás Alarcón. Ms. Poma Poma is a Peruvian citizen and member of the Aymara, an indigenous people which has been living in the Andes and Altiplano regions of South America for over 2,000 years. An important aspect of their culture has always been the breeding and herding of alpacas and llamas in the Andean highlands.

Ms. Poma Poma and her children are owners of an alpaca farm covering 350 hectares of pastoral land, which is situated on the Andean Altiplano, an area of inland drainage in south-eastern Peru between the western and the eastern ranges (Cordillera Occidental and Oriental) at

4,000 meters above sea level. The Andean Altiplano has always been supplied with water by underground springs thus creating the highland wetlands. Part of Ms. Poma Poma’s farmland is constituted by such a wetland area. Ms. Poma Poma’s family and ancestors have been using the area for raising and herding llamas and alpacas for thousands of years in accordance with the traditional customs of the Aymara people. To this day, this activity is their only means of subsistence. Besides Ms. Poma Poma and her family, eight more families of Aymara descent live in the respective wetland area.

During the 1950s, the government of Peru diverted the course of the river Uchusuma, which had originally run through the respective wetlands, thus depriving Ms. Poma Poma’s farm of access to surface water that sustained the grasslands. However, the wetlands continued to receive groundwater from an area upstream of the farm.

Yet during the 1970s, the Peruvian government drilled wells (the so-called “Ayro Wells”) in the area supplying the wetlands with underground water, thus significantly reducing the water supply to the pasture lands. Ever since then, water has been diverted from the Andes to the Pacific coast to provide water to the coastal city of Tacna. This has caused the slow but gradual drying out of the wetlands.

In the early 1990s, the government approved a new project – the Special Tacna Project – under the supervision of the National Institute for Development. This project envisaged the immediate construction of 12 new wells in the Ayro region and an additional 50 wells in the near future. The 12 wells were drilled without prior consultation of the Aymara people and without an investigation of the impact this project would have on the environment. Ultimately, the operation of the wells led to an acceleration of the degradation of the Aymaras’ pastoral lands and caused the death of large quantities of livestock.

In response to protests of the affected Aymara people, six of the 12 new wells were shut down including well No. 6 which was supposed to be particularly harmful to the water supply of the Aymaras’ pastoral lands but was later unilaterally re-opened by the public company in charge of the project (EPS Tacna). The subsequent criminal complaints filed by Ms. Poma Poma against the manager of EPS Tacna for an environmental offence, unlawful appropriation and damages were dismissed on procedural grounds. Ms. Poma Poma’s complaints to the National Development Institute and to the Commission on Andean, Amazon and Afro-Peruvian Communities also remained unsuccessful: both institutions refrained from taking any action.
Ms. Poma Poma therefore alleged that her rights had been violated by the state of Peru. She *inter alia* referred to the rights laid down in arts 1 (2) – the right of a people to freely dispose of its natural wealth and resources – and 17 ICCPR – the right to family life.

She argued that article 1 (2) ICCPR had been violated by the Peruvian state since the diversion of groundwater had destroyed the ecosystem of the Altiplano and led to the degradation of pastoral lands and the death of large quantities of livestock, thus depriving the Aymara people of their only means of subsistence. Ms. Poma Poma also alleged that the Peruvian government had unlawfully interfered with the life and activities of her family, thus violating 17 ICCPR. Her family's life consisted of their customs, social relations and culture, including the grazing and caring for animals according to their traditional customs. This way of family life had been affected by the lack of water.

The government of Peru, however, responded that the drilling and subsequent operation of the wells had been necessary to meet the domestic and agricultural water needs of the Tacna valley. It further stated that the alleged damage caused to the ecosystem had not been technically or legally substantiated.\(^8\)

### 2. Decision of the Human Rights Committee

As usual, the Human Rights Committee first decided on the admissibility of the case. With regard to article 1 (2) ICCPR, the Human Rights Committee referred to its jurisprudence in previous decisions in which it had argued that article 1 ICCPR could – as a collective right – not be subject of proceedings under Optional Protocol I since this Protocol only provided for claims of “individuals” claiming “to be victims of

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7 In addition, Ms. Poma Poma also alleged a violation of arts 2 (3) lit. a (right to an effective remedy) and 14 (1) ICCPR (equality before courts and tribunals). Whereas the Human Rights Committee found that Ms. Poma Poma had indeed been deprived of her right to an effective remedy for the violation of her rights recognised in the ICCPR and hence found a violation of article 2 (3) lit. a ICCPR, it dismissed the complaint concerning the alleged violation of the rights laid down in article 14 (1) ICCPR as being inadmissible, since this alleged violation, i.e. a discrimination on the grounds of Ms. Poma Poma’s indigenous descent, had not been sufficiently substantiated. See *Ángela Poma Poma v. Peru*, see note 1, paras 6.4 and 7.8.

8 For the factual background of this case and the parties’ observations and comments, see *Ángela Poma Poma v. Peru*, see note 1, paras 2.1-5.3.
violations of any of the rights set forth in the Covenant.” This jurisprudence was expressly upheld in this case.9 So far as Ms. Poma Poma invoked article 17 ICCPR to establish a violation of her rights stemming from the operation of the wells, the Human Rights Committee stated that the facts presented by Ms. Poma Poma were not so much a case of a violation of article 17 ICCPR but rather raised issues related to article 27 ICCPR.10 Hence, after admitting the case, the Human Rights Committee considered the merits only in respect of an alleged violation of article 27 ICCPR.

Investigating a potential violation of Ms. Poma Poma’s rights under article 27 ICCPR, the Human Rights Committee first recalled its General Comment No. 23 regarding the Rights of Minorities, which clarifies the rights under article 27 ICCPR.11 The Human Rights Committee stressed that article 27 ICCPR did not constitute a collective right but rather a particular individual right, “which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, the other rights which all persons are entitled to enjoy under the Covenant.”12 Hence article 27 ICCPR constituted a right of an individual belonging to a minority group to enjoy a particular culture within this group. Therefore, the complainant him- or herself had to be violated in his or her own right to enjoy a particular culture in order to be able to invoke a violation of article 27 ICCPR. The Human Rights Committee then further elaborated that especially in cases where the minority to which the individual belonged, was an indigenous community, the individual person’s right to enjoy his or her culture, “may consist in a way of life which is closely associated with territory and use of its resources.”13

As already stated in previous decisions, the Human Rights Committee emphasised that the rights protected under article 27 ICCPR included “the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the com-

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9 Ibid., para. 6.3 with further references.
10 Ibid.
11 Human Rights Committee, General Comment No. 23: The Rights of Minorities (Article 27), Doc. CCPR/C/21/Rev.1/Add.5 of 8 April 1994.
12 See Ángela Poma Poma v. Peru, see note 1, para. 7.2, referring to General Comment No. 23, para. 1.
13 Ibid., para. 7.2, referring to General Comment No. 23, para. 3.2.
munity to which they belong.”14 It further stated that in the present case it was undisputed that Ms. Poma Poma belonged to an ethnic minority, whose culture was essentially based on raising llamas and that Ms. Poma Poma herself was engaged in this activity.15

In a next step, the Human Rights Committee declared that article 27 ICCPR did not constitute an absolute right. On the contrary, it expressly recognised a state’s right to adopt measures in order to promote its economic development.16 However, it stated that such measures had to be proportional compared to the negative effects suffered by the minorities.17

With regard to the present case, the Human Rights Committee stated that the construction and operation of the Ayro Wells significantly impaired the complainant’s right to enjoy her culture and live according to her traditional way of life within her community. The diversion of the water had led to the degradation of 10,000 hectares of Aymara pasture land and the death of thousands of head of livestock thus ruining the complainant’s way of life and the economy of the community as a result of which the members of the community had been forced to abandon their land and their traditional economic activity.18

In a next step, the Human Rights Committee pointed out that such severe inferences in a community’s right to enjoy their own culture could only be justified in cases where the affected persons had the opportunity to effectively participate in the decision-making process prior to the execution of the measures in question. The Human Rights Committee expressly stated that such effective participation did not merely require a prior consultation but rather the “free, prior and informed consent of the members of the community.”19 In addition, a measure had to be proportional so as “not to endanger the very survival of the community and its members.”20

15 Ibid., para. 7.3.
16 Ibid., para. 7.4.
17 Ibid., para. 7.6.
18 Ibid., para. 7.5.
19 Ibid., para. 7.6.
20 Ibid., para. 7.6.
The Human Rights Committee asserted that in the present case neither the complainant nor other members of her community had been consulted prior to the drilling of the wells. Furthermore, the Peruvian state had not considered it necessary to require studies to be undertaken by an independent body in order to assess the economic impact of the wells. In addition, no measures had been adopted to minimise the negative effects of the project and to repair the harm done. Furthermore, the project had made it impossible for the complainant to continue benefitting from her traditional economic activity, thus substantially impairing her right to live according to her culture within her community. Taking all this together, the Human Rights Committee found that the state of Peru had violated Ms. Poma Poma’s rights laid down in article 27 ICCPR.\textsuperscript{21} In the light of this finding, the Human Rights Committee did not consider it necessary to deal with the alleged violation of article 17 ICCPR.\textsuperscript{22}

As a result of its findings, the Human Rights Committee requested Peru to provide the complainant with an effective remedy and reparation measures that were commensurate with the harm sustained. In addition the Human Rights Committee ordered Peru to adopt all necessary measures to avoid the occurrence of similar violations in the future and to report to the Human Rights Committee within 180 days about the measures taken to give effect to the Human Right Committee’s decision.\textsuperscript{23}

IV. Evaluation

Two points are of particular relevance in this decision and thus will be analysed in detail: first, the redefinition of the complaint by the Human Rights Committee from an alleged violation of arts 1 (2) and 17 ICCPR to a violation of article 27 ICCPR and its implication on the status of indigenous peoples, and second, the express requirement of a free, prior and informed consent of the affected indigenous community by the Human Rights Committee.

\textsuperscript{21} Ibid., para. 7.7.
\textsuperscript{22} Ibid., para. 7.9.
\textsuperscript{23} Ibid., paras 9-10.
1. Redefinition of the Complaint by the Human Rights Committee and Indigenous Peoples’ Rights in the ICCPR in General

a. Indigenous Peoples as Minorities pursuant to Article 27 ICCPR?

When Ms. Poma Poma filed the complaint she expressly referred to violations of arts 1 (2) and 17 ICCPR and did not even mention article 27 ICCPR, although there have been several previous cases in which the Human Rights Committee had based a violation of indigenous peoples’ rights on article 27 ICCPR. Ms. Poma Poma was represented by a lawyer, Mr. Tomás Alarcón, President of the Juridical Commission for Auto-Development of First Andean Peoples (CAPAJ) and an indigenous person himself, who had previously been Chairperson-Rapporteur of the Human Rights Commission’s Report on the Expert Seminar on Indigenous Peoples and the Administration of Justice. This experienced lawyer was certainly aware of previous decisions by the Human Rights Committee and the fact that article 27 ICCPR was the most likely provision on which a violation of an indigenous person’s right could be successfully based. Therefore, it can be assumed that the alleged deprivation of water was deliberately not based on article 27 ICCPR but on arts 1 (2) and 17 ICCPR. Ms. Poma Poma did not want to succeed due to the fact that she was an individual member of a minority but because her people as a whole had been collectively deprived of its right to freely dispose of its natural resources and to continue to live according to their traditional way of life.

In this context, it needs to be mentioned that most indigenous peoples do not refer to themselves as minorities, although they generally fulfil all requirements attached to a minority. The most widely acknowledged definition of “minority”, the so-called Capotorti definition, defines minorities as follows:

“A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics

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differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.”

Most indigenous peoples are in fact numerically inferior within their states, are in a non-dominant position, possess particular ethnic, religious and linguistic characteristics and want to preserve their culture and traditions. Yet, they do not want to be granted minority rights by their home states because they regard such a classification as inadequate and derogatory. Since indigenous peoples have lived on the land, which now makes up their states’ territories, for thousands of years as independent peoples, they generally still regard themselves as nations – insofar they still possess a territorial basis – or at least as holders of a right to self-determination, which allows them to resume their pre-colonial position as sovereigns within the community of states. Hence, they want to be regarded as equals with their own original rights, which have to be respected as a matter of sovereign equality, not as subordinates who are granted derivative rights.

But besides this emotional argument, there is also a very practical reason for indigenous peoples not wanting to be classified as minorities: whereas peoples have collective rights under public international law, e.g. the right to self-determination laid down in Article 1 (2) United Nations Charter and in article 1 (1) and (2) ICCPR and article 1 (1) and (2) International Covenant on Economic, Social and Cultural Rights (ICESCR), minorities do not. Whereas peoples’ rights are directly attached to the people, minority rights are attached to the members of the minority group, not to the minority itself.

The reinterpretation of Ms. Poma Poma’s communication by the Human Rights Committee has probably been made with good intentions. The Human Rights Committee wanted Ms. Poma Poma to succeed with her complaint and chose the provision, which was most likely

28 Regarding the nature of minority rights, see e.g. G. Gilbert, “Individuals, Collectivities and Rights”, in: N. Ghanem/ A. Xanthaki (eds), Minorities, Peoples and Self-Determination: Essays in Honour of Patrick Thornberry, 2005, 139 et seq.
to lead to the desired outcome. Yet, by substituting Ms. Poma Poma’s complaint with its own interpretation, the Human Rights Committee did exactly what Ms. Poma Poma and her lawyer wanted to avoid: it reduced Ms. Poma Poma’s people, the Aymara, to a minority and thus deprived the Aymara of their collective rights.

By doing this, the Human Rights Committee affirmed its view expressed in several previous cases, i.e. that an individual claimant was unable to claim a violation of the right to self-determination under article 1 ICCPR because this right was not conferred upon individuals but on peoples. Since Optional Protocol I only mandated the Human Rights Committee to receive and consider communications filed by “individuals” claiming “to be victims of violations of any of the rights set forth in the Covenant”, and since individual rights were set out conclusively in Part III ICCPR, i.e. in arts 6-27 ICCPR, an individual claim could not be based on an alleged violation of article 1 ICCPR under the procedure provided in Optional Protocol I. Therefore, since the ICCPR and its Protocols neither expressly provided a procedure enabling a group of persons to claim a violation of their collective group right, nor a procedure allowing an individual to file a claim on behalf of a group, a communication could – according to the Human Rights Committee – never be based on an alleged violation of article 1 ICCPR.

This, however, prompts the question why Mr. Alarcón, an experienced lawyer regarding indigenous peoples’ rights issues, nevertheless based Ms. Poma Poma’s complaint on article 1 ICCPR although he must have been aware of the previous decisions of the Human Rights Committee regarding the futility of basing an individual complaint on an alleged violation of article 1 (2) ICCPR. Yet, there is indeed one major difference between the previous cases in which the Human Rights Committee stated that an individual complaint could not be based on article 1 ICCPR and the present case: the adoption of the United Nations Declaration on the Rights of Indigenous Peoples by the United Nations General Assembly on 13 September 2007.

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b. The Adoption of the United Nations Declaration on the Rights of Indigenous Peoples and the International Recognition of Indigenous Peoples as “Peoples”

The United Nations Declaration on the Rights of Indigenous Peoples is a major step in the protection and promotion of indigenous peoples' rights. Although the Declaration is – as a General Assembly resolution – not legally binding, it nevertheless can be regarded as a strong and important statement due to its broad support among states, and it may contribute to the development of customary international law. One important development is the designation of indigenous groups as “peoples”. Until the adoption of the United Nations Declaration on the Rights of Indigenous Peoples, it had been highly disputed whether indigenous groups could be classified as peoples under international law and as a consequence could claim the rights attached to this term.

Yet, whereas article 1 (3) of the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169) still contained the provision that “[t]he use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law” and hence denied indigenous peoples a right to self-determination, the United Nations Declaration on the Rights of Ind-


\[34\] Article 1 (3) ILO Convention No. 169 (emphasis in the original).
The United Nations Declaration on the Rights of Indigenous Peoples is that for the first time ever collective rights of indigenous peoples – such as the right to culture,\(^38\) identity,\(^39\) and language,\(^40\) and the right to own land collectively\(^41\) – are expressly recognised in a universal instrument of international law.\(^42\) The fact that the rights of indigenous peoples cannot be protected by merely granting individual human rights to every single indigenous individual but that the recognition of collective rights is essential for the survival of indigenous peoples as distinct peoples and prerequisite for the exercise and enjoyment of the rights of indigenous individuals is also referred to in the Preamble of the United Nations Declaration on the Rights of Indigenous Peoples, which recognises and reaffirms “that indigenous individuals are entitled without discrimination to all human rights recognised in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples.”

The United Nations has constantly supported the composition and adoption of the Declaration, e.g. the World Conference on Human Rights called on the Working Group on Indigenous Populations to

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35 Adopted 26 June 1945, entered into force 24 October 1945, 145 British and Foreign State Papers 805.
36 Arts 3-4 United Nations Declaration on the Rights of Indigenous Peoples.
37 Ibid., 46 (1).
38 Ibid., arts 8, 11, 14 (3), 15 and 31.
39 Ibid., article 33.
40 Ibid., arts 3-14 and 16.
41 Ibid., arts 25-27.
42 Barelli, see note 32, 963.
complete the drafting in 1993, the World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance called upon states to approve the text of the Declaration as soon as possible, and the document adopted at the end of the 2005 World Summit, the largest gathering of world leaders in the history of the United Nations, reaffirmed the commitment of the international community “to continue making progress in the advancement of the human rights of the world’s indigenous peoples [...] and to present for adoption a final draft United Nations declaration on the rights of indigenous peoples as soon as possible.”

In addition, following the adoption of the Declaration, several United Nations institutions have reacted to this new development in international law. For example, the Committee on the Elimination of Racial Discrimination (CERD) recommended in its 2008 Concluding Observations on the United States “that the declaration be used as a guide to interpret the State party’s obligations under the Convention relating to indigenous peoples.” Not only did CERD refer to the Declaration on the Rights of Indigenous Peoples to interpret obligations under the International Convention on the Elimination of All Forms of Racial Discrimination. It also recommended that the United Nations Declaration on the Rights of Indigenous Peoples be applicable as a legally binding instrument to all United Nations Member States, even the ones which had voted against it. Likewise, the Committee on the Rights of the Child has also considered the United Nations Declaration on the Rights of Indigenous Peoples as a guide to interpret a state’s obligation under the Convention on the Rights of the Child by urging State Par-

ties “to adopt a rights-based approach to indigenous children based on the Convention and other relevant international standards, such as ILO Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples.”\(^{49}\) The Committee on Economic, Social and Cultural Rights has also taken note of the adoption of the United Nations Declaration on the Rights of Indigenous Peoples and encouraged Nicaragua in its Concluding Observations “to continue with its efforts to promote and implement the principles of the United Nations Declaration on the Rights of Indigenous Peoples.”\(^{50}\) Likewise, the High Commissioner for Human Rights has confirmed that “[t]he OHCHR’s work is to assist states and indigenous peoples in implementing the Declaration.”\(^{51}\)

c. Implications of the Adoption of the United Nations Declaration on the Rights of Indigenous Peoples for the Human Rights Committee

In contrast to other United Nations bodies and institutions, which have taken note of the adoption of the United Nations Declaration on the Rights of Indigenous Peoples and acted accordingly, the Human Rights Committee did not even mention the Declaration in its decision, and by merely redefining the complaint and basing it on article 27 ICCPR instead of article 1 (2) ICCPR, the Human Rights Committee completely ignored the recent developments in international law regarding the strengthening of indigenous peoples’ rights.

This comes as a surprise since in the past the Human Rights Committee had proven to be rather progressive in its interpretation. For example, the Human Rights Committee had declared in its General Comment No. 23 regarding the interpretation of article 27 ICCPR that the recognition and protection of certain indigenous rights was essential for the survival of indigenous peoples as peoples and requested the ICCPR Member States to act accordingly:


“[T]he Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them. [...] The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned [...]. States parties, therefore, have an obligation to ensure that the exercise of these rights is fully protected [...].”

In addition, the Human Rights Committee had acknowledged that a group of individuals claiming to be similarly affected in the exercise of their individual rights by actions or omissions of a state may collectively submit a communication about alleged breaches of these rights, and in recent years, it had also recognised in its concluding observations on state reports that indigenous peoples are indeed “peoples” within the meaning of article 1 ICCPR, hence the States Parties to the ICCPR are obliged to respect their right to self-determination and to freely dispose of their natural wealth and resources. In addition, with regard to individual communications concerning indigenous peoples’ rights, the Human Rights Committee had stated that article 1 ICCPR may be relevant in the interpretation of other rights in the ICCPR, in particular article 27 ICCPR.

Therefore, Mr. Alarcón, the counsel of Ms. Poma Poma, had probably expected the Human Rights Committee to continue its progressive approach and to use the adoption of the United Nations Declaration on

52 General Comment No. 23, see note 11, paras 7-9 (footnote omitted).
53 Lubicon Lake Band v. Canada, see note 14, para. 32.1; Apirana Mahuika et al. v. New Zealand, see note 29, para. 9.2.
55 See Apirana Mahuika et al. v. New Zealand, see note 29, para. 9.2, and J.G.A. Diergaardt v. Namibia, see note 29, para. 10.3.
the Rights of Indigenous Peoples as an opportunity to base an indigenous individual’s claim on article 1 ICCPR.

Such a step would have been in accordance with recent developments in international law regarding the rights and legal status of indigenous peoples and it would have been covered by the wording of Optional Protocol I. According to article 1 Optional Protocol I, the States Parties to Optional Protocol I recognise “the competence of the Committee to receive and consider communications from individuals […] who claim to be victims of a violation […] of any of the rights set forth in the Covenant.” And according to article 2 Optional Protocol I, individuals may submit communications to the Human Rights Committee claiming “that any of their rights enumerated in the Covenant have been violated.” Hence, according to the wording, an individual claim can be based on any right laid down in the ICCPR and not only on arts 6-27 ICCPR as stated by the Human Rights Committee. The argument that an individual complaint could not be based on article 1 ICCPR since the ICCPR and its Protocols did not provide a procedure enabling a group of persons to claim a violation of their collective group right or a procedure allowing an individual to file a claim on behalf of a group, is also not convincing since the protection of an indigenous peoples’ right is often a prerequisite for indigenous individuals to exercise their individual rights.

Yet for political reasons, the Human Rights Committee is still reluctant to take the final step and to allow the members of an indigenous people to base a communication on an alleged violation of article 1 ICCPR. In fact, the decision in the case of Ángela Poma Poma v. Peru can even be regarded as a step backwards in the protection of indigenous peoples’ rights since the Human Rights Committee did not even refer to article 1 ICCPR to interpret the content of article 27 ICCPR – as it had done in previous decisions56 – but rather saw article 27 ICCPR as a stand-alone provision. By doing this, the Human Rights Committee failed to recognise the importance the protection of collective rights has for the protection of an individual indigenous person’s right. Furthermore, by failing to even refer to article 1 ICCPR when interpreting article 27 ICCPR regarding an indigenous person’s complaint, the Human Rights Committee indirectly denied indigenous peoples the status as peoples and the right to self-determination. Instead, the Human Rights Committee expressly stated that article 27 ICCPR “establishes

56 See Apirana Mahuika et al. v. New Zealand, see note 29, para. 9.2, and J.G.A. Diergaardt v. Namibia, see note 29, para. 10.3.
and recognises a right which is conferred on individuals belonging to minority groups\(^{57}\) and that “[i]n the present case, it is undisputed that the author is a member of an ethnic minority and that raising llamas is an essential element of the culture of the Aymara community.”\(^{58}\) Hence, indigenous peoples were once again classified as being merely a minority – a particular minority indeed but still a minority and not a people.

However, although the Human Rights Committee regarded the Aymara as an ethnic minority – “a community” – and not a people, it still recognised the collective dimension of the right to access to water, e.g. it stated that “the rights protected by article 27 include the rights of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong,”\(^{59}\) and that “measures whose impact amounts to a denial of the right of the community to enjoy its own culture are incompatible with article 27.”\(^{60}\) Yet, ultimately, the Human Rights Committee insisted that an individual violation of the claimant had to be shown even if it was evident that the indigenous people as a group were collectively affected by an act or omission of a state. For example, in the case of Ángela Poma Poma, the proceedings lasted almost four and a half years because the members of the Human Rights Committee insisted on a proof that the diversion of water was of direct and individual concern to Ms. Poma Poma. The complaint could only be decided after a staff member of the Human Rights Committee had travelled to the remote area of the Aymara people, found Ms. Poma Poma and had seen for himself that Ms. Poma Poma had indeed been engaged in breeding and herding llamas and alpacas. Meanwhile, probably all the alpacas and llamas had died of thirst and the Aymara traditional way of living had been irreversibly destroyed.

Therefore, although Ms. Poma Poma finally succeeded with her complaint, the adherence of the Human Rights Committee to its previous decisions, i.e. the refusal to allow an individual communication to be based on article 1 ICCPR and the classification of an indigenous group as ethnic minority instead of people in spite of the adoption of the United Nations Declaration on the Rights of Indigenous Peoples

\(^{57}\) See Ángela Poma Poma v. Peru, see note 1, para. 7.2 referring to General Comment No. 23, para. 1.

\(^{58}\) Ibid., para. 7.3.

\(^{59}\) Ibid., para. 7.3.

\(^{60}\) Ibid., para. 7.4.
has to be regarded as a bitter disappointment for indigenous peoples in their struggle to protect their right to self-determination.

2. The Concept of Free, Prior and Informed Consent

Although the Human Rights Committee decided very conservatively regarding the judiciability of article 1 ICCPR in an individual complaint, it has proven to be open to a new development in international law regarding the protection and promotion of indigenous peoples’ rights: the concept of free, prior and informed consent. For the first time ever, the Human Rights Committee stated in its decision in Ángela Poma Poma v. Peru that “the free, prior and informed consent of the members of the community affected by ‘measures which substantially compromise or interfere with the culturally significant activities of a minority or indigenous community’” was necessary in order to make such a measure admissible. “[M]ere consultation” – on the other hand – was not regarded as being sufficient to ensure the required effective participation in the decision-making process.61

This statement stands in contrast to the Human Rights Committee’s previous decisions regarding individual complaints based on article 27 ICCPR, in which it held that consultations during the proceedings were sufficient in order to ensure an effective participation of the affected indigenous group as long as the state takes the indigenous group’s interests into consideration when deciding on the measures.62

Although the Human Rights Committee had already departed from this point of view in its 2006 Concluding Observations on Canada, in which it stressed “the obligation of the State party to seek the informed consent of indigenous peoples before adopting decisions affecting them”,63 it was not until Ángela Poma Poma v. Peru that it expressly stated for the first time that the mere attempt to gain such a consent was not enough but that the actual grant of a free, prior and informed con-

61 Ibid., para. 7.6.
sent by the affected community was necessary in all cases where measures substantially compromise or interfere with culturally significant activities. Hence the Human Rights Committee awarded indigenous groups a veto power if the measure in question had substantial negative impacts on the cultural life of the indigenous group.

Yet, it is doubtful whether the requirement of a free, prior and informed consent by an affected indigenous people in this decision can be regarded as a progressive and decisive step taken by the Human Rights Committee to protect and promote indigenous peoples’ rights. The concept of free, prior and informed consent is not a new development in international law. In fact, this concept has been applied by a number of international, regional and domestic bodies and institutions for several years. Hence, in order to be able to determine whether the decision of the Human Rights Committee in Ángela Poma Poma v. Peru can be regarded as an important step in the protection and promotion of indigenous peoples’ rights due to the recognition of a state’s obligation to obtain an affected indigenous peoples’ free, prior and informed consent, the application, content and extent of this concept by these other bodies and institutions needs to be analysed and compared to the Human Rights Committee’s approach.

a. The Development of the Concept of Free, Prior and Informed Consent on the International, Regional and State Level

aa. The International Level

When addressing the rights of indigenous peoples under international law, the first reference is generally the ILO Convention No. 169 of 1989. Besides ILO Convention No. 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, ILO Convention No. 169 remains the only international binding instrument exclusively dealing with the rights of indigenous peoples. Yet ILO Convention No. 107 is nowadays regarded as outdated due to its assimilative approach and is no longer referred to. Although it remains binding on those 17 states which have ratified it, it had been declared closed for ratification after the adop-

65 The relevant list is available at: <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C107>.
tion of ILO Convention No. 169. Yet when looking at ILO Convention No. 169, which was meant to replace ILO Convention No. 107 and which is based on respect for the cultures and ways of life of indigenous peoples, it has to be borne in mind that so far, it has only been ratified by 20 states. Therefore, it cannot in itself be regarded as a strong statement of international law. But since it is often referred to by international bodies, its contribution goes beyond the limited number of ratifications and therefore it is an appropriate starting point for investigations on recognised indigenous peoples’ rights. Regarding the concept of free, prior and informed consent, four articles are of importance: arts 2, 6, 7 and 15 of Convention No. 169. According to article 2 (1) states have a duty to systematically protect indigenous peoples’ rights “with the participation of the peoples concerned.” Pursuant to article 6 (1) lit. a the governments shall, as a general principle, “consult the peoples concerned […] whenever consideration is being given to legislative or administrative measures which may affect them directly” and according to article 6 (2) these consultations “shall be undertaken, in good faith, […] with the objective of achieving agreement or consent to the proposed measures.” Article 7 of ILO Convention No. 169 also stipulates the duty of cooperation and recognises the indigenous peoples’ “right to decide their own priorities for the process of development” and “to exercise control, to the extent possible, over their own economic, social and cultural development.” Article 15 of Convention No. 169 protecting the indigenous peoples’ right to participate in the use, management and conservation of the resources on their traditional lands obliges states to “establish or maintain procedures through which

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66 See, for example, article 5 ILO Convention No. 169.
67 The relevant list is available at: <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?(C169)>.
70 Emphasis added by author.
71 Emphasis added by author.
they shall consult these peoples […] before undertaking or permitting any programmes for the exploration or exploitation of such resources."  

Hence, ILO Convention No. 169 stipulates the duty of states to involve indigenous peoples in all decisions affecting them. Yet, this duty only amounts to a duty of consultation, which has to be undertaken with the objective of achieving consent. An actual consent is, however, not required for a measure to be admissible. Therefore, ILO Convention No. 169 does not recognise the principle of free, prior and informed consent.

In contrast, the 2007 United Nations Declaration on the Rights of Indigenous Peoples expressly recognises the duty of states to obtain the free prior and informed consent of indigenous peoples with regard to "any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources" (article 32 (2); see also arts 10, 11, 28 and 29). In addition, as a general principle, article 19 stipulates that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."

Hence, according to the United Nations Declaration on the Rights of Indigenous Peoples, a mere consultation and the objective to obtain an indigenous peoples’ consent are not sufficient but an actual consent needs to be obtained before any measure affecting indigenous peoples’ lands, cultures and ways of life can be undertaken. If a state undertakes a measure without having obtained such consent the measure is inadmissible and if it is carried out nevertheless the state will be liable to pay damages (see arts 11 and 28). Although the Declaration is – as stated above – not binding on states, its requirement of a free, prior and informed consent seems to reflect the view of the international community, not only because the Declaration has been endorsed by a broad majority of states but also due to the fact that the idea of a duty to obtain an indigenous peoples’ free and informed consent prior to taking any measures affecting them has – since the initial drafting of the Declaration – been taken up and supported by several international bodies and institutions.

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72 Emphasis added by author.
73 Emphasis added by author.
For example, in its General Recommendation XXIII on Indigenous Peoples of August 1997, CERD called upon states to “[e]nsure […] that no decisions directly relating to [indigenous peoples’] rights and interests are taken without their informed consent” (para. 4 lit. d) and to take steps to return those lands and territories indigenous peoples have traditionally owned or otherwise inhabited or used and of which they have been deprived without their free and informed consent (para. 5). CERD has subsequently drawn the attention of states to this General Recommendation and reiterated in its Concluding Observations on States Parties that with regard to decisions affecting indigenous peoples’ land rights, the affected peoples’ informed consent should be secured prior to undertaking any measures.

Likewise, the United Nations Committee on Economic, Social and Cultural Rights has expressed its deep concern that traditional lands have been occupied or reduced and resources pertaining to traditional lands exploited without the full consent of the affected communities and urged States Parties to obtain an indigenous people’s consent prior to undertaking any such activities.

The World Bank, in its Operational Policy 4.10 of 2005, requires borrowers “to engage in a process of free, prior, and informed consultation” (para. 1) whereby it clarifies in a footnote that this term “refers to a culturally appropriate and collective decision making process subsequent to meaningful and good faith consultation and informed participation regarding the preparation and implementation of the project” but “does not constitute a veto right for individuals or groups”. Yet, the

World Bank also states in its Operational Policy that it “does not proceed further with project processing if it is unable to ascertain that [broad] support [by the affected indigenous peoples] exists” (para. 11). Therefore, although the World Bank does not use the term “free, prior and informed consent” and expressly denies indigenous peoples a power of veto, the fact that it requires prior and informed consultation carried out in good faith and does not proceed with a project if the project does not have the broad support of the community implies that the required consultation amounts – in fact – to a consent, with the difference being that this “consent” does not necessarily have to be obtained from the affected indigenous people by the state but is ascertained by the World Bank on behalf of the indigenous people.

Likewise, Member States to the Convention on Biological Diversity of 1992 (CBD)\(^78\) are obliged to obtain the free, prior and informed consent of an affected indigenous people. Article 8 lit. j CBD calls on states to “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities […] and promote their wider application with [their] approval and involvement”. That such a duty to involve indigenous peoples amounts to a right of free, prior and informed consent has been specified in Decision V/16 of the Fifth Conference of Parties to the CBD according to which “[a]ccess to traditional knowledge, innovations and practices of indigenous and local communities should be subject to [their] prior informed consent or prior informed approval.”\(^79\)

During the United Nations Workshop on Indigenous Peoples, Private Sector Natural Resource, Energy and Mining Companies and Human Rights, held in Geneva from 5-7 December 2001, the participants recognised the need to have a universal definition of the concept of free, prior and informed consent, and reached a basic common understanding of the contents and extent of this concept. According to them, this concept comprises “the right to say ‘no’” thus giving indigenous peoples a veto power.\(^80\)


\(^{80}\) United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights.
When the United Nations Permanent Forum on Indigenous Issues in preparation of its third session surveyed a questionnaire distributed to United Nations bodies, funds, programmes and specialised agencies in order to gather information about “how the principle of free, prior and informed consent is understood and applied” by them, the report showed that UNDP, UNFPA, FAO, ILO, UNITAR, the Office of the United Nations High Commissioner for Human Rights and the WHO have implemented the concept of free, prior and informed consent in their policies and practices and regard this concept as being embedded in the human rights framework.

\textit{bb. The Regional Level}

Not only on the international but also on the regional level the obligation of states to obtain an affected indigenous people’s free and informed consent prior to taking any measures having an adverse impact on its lands, cultures, or ways of life has now been widely recognised.

In the Americas, the concept of free, prior and informed consent is laid down in article XVIII of the Draft American Declaration on the Rights of Indigenous Peoples of the Organization of American States. With regard to land rights, article XVIII (3) (ii) states that a traditional title to land “may only be changed by mutual consent between the state and the respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property”. Regarding subsoil surfaces located on traditional lands but belonging to the state, article XVIII (5) stipulates a state’s duty to “establish or maintain procedures for the participation of the peoples concerned in determining whether the interests of these people would be adversely affected

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\textsuperscript{82} Approved by the Inter-American Commission on Human Rights on 26 February 1997, at its 95th Regular Sess., 1333rd Mtg., OAS Doc. OEA/Ser/L/VII/95 Doc. 6 (1997).
and to what extent, before undertaking or authorizing any program for planning, prospecting, or exploiting existing resources on their lands.”

As regards relocation, article XVIII (6) lays down that “states shall not transfer or relocate indigenous peoples without the free, genuine, public and informed consent of those peoples.” Although the American Declaration on the Rights of Indigenous Peoples has not yet entered into force, the Inter-American Commission on Human Rights has in its decisions repeatedly demanded a “fully informed consent” regarding the occupation and use of traditional lands and resources and the endorsed right not to be deprived of this interest whereby the Inter-American Commission on Human Rights based these obligations on the American Declaration of the Rights and Duties of Man.83 Likewise, the Inter-American Developmental Bank (IDB)’s Strategies and Procedures on Sociocultural Issues as Related to the Environment of June 1990 provide that “in general the IDB will not support projects that involve unnecessary or avoidable encroachment onto territories used or occupied by tribal groups or projects affecting tribal lands, unless the tribal society is in agreement.”84

Regarding the recognition of the concept of free prior and informed consent within Europe, the Resolution of the Council of the European Union of 30 November 1998 on Indigenous Peoples within the Framework of the Development Cooperation of the Community and the Member States needs to be mentioned, which stipulates that “indigenous peoples have the right to choose their own development paths, which includes the right to object to projects, in particular in their traditional areas,”85 thus awarding indigenous peoples a power of veto. The principle of free, prior and informed consent has been confirmed

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and expressly recognised in the 2005 Joint Statement on EU Development Policy stipulating that “[t]he key principle for safeguarding indigenous peoples’ rights in development cooperation is to ensure their full participation and the free and prior informed consent of the communities concerned” and the European Commission’s Programming Fiche on Indigenous Peoples stating that the indigenous peoples’ “right and capacity to achieve ‘self-development’ and to permit their free prior and informed consent” constitutes a basic principle of cooperation with indigenous peoples.

**cc. The State Level**

Not only have international and regional bodies and institutions implemented the concept of free, prior and informed consent but it has also been implemented in several domestic legal instruments and is endorsed by numerous national courts.

The concept of free, prior and informed consent has been codified by several states in their constitutions and national legislation. For example, the Philippines in their Indigenous Peoples Rights Act of 1997 stipulate that an indigenous people’s free, prior and informed consent is necessary for all activities affecting their lands and territories including relocation (sec. 7 lit. c and sec. 58), the taking of their cultural, intellectual, religious, and spiritual property (sec. 32), archaeological explorations (sec. 33 lit. a), access to biological and genetic resources (sec. 35), exploitation of natural resources (sec. 46 lit. a and sec. 59), delineation (sec. 52 lit. b), and environment protection and conservation measures (sec. 58).

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Likewise, New Zealand in its Crown Minerals Act of 1991 lays down that “[n]o person may, without the consent of the owners of the land, enter Maori land for the purpose of carrying out a minimum impact activity where the land is regarded as waahi tapu [(sacred area)]” (sec. 51 (2)). Regarding activities other than those with minimum impact, the obligation to obtain consent is stipulated in arts 53-54.

Several states in Latin America have also endorsed the principle of free, prior and informed consent in their national legislations and constitutions, see e.g. Peru regarding the use of traditional knowledge, bioprospection and the establishment of protected areas, Ecuador regarding research exploitation, Paraguay regarding relocation, and Bolivia, which has adopted the entire United Nations Declaration on the Rights of Indigenous Peoples including the provisions on free, prior and informed consent, as national law and incorporated some of the provisions into its new constitution.

Besides the implementation of the concept of free, prior and informed consent in national legislation and constitutions, this principle has also been endorsed by numerous national courts, e.g. the Colombian Constitutional Court, the Supreme Court of Belize, and the Canadian Supreme Court.

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90 Propuesta de Régimen de Protección de los Conocimientos Colectivos de los Pueblos y Comunidades Indígenas Vinculados a los Recursos Biológicos (Law Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples derived from Biological Resources), Law No. 27811, enacted 10 August 2002, arts 5 lit. d, 6 and 42.
91 Decreto Supremo (Supreme Decree) No. 038-2001-AG of 22 June 2001, amended to Ley de Áreas Naturales Protegidas (Law of Natural Protected Areas), Law No. 26834, enacted 30 June 1997, article 166.3.
92 Ibid, article 43.2.
93 Constitution of Ecuador of 2008, article 57 (7).
94 Constitution of Paraguay of 1992, article 64.
95 Law No. 3760, enacted 7 November 2007.
97 Constitutional Court of Columbia, The U’wa Case, Ruling SU-039/97 of 3 February 1997, section 3.3.
98 Supreme Court of Belize, Aurelio Cal et al. v. The Attorney-General of Belize and the Minister of Natural Resources and Environment/ Manuel Coy et al. v. the Attorney-General of Belize and the Minister of Natural Re-
b. The Application of the Principle of Free, Prior and Informed Consent by the Human Rights Committee

Looking at this recent development in national and international law, the concept of free, prior and informed consent can be identified as a principle of international law which has gained wide support throughout the international community and might even amount to customary international law. Therefore, it is evident that the Human Rights Committee’s requirement of a free, prior and informed consent in the case Ángela Poma Poma v. Peru cannot be regarded as a new and innovative development but merely reflects an existing and widely recognised concept of public international law. Nevertheless the explicit adoption of this principle by the Human Rights Committee must be appreciated as an affirmation and promotion of this concept and as a welcome step towards unification of public international law norms.

Yet, the overall impact of this decision on the protection and promotion of indigenous peoples’ rights suffers from its ambiguity and contradiction as to the extent of the obligation to obtain free, prior and informed consent. On the one hand, the Human Rights Committee explained that the rights under article 27 ICCPR are no absolute rights but that “a State may legitimately take steps to promote its economic development”, that it has a “leeway” in this area, and that only “measures whose impact amounts to a denial of the right of a community to enjoy its own culture are incompatible with article 27, whereas measures with only a limited impact […] would not necessarily amount to a denial of rights under article 27.” Furthermore, it added that the opportunity to participate in the decision-making process would merely be necessary if the intended measures “substantially compromise or in-

100 See also J. Anaya, “Indigenous Peoples’ Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources”, Arizona Journal of International and Comparative Law 22 (2005), 7 et seq. (17); Barelli, see note 32, 972-977.
101 See Ángela Poma Poma v. Peru, see note 1, para. 7.4.
terfere with the culturally significant economic activities." This statement seems to imply that proportionality and the obligation to obtain free, prior and informed consent exist alternatively: if a measure was proportionate it would be admissible and no consent by the affected indigenous group would be necessary. If the intended measure was disproportionate, it would be inadmissible unless a free, prior and informed consent be given by the affected group. Thus the free prior and informed consent would merely serve as a means of justification for disproportionate measures. Yet such an interpretation would completely undermine the importance of an effective participation of an affected indigenous group for the preservation of their traditional way of life. In addition, it would offer even less protection than the amount of protection granted by the Human Rights Committee in previous cases, in which it held that also with regard to measures not amounting to a complete denial of rights under article 27 ICCPR, the affected group needed at least to be consulted.\textsuperscript{103} Hence, such an interpretation cannot have been the intention of the Human Rights Committee, especially since it also stated – on the other hand – that “[i]n addition” to the free, prior and informed consent “the measure must respect the principle of proportionality so as not to endanger the very survival of the community and its members.”\textsuperscript{104} In stark contrast to its previous explanations, this statement seems to imply that proportionality and free prior and informed consent are always cumulative requirements for a measure to be admissible and therefore that a free prior and informed consent would have to be obtained in all cases where a measure adversely affected an indigenous community, even if the measure in question only had a proportionate impact on an indigenous people.

Therefore, although in general the Human Rights Committee’s explicit adoption of the concept of free, prior and informed consent has to be regarded as an important step in the international protection of indigenous peoples’ rights, this aspect of the decision cannot be welcomed without reservations as it remains doubtful what exactly the Human Rights Committee wanted to express by obliging states to obtain the free, prior and informed consent of the indigenous group affected by an intended measure.

\textsuperscript{102} Ibid., para. 7.6.
\textsuperscript{103} Ilmari Länsman et al. v. Finland, see note 62, para. 9.6; Joumi E. Länsman et al. v. Finland, see note 62, para. 10.5; Apirana Mahuika et al. v. New Zealand, see note 29, paras 9.6–9.8.
\textsuperscript{104} See Angela Poma Poma v. Peru, see note 1, para. 7.6.
V. Conclusion

The decision in the case Ángela Poma Poma v. Peru leaves the reader with an ambivalent feeling. On the one hand, the case is very disappointing for the indigenous peoples’ struggle for recognition, promotion and protection of their right to self-determination since it completely ignores the adoption of the United Nations Declaration on the Rights of Indigenous Peoples and adheres to the qualification of indigenous peoples as ethnic minorities pursuant to article 27 ICCPR. The affirmation of its previous jurisdiction regarding the inadmissibility of basing an individual complaint on article 1 ICCPR deprives indigenous peoples of the chance to collectively protect their rights as peoples. Yet, on the other hand, the Human Rights Committee, for the first time ever, explicitly endorsed the principle of free, prior and informed consent – a principle which indirectly protects the right of indigenous peoples to self-determination and to freely dispose of their natural wealth and resources laid down in article 1 ICCPR and which is bestowed on peoples only and not on minorities. This development in the Human Rights Committees jurisdiction is to be hailed since the concept of free, prior and informed consent fundamentally strengthens an indigenous peoples’ position.

Yet, the ambivalence in the Human Rights Committee’s decision significantly reduces the positive impact of the endorsement of this concept. In addition, the concept of free, prior and informed consent is merely mentioned without having an actual impact on the ruling. Rather, the ruling regarding the unacceptability of the measure is almost entirely based on the disproportionally of the measure, not the lack of free, prior and informed consent. Hence, the prominent aspect of this decision is not the first-time-ever recognition of the concept of free, prior and informed consent by the Human Rights Committee but its continuous denial to recognise indigenous peoples as peoples pursuant to article 1 ICCPR, which stands in discrepancy to recent developments in international law, in particular, the adoption of the United Nations Declaration on the Rights of Indigenous Peoples. Therefore, although ultimately the Human Rights Committee decided in favour of Ms. Poma Poma, the decision and its consequences have to be regarded as rather disappointing for the indigenous peoples’ movement. One can only hope that in future cases the Human Rights Committee will eventually abandon its position on the inadmissibility of basing individual complaints on alleged violations of article 1 ICCPR while at the same time adhering to and clarifying the concept of free, prior and informed
consent. Such a development in the jurisprudence of the Human Rights Committee would constitute a major and long overdue step in the indigenous peoples’ long-standing struggle for the protection and promotion of their right to self-determination.
Violence against Women by Private Actors: The Inter-American Court’s Judgment in the Case of Gonzalez et al. (“Cotton Field”) v. Mexico

Katrin Tiroch* 

Violence against women continues to persist as one of the most heinous, systematic and prevalent human rights abuses in the world. It is a threat to all women, and an obstacle to all our efforts for development, peace and gender equality in all societies.1

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* This article is dedicated to the women and girls of Ciudad Juárez.

I. Introduction

On 16 November 2009 the Inter-American Court of Human Rights (IACtHR) delivered its judgment in the case González et al. v. Mexico.\(^2\) The case is also known by the name “Cotton Field” or “Campo Algodonero” in Spanish, named after the location where the three victims were found in Ciudad Juárez.

The case decided by the Court constitutes an emblematic case of violence against women committed by private actors. Generally speaking it concerns the situation of women in the Mexican border city Ciudad Juárez, state of Chihuahua.

From the beginning of the 1990s Ciudad Juárez acquired notoriety due to the constant wave of violence against and homicide of women. Characteristically it was denominated: “Capital of Women’s Murders.”\(^3\) The situation was characterised by a sharp rise in the homicide rate of women, extreme brutality of the crimes and a deficient response of the public authorities leading to impunity of the perpetrators. Many of the killings are described as manifestations of violence based on gender.\(^4\) As

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the United Nations Special Rapporteur on Violence against Women, its Causes and Consequences Yakin Ertürk pointed out in her report on Mexico, gender-based violence in Mexico constitutes only the tip of an iceberg. Beneath the surface systemic and complex problems are lurking. These problems have to be seen and can “only be understood in the context of socially entrenched gender inequality on the one hand and a multilayered governance and legal system that does not effectively respond to violent crime, including gender-based violence, on the other hand.”

In particular, the case deals with the disappearance, mistreatment and subsequent death of the three young women Claudia Ivette González, Esmeralda Herrera Monreal and Laura Berenice Ramos Monarrez. The Court declared Mexico responsible for violating the rights established in arts 4 (Right to Life), 5 (Right to Humane Treatment), 7 (Right to Personal Liberty), 8 (Right to a Fair Trial), 19 (Right of the Child) and 25 (Right to Judicial Protection) of the American Convention on Human Rights (hereinafter the American Convention or ACHR), in relation to the obligations established in arts 1 (1) (Obligation to Respect Rights) and 2 (Domestic Legal Effects) American Convention, together with a failure to comply with the obligations arising from article 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (hereinafter Convention of Belém do Pará or CBdP).

The decision is noteworthy because it strengthens the protection of women under the American Convention. In the following, the main issues of the judgment will be outlined. In order to establish a general context, the article starts with a brief introduction to the topic of violence against women (Part II.) and the inter-American system of human rights protection (Part III.). Then it enters into the discussion of the judgment, starting with a summary of the facts of the case (Part IV.),

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followed by the question of the applicability of the Convention of Belém do Pará (Part V.). The subsequent parts cover some substantive issues of the case, which are positive obligations of states in cases of violence against women\(^8\) (Part VI.), discrimination and violence against women (Part VII.) and violence against women as torture (Part VIII.). The article ends by pointing to the importance of the reparations in this case (Part IX.) and giving a general conclusion (Part X.).

II. Violence against Women

Women all around the world are affected by gender-based violence. Even though a woman may not be a victim herself, gender-based violence shapes all women’s lives and affects their choices.\(^9\) The Convention of Belém do Pará defines violence against women “as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.”\(^10\) Violence against women appears in various forms, it ranges from more subtle dimensions to unspeakable atrocities as witnessed in the case under discussion. Violence does not know cultural or national borders, age, economic status, ethnicity or political structures and can be found in a multitude of roots.\(^11\) Discriminatory practices are based on the idea of female inferiority or male superiority and are often embedded in a culture, tradition and history of subjugation of women. Violence against women is one of the grossest and most common forms of female subjugation. Human rights are formulated in a gender-neutral way and theoretically are defined and applied as belonging to all persons, all human beings. Furthermore, the sex of a person is included within the prohibition of non-discrimination. However, reality is different. In practice human rights are imbedded in social contexts and in-

\(^8\) Gender-based violence and violence against women will be used interchangeably, although the former also could include violence against men.
\(^10\) Article 1 Convention of Belém do Pará, see note 7.
teract with national laws, both of which are often gender-biased.\textsuperscript{12} As a result, in order to deal with violence against women effectively, it is necessary not only to establish legal rules that prescribe the equality of men and women but to bring about a change within the cultural patterns and social structures that allow discrimination of women.\textsuperscript{13}

Feminist legal scholars have long argued that one of the main problems for the advancement of women is the so called public-private divide. The theory is based on the assumption that men traditionally dominate the public sphere of a state, which is seen as area of power and authority. Women, on the other hand, are often relegated to the private realm (family and home).\textsuperscript{14} As a result, women more often suffer abuse at the hands of a private person than a public official. States, of course, do commit human rights violations against women. Nonetheless, the great majority of women endure violations of human rights in private settings.\textsuperscript{15} Traditionally international law does not regulate the private realm. The classic conception of human rights reflected the state-based nature of international law. The main focus was to restrict a state’s power in order to protect the individual from abuses of his or her rights by the state.\textsuperscript{16} This focus confined the application of human rights to the public sphere and overlooked harms that most commonly affected women.\textsuperscript{17} Hence, it was argued that the public-private divide

\begin{thebibliography}{99}
\bibitem{15} Ulrich, see note 11, 636.
\end{thebibliography}
systematically privileges the realities of men and disadvantages or marginalizes women.\textsuperscript{18}

Yet a shift from the traditional understanding of human rights has taken and is taking place. The international responsibility of states has been widened. Actions perpetrated by non-state actors are increasingly falling within the scope of human rights due to developments with regard to the concept of positive obligations and the process of reinterpretation of human rights.\textsuperscript{19} Attention and consciousness to the specific problems of women has also gradually been raised. This can be attributed to mainstreaming gender perspectives and women’s activism, but also to world wide media coverage of atrocities committed against women.\textsuperscript{20} New mechanisms for the advancement of the status of women were established, such as the UN Commission on the Status of Women. Conferences dealing with women’s problems were held,\textsuperscript{21} conventions especially dealing with women’s concerns were adopted\textsuperscript{22} and the United Nations General Assembly even declared the UN Decade for Women between 1976 and 1985.\textsuperscript{23} Moreover, international courts and tribunals have become increasingly responsive to women’s issues

\textsuperscript{18} On the topic of the public-private divide, see: C. Romany, “State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law”, in: Cook, see note 17, 85 et seq. (96); it has to be mentioned that the feminist theory of a public-private dichotomy was also criticised. It is argued that it is a western construct and itself based on stereotypes, see Charlesworth, see note 17, 69; Edwards, see note 16, 352-358.


\textsuperscript{20} For example the atrocities committed against women in Rwanda and the Balkans.

\textsuperscript{21} Cf. e.g. World Conferences on Women held in Mexico 1975, Copenhagen 1980, Nairobi 1985 and Beijing 1995.


and have begun to recognise violence against women as human rights violation.\textsuperscript{24} Nowadays, international law has established state obligations to prevent and punish violence perpetrated by private actors. The concept of positive obligations facilitates the crossing of the public-private divide. Cases brought before international tribunals and quasi-judicial bodies show that gender-bias can be overcome by recognising that states have positive obligations, i.e. are obliged to enforce protective measures.\textsuperscript{25} However, although there has been a significant development concerning women’s rights,\textsuperscript{26} violence against women is still widespread and continues to persist. Unfortunately it remains widely accepted and is considered less severe than official state-inflicted violence.\textsuperscript{27} There is still a significant amount of work to be done to achieve the ultimate goal of a life free of violence for women all over the world.

In the American context, the plight of women was not taken much account of for many years.\textsuperscript{28} In the 1990s, following the general trend of gender-mainstreaming, the situation improved and the Inter-American Commission on Human Rights (hereinafter the Commission or IACHR) started to include the issue of abuses against women in its agenda.\textsuperscript{29} The Commission began using its mandate to examine human

\begin{itemize}
\item \textsuperscript{24} Cf. Marshall, see note 19.
\item \textsuperscript{26} For the purpose of this article, women’s rights are understood as all rights that deal with particular disadvantages for women, see Charlesworth, see note 17, 66.
\item \textsuperscript{27} R. Copelon, “Intimate Terror: Understanding Domestic Violence as Torture”, in: Cook, see note 17, 116 et seq. (116).
\item \textsuperscript{28} C. Grossman, “The Inter-American System: Opportunities for Women’s Rights”, \textit{American University Law Review} 44 (1994-1995), 1305 et seq. (1305); Medina, see note 9, 117.
\item \textsuperscript{29} The General Assembly of the Organization of American States requested the IACHR to revise the situation of women in the American continent via Resolution AG/RES.1112 (XXI-0/91), OEA, Fortalecimiento de la OEA en material de derechos humanos, AG/RES.1112 (XXI-0/91), in: OEA, \textit{Actas y Documentos: Volumen I}, OEA/Ser. P/XXI.02 (79) of 20 August 1991.
\end{itemize}
rights situations in countries to protect the rights of women. A Special Rapporteur on Women was appointed and the Commission started to include a special section on women in country and annual reports. Moreover, the Commission commenced to examine individual complaints relevant for human rights of women. However, the role of the Inter-American Court of Human Rights (hereinafter the Court or IACtHR) dealing with women’s issues, especially gender-based violence may be described as “modest.” It is true that the Commission did not bring a lot of cases before the Court dealing especially with human rights of women. However, most of the few cases that potentially could have had an impact on women’s rights that the IACtHR was allowed to deal with, were not treated adequately. Nevertheless, more recent cases, like the judgment of the IACtHR in the case Miguel Castro-Castro Prison v. Peru, signalled a positive development regarding gender sensibility, although the cases were also criticised for having serious deficiencies in their reasoning.

30 See Medina, see note 13, 5-7; for information on the work of the Commission with regard to women, see: E.A.H. Abi-Mershed, “El sistema interamericano de Derechos Humanos y los derechos de la mujer: avances y desafíos”, in: C. Martin/ D. Rodríguez-Pinzón/ J.A. Guevara (eds), Derecho Internacional de los Derechos Humanos, 2004, 481 et seq.
31 See Medina, see note 9, 124-128.
34 See Medina, see note 13, 5-7.
This article analyses the most recent judgment of the IACtHR, which specifically deals with gender issues. The judgement touches on various points of interest. At its heart lies the problem of gender-based violence as a human rights violation when committed by private individuals. The Court explicitly and extensively lays down positive obligations of states with regard to violence against women committed by private individuals. It is noteworthy that for the first time the court considers a case concerning violence against women as its main topic. Considerations based on gender-issues form a central part of the judgement. It is also worth mentioning that the Court takes into account and puts emphasis on the general situation of women in Ciudad Juárez. It establishes the existence of a culture of discrimination and observes that women in Ciudad Juárez suffer from collective violence. That leads the Court to the conclusion that gender-based violence constitutes a form of discrimination. The gender-sensitivity of the Court can also be noted in the comprehensive catalogue of reparations in the judgment. However, the judgment also leaves open some points of critique, for example the failure to qualify the actions perpetrated against the victims as torture. Furthermore, the application of the Convention of Belém do Pará can be seen in a critical way.

III. The Inter-American System for the Protection and Promotion of Human Rights

To begin with, a short introduction to the inter-American system for the protection and promotion of human rights shall be given.

The inter-American system comprises a combination of human rights norms and supervisory organs. Human rights norms are primarily derived from two different legal sources. One system is based on the 1948 Charter of the Organization of American States (hereinafter the OAS Charter)\(^{38}\) and the American Declaration of the Rights and Duties of Man (hereinafter the American Declaration)\(^{39}\) of the same year. The other system is built on the American Convention. The Charter-based

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39 American Declaration of the Rights and Duties of Man (approved 10 December 1948), printed in: AJIL 43 (1949), 133 et seq.
system is binding for all Member States of the OAS,\textsuperscript{40} i.e. for all independent American states. The OAS Charter itself only contains a few provisions referring to human rights.\textsuperscript{41} Therefore, the American Declaration is the standard against which all OAS states are measured. It was adopted as a conference resolution, a non-legally binding instrument. However, subsequently the status of the Declaration was interpreted differently by the Inter-American Commission on Human Rights.\textsuperscript{42} Nowadays it is seen as the interpretative instrument, which defines the term “fundamental rights of the individual” set out in article 3 (l) OAS Charter.\textsuperscript{43} The American Convention, on the other hand, contains a le-

\textsuperscript{40} The Organization of American States was established in 1948 and constitutes an international organization. The Member States are all sovereign states of the Americas; for an overview on the OAS, see J.M. Arrighi, “Organization of American States (OAS)”, in: R. Wolfrum (ed.), The Max Planck Encyclopedia of Public International Law, 2008, online edition, <www.mepil.com>.

\textsuperscript{41} Article 3 para. 1 OAS Charter, see note 38, states:

“Article 3 OAS Charter,
The American States reaffirm the following principles: ...
1) The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex;”.

\textsuperscript{42} Cf. IACHR, “Baby Boy”, Resolution 23/81, Case 2141 (United States), OEA/Ser.L/V/II.54 Doc. 9 Rev. 1 of 16 October 1981, paras 16 and 17.

“16. As a consequence of articles 3 i, 16, 51 e, 112 and 150 of this Treaty [the OAS Charter], the provisions of other instruments and resolutions of the OAS on human rights, acquired binding force. Those instruments and resolutions approved with the vote of U.S. Government, are the following:

- American Declaration of the Rights and Duties of Man (Bogotá, 1948)
- Statute and Regulations of the IACHR 1960, as amended by resolution XXII of the Second Special Inter-American Conference (Rio de Janeiro, 1965)

17. Both Statutes provide that, for the purpose of such instruments, the IACHR is the organ of the OAS entrusted with the competence to promote the observance and respect of human rights. For the purpose of the Statutes, human rights are understood to be the rights set forth in the American Declaration in relation to States not parties to the American Convention on Human Rights (San José, 1969). (Articles 1 and 2 of 1960 Statute and article 1 of 1979 Statute).” (emphasis added).

\textsuperscript{43} T. Buergenthal/ D. Shelton/ D.P. Stewart, International Human Rights in a Nutshell, 2009, 262; for a discussion on the normative character of the American Declaration, see also C.M. Cerna, “Reflections on the Normative Status of the American Declaration of the Rights and Duties of Man”,
gally binding set of rules and obligations only for States Parties. Rati-
fication of the American Convention is not required for membership in
the OAS.  

The two main supervisory organs involved are the already men-
tioned Inter-American Court of Human Rights and the Inter-American
Commission on Human Rights. The Commission is an organ of both
the OAS Charter and the American Convention. It was established in
1959 in order to promote observance and respect for human rights. It is
composed of seven independent experts, who are selected by the OAS
Council upon government nomination. The right to lodge complaints
to the Commission is not limited to victims of human rights violations.
Any person, group of persons or non-governmental entity may submit
a petition containing a complaint of an alleged human rights violation.
Additionally, the Commission can act proprio motu. The Commission
has a wide mandate in the field of human rights protection. Article 1 (1)
Statute of the Commission lays down that the Commission was “cre-
ated to promote the observance and defense of human rights and to
serve as a consultative organ of the Organization in this matter.” The
functions and powers of the Commission include, inter alia, developing

Pennsylvania Journal of International Law 30 (2008-2009), 1211 et seq.; T.
Buergenthal, “The American Human Rights Declaration: Random Reflec-
tions”, in: K. Hailbronner/ G. Ress/ T. Stein (eds), Staat und Völkerrechts-
ordnung: Festschrift für Karl Doehring, 1989, 133 et seq.; C.M. Grossmann,
“American Declaration of the Rights and Duties of Man (1948)”, in:
Wolfrum, see note 40; IACtHR, Interpretation of the American Declara-
tion of the Rights and Duties of Man within the Framework of Article 64 of
the American Convention on Human Rights, Advisory Opinion OC-10/89
of 14 July 1989, Series A No. 10.

44 See Buergenthal/ Shelton/ Stewart, see note 43, 257-258.
45 Unlike the European system, where membership in the Council of Europe
requires adherence to the European Convention on Human Rights; Coun-
cil of Europe, “Convention for the Protection of Human Rights and Fund-
damental Freedoms” (signed 4 November 1950, entered into force 3 Sep-
tember 1953), UNTS Vol. 213 No. 2889, (hereinafter the ECHR); see also
Cerna, see note 43, 1213.
46 Arts 23 and 24 Rules of Procedure of the Inter-American Commission on
Human Rights (approved October/November 2009), see <http://
47 Statute of the Inter-American Commission on Human Rights (approved
October 1979) in: Inter-American Court of Human Rights (ed.), Basic
Documents Pertaining to Human Rights in the Inter-American System,
2007, 163 et seq.
awareness of human rights, issuing recommendations to OAS Member States, preparing reports or asking governments to prepare reports on measures they adopted, responding to inquiries by Member States, submitting annual reports to the OAS General Assembly and acting on individual petitions and other communications. There are some differences in procedure for cases against State Parties and non-State Parties to the American Convention. However, in practice, the Commission processes applications under both procedures in a similar way. Yet one big difference has to be pointed out: the access to the IACtHR. That option is limited to complaints under the American Convention. After the Commission establishes that a human rights violation occurred, it transmits a preliminary report including remedial recommendations to the state concerned. If the state does not comply with the recommendations set forth, the Commission or the state may then submit the case to the Court.

The Court was created by the American Convention and constitutes an autonomous judicial organ. In addition to the ratification of the American Convention, states have to accept the compulsory jurisdiction of the Court. The Court is composed of seven judges, who have to be “jurists of the highest moral authority and of recognized competence in the field of human rights” eligible to the highest judicial functions of their respective states. The Court has advisory and contentious ju-

48 Cf. arts 18-20 Statute of the IACHR, see note 47, and arts 41, 44-51 ACHR, see note 6; C. Cerna, “The Inter-American Commission on Human Rights: its Organization and Examination of Petitions and Communications”, in: D.J. Harris/ S. Livingstone (eds), The Inter-American System of Human Rights, 1998, 65 et seq. (74-75).
49 Cf. also arts 51-52 Rules of Procedure of the Commission, see note 46.
50 See Cerna, see note 48, 77.
51 Article 51 ACHR, see note 6; for an introduction to the Inter-American Commission on Human Rights and further references, see C.M. Grossman, “Inter-American Commission on Human Rights (IACommHR)”, in: Wolfrum, see note 40.
52 A.A. Cançado Trindade, “The Operation of the Inter-American Court of Human Rights”, in: Harris/ Livingstone, see note 48, 133 et seq. (133).
53 Article 52 ACHR, see note 6.
54 At the time of the judgment the Court was composed of the following judges: C. Medina Quiroga (President), D. García-Sayán (Vice-President), S. García Ramírez, M.E. Ventura Robles, L.A. Franco, M. May Macaulay, R. Abreu Blondet. The judges García Ramírez and L.A. Franco did not participate in the judgment, the former because he notified his disqualifica-
risdiction. Furthermore, it can adopt provisional measures. Unlike the European system for the protection of human rights, some other Inter-American treaties confer jurisdiction on the Court.\textsuperscript{55} An interesting procedural question of the present case concerned the direct applicability of the Convention of Belém do Pará, which was questioned by Mexico and will be discussed below.\textsuperscript{56} It is important to note that individuals can only lodge petitions with the Commission, not directly with the Court. The Commission decides whether a claim is submitted to the Court, i.e. it controls the docket of the Court.\textsuperscript{57} Once a case is presented, the Commission becomes a party during the Court proceedings representing the victims’ side. Individuals can take part through a chosen representative. Judgments of the Court are binding for the states concerned and the American Convention grants wide powers to the Court with regard to reparations.\textsuperscript{58}

In the inter-American context, the Inter-American Commission of Women\textsuperscript{59} should also be mentioned. It is a specialized organisation of the OAS. Its main objective is the advancement of the situation of women. The Inter-American Commission of Women is a forum to generate and endorse policies to promote and protect women’s rights and to advance gender equality. Furthermore, it aims at assisting OAS Member States in their “efforts to ensure full exercise of civil, political, economic, social, and cultural rights that will make possible equal participation by women and men in all aspects of society, so that women and men will share, fully and equally, both the benefits of development and responsibility for the future.”\textsuperscript{60} The Inter-American Commission

\textsuperscript{55} See Buergenthal/ Shelton/ Stewart, see note 43, 321.
\textsuperscript{56} See Part V.
\textsuperscript{57} It should be mentioned that the procedure changed in 2001. Now the Commission refers cases to the Court, unless the absolute majority of the members of the Commission decide against such referral, article 45 para.1 Rules of Procedure of the Commission, see note 46.
\textsuperscript{58} See Part IX.; for an introduction to the Inter-American Court of Human Rights and further references, see G.L. Neumann, “Inter-American Court of Human Rights (IACtHR)”, in: Wolfrum, see note 40.
\textsuperscript{59} According to its Spanish abbreviation: Comisión Interamericana de Mujeres.
\textsuperscript{60} Article 2 Statute of the Inter-American Commission of Women, see <http://portal.oas.org/LinkClick.aspx?fileticket=Ge7RZWJjibk%3d&tabid=1670&language=en-US>.
of Women is noteworthy because it was already established in 1928 dealing especially with women’s concerns. However, it does not possess any supervisory powers, unlike the IACHR.\(^{61}\)

**IV. Facts of the Case**

In order to enter into the specific subject of the case, it is necessary to start with a short summary of the comprehensive facts of the case, dividing them into the context,\(^{62}\) the specific facts\(^{63}\) and the partial acceptance of responsibility by the state.\(^{64}\)

The applicants – the mothers of the three victims – complained before the IACtHR of the failure of Mexico to fulfil its obligations to provide for protection and effective investigation of the abduction, mistreatment and subsequent murder of their daughters.

To begin with, the Court considered it necessary to analyse the context of violence against women in Ciudad Juárez surrounding the individual facts of the case. The Court considered topics such as the phenomenon of the increased rate of women’s murders in Ciudad Juárez, gender-based violence, the common characteristics of the victims, the alleged femicide, the irregularities during the investigations of the crimes against women, the general discriminatory attitude of the authorities and the lack of clarification of the crimes. Thereby the Court concluded that a significant increase of women’s homicides could be noted in Ciudad Juárez from 1993 onwards. Although the numbers provided were unreliable and the exact numbers could not be established, the Court accepted as proven that there were at least 264 victims up to 2001 and 379 up to 2005. In a substantial number of cases the victims showed similar characteristics – they were young women between 15 and 25 years, underprivileged and working in so called “maquilas” or they were students. However, the most decisive factor was the victim’s sex.\(^{65}\) Moreover, the method of the crimes showed similar characteristics and patterns. The extremely brutal circumstances of the killings, including rape and other kind of sexual abuse, torture and mutila-

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61 See Medina, see note 9, 117.
62 See paras 113 et seq., *Case of Gonzalez et al. ("Cotton Field") v. Mexico*, see note 2.
63 See paras 165 et seq., ibid., see note 2.
64 See paras 20 et seq., ibid., see note 2.
65 Para. 133, ibid., see note 2.
tion, were considered especially worrying by the Court. The Court concluded that the crimes perpetrated in Ciudad Juárez from 1993 onwards have been influenced by a culture of discrimination against women, as accepted by Mexico itself. This eventually has generated a climate of impunity for the perpetrators.

The specific facts of the case refer to the disappearance, mistreatment and subsequent death of three young women – two of them under 18 –, Claudia Ivette González (20), Laura Berenice Ramos Monárrez (17) and Esmeralda Herrera Monreal (15). The dead bodies of the three young women were found on 6 November 2001 in an abandoned cotton field in Ciudad Juárez. The common characteristics of most women’s murders indicated above also apply to the three victims: they were young, underprivileged and were workers or students. One day the young women left their respective homes, disappeared and eventually were found days or weeks after their disappearance with signs of sexual abuse and other mistreatment.

The Court established that all girls were held captive before their death. Due to the deficiencies in the initial stages of the investigation of the crime, the Court could only determine with certainty that Esmeralda Herrera Monreal “must have endured such cruelty that it had to have caused her severe physical and mental suffering before she died.” With regard to Claudia Ivette González and Laura Berenice Ramos Monárrez the Court was unable to ascertain the exact abuse the young women were suffering due to the deficiencies in the state’s investigation and the subsequent passing of time. However, the Court took into account that the two girls must have sustained at least severe psychological suffering during their captivity. By the way the victims were found, namely half naked, the Court further concluded a high possibility the girls also suffered from sexual violence or other sexual abuse. Additionally, the Court took into account the previously established context of a multiplicity of analogous cases, most of which showed signs of sexual violence. It was accepted as proven that the girls suffered severe physical ill-treatment before they died. Very probably the girls also suffered sexual abuse or violence.

In the days between the disappearance and the discovery of the dead bodies, the families of the victims sought help from the police and local authorities. The response of the authorities was markedly deficient. The

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66 Para. 219, ibid., see note 2; inter alia, her lower body was exposed and her right breast was missing.
67 Para. 230, ibid., see note 2.
authorities reacted with indifference, trying to play down the situation. The families found themselves confronted with prejudice and stereotypes against women. No concrete actions to find the girls alive were taken.\textsuperscript{68} The investigations both after the disappearance and the discovery of the bodies were deficient and ineffective, which is comprehensively analysed by the Court.

Finally, it should be mentioned that Mexico partially accepted international responsibility concerning some facts and allegations. In general terms, within the context of the crimes, Mexico admitted irregularities which happened in the so-called “first stage” of the investigations of the homicides between 2001 and 2003. The state also accepted that due to these irregularities the psychological integrity of the victims’ families suffered damage. It is noteworthy that Mexico further acknowledged that the murders were influenced by a culture of gender-based discrimination existent in Mexico.\textsuperscript{69} Mexico also assumed its duty to repair the accepted violations. As a result the Court endorsed the recognition of Mexico’s responsibility and declared that the controversy over arts 5, 8 and 25 American Convention to the detriment of the victims’ families had ceased. However, the IACtHR clarified and pointed out that the state accepted its international responsibility in a very general way. Later arguments concerning specific facts of the case contradicted the general acknowledgement of some facts. Therefore, the controversy continued with regard to all other alleged violations.

V. The State’s Preliminary Objection: The Direct Application of the Convention of Belém do Pará

Before entering into the substantive matters of the judgment, the Court was confronted with a preliminary objection of the state. Mexico contended the jurisdiction \textit{rat"{i}one materiae} of the Court to apply the Convention of Belém do Pará. The dispute centres on the ambivalent formulation of article 12 of the Convention. The provision reads as follows:

“Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the \textit{Inter-American Commission on

\textsuperscript{68} Para. 278, ibid., see note 2.

\textsuperscript{69} Para. 129, ibid., see note 2.
Human Rights containing denunciations or complaints of violations of Article 7 of this Convention by a State Party, and the Commission shall consider such claims in accordance with the norms and procedures established by the American Convention on Human Rights and the Statutes and Regulations of the Inter-American Commission on Human Rights for lodging and considering petitions.” (emphasis added)

As can be seen, the text solely mentions the Inter-American Commission on Human Rights as competent to accept petitions. Therefore, the principal question pertained to the requirement of an express reference of the Court in order to establish its jurisdiction.\(^70\) In order to solve the issue the Court referred to the Vienna Convention on the Law of Treaties\(^71\) and its provisions on the interpretation of treaties.\(^72\)

A literal understanding of article 12 Convention of Belém do Pará, at first sight, seems to confer competence in contentious cases exclusively to the Commission. Neither the Court is mentioned nor its Statute and Rules of Procedure.\(^73\) In addition to that, article 11 grants express competence to the Court to issue advisory opinions.\(^74\) The two articles seem to provide for two different forms of jurisdiction: one for the Commission in contentious cases, the other one for the Court with regard to advisory opinions. However, article 12 does contain a refer-

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\(^{70}\) Article 62 ACHR, see note 6, lays down the requirement of an express jurisdiction. According to the provision there should exist either a special declaration or a special agreement by the state.


\(^{74}\) Article 11 Convention of Belém do Pará, see note 7, reads as follows: “The States Parties to this Convention and the Inter-American Commission of Women may request of the Inter-American Court of Human Rights advisory opinions on the interpretation of this Convention.”
ence to the norms and procedures established by the ACHR and the Statute and Rules of Procedure of the Commission. The pertinent provisions are found in arts 44 to 51 American Convention, article 19 of the Commission’s Statute and arts 26 to 50 of the Commission’s Rules of Procedure. These provisions lay down the possibility of the Commission to bring claims before the Court. The contentious issue, therefore, was whether the said reference constituted an express acceptance of the Court’s jurisdiction by the state or not. According to the Court the literal meaning of the provision is clear and as a result the direct application of article 7 Convention of Belém do Pará is possible.

Furthermore, the Court established that the provision must be interpreted as a whole. Therefore, other criteria of interpretation laid down in article 31 Vienna Convention on the Law of Treaties, such as, inter alia, the object and purpose of a treaty, systematic and teleological arguments and the principle of effectiveness, must also be considered. The systematic interpretation basically contained two controversial issues. First it was argued by the state that there exist many human rights instruments that do not establish a mechanism for the submission of individual petitions to a court or tribunal. Sometimes protocols establishing ad hoc committees are adopted to deal with individual petitions. These committees display similar structures to the Commission, i.e. they are of a quasi-judicial nature. They do not constitute a court or tribunal. Hence, a judicialisation of the system is not a necessary requirement.

To answer that contention the Court made a comparison between different systems established in the inter-American system. It established that three different categories of treaties can be distinguished. The first does not make any reference to the possibility of individual petitions. The second contains such a reference but is restricted to certain rights ratione materiae. The Convention of Belém do Pará has to be examined within the third category of treaties that allow for individual petitions in general terms. The Inter-American Convention to Pre-

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75 Especially article 51 para. 1 American Convention, see note 6, article 19 paras b.) and c.) Statute of the Commission, see note 47, and article 44 para. 3 and article 45 Rules of Procedure of the Commission, see note 46, are decisive.

76 Paras 35 et seq., *Case of González et al. ("Cotton Field") v. Mexico*, see note 2.
vent and Punish Torture\textsuperscript{77} and the Inter-American Convention on Forced Disappearance of Persons\textsuperscript{78} form part of this category.

Both conventions contain different references in respect of the admissibility of individual petitions and were already applied by the Court. The Inter-American Convention on Forced Disappearance of Persons does not make any reference to the Court but mentions the,

“procedures established in the American Convention on Human Rights and ... the Statute and Regulations of the Inter-American Commission on Human Rights and ... the Statute and Rules of Procedure of the Inter-American Court of Human Rights.” (emphasis added)\textsuperscript{79}

The Inter-American Convention to Prevent and Punish Torture provides in its article 8 that,

“... [a]fter all the domestic legal procedures of the respective State and the corresponding appeals have been exhausted, the case may be submitted to the international fora whose competence has been recognized by that State.” (emphasis added)

The state argued that these Conventions provide for a different wording than the Convention of Belém do Pará and therefore, the criteria used by the Court to apply these Conventions are not applicable. The IACtHR was not of the same opinion. It held that article 8 of the Inter-American Convention to Prevent and Punish Torture was even less explicit than article 12 of the Convention of Belém do Pará.\textsuperscript{80}

The second issue concerned the extent of the reference in said article 12 to the American Convention. The state argued that it only comprises Section 4 of Chapter VII American Convention. These provisions lay down the procedure for individual petitions before the Commission, which according to the state should not be confused with the fact that the Commission may bring claims before the IACtHR. The Court did

\textsuperscript{77} Inter-American Convention to Prevent and Punish Torture (done 9 December 1985, entered into force 28 February 1987), in: \textit{ILM} 25 (1986), 519 et seq.


\textsuperscript{79} Article XIII Inter-American Convention on Forced Disappearance of Persons, see note 78.

\textsuperscript{80} Paras 43 et seq., \textit{Case of González et al. ("Cotton Field") v. Mexico}, see note 2.
not agree with the state’s line of reasoning. It established that there were no indications for a partial application of article 51 American Convention.\textsuperscript{81}

Further arguments concerned the purpose of the respective norm. Whereas the state acknowledged that the purpose of the Convention of Belém do Pará constitutes the total elimination of gender-based violence, it pointed out that this cannot be mistaken for the judicialisation of the system. The Court, on the other hand, held that the purpose of article 12 of the Convention of Belém do Pará was to enhance the right to an individual petition before an international institution and thus to establish the greatest judicial protection possible. Therefore, the purpose of the Convention of Belém do Pará also speaks for a direct application.\textsuperscript{82} The Court further considered the preparatory works of the Convention of Belém do Pará, which were deemed insufficient for changing the Court’s opinion as they are only a subsidiary method of interpretation. Finally, the Court established that the application of the Convention of Belém do Pará in the case of Miguel Castro-Castro Prison, although without explication, can be seen as equivalent to declaring its jurisdiction.\textsuperscript{83} Eventually, after carefully and comprehensively considering all arguments, the Court came to the “clear” conclusion that the Convention of Belém do Pará is applicable.

With regard to the application of the Convention of Belém do Pará an interesting situation emerged. Both lines of argumentation seem reasonable and possible. Both the Court and the state have valid arguments pro and contra its application. Neither interpretation seems to be obviously incorrect. Both interpretations have more and less convincing parts. Also in literature there have been different points of view.\textsuperscript{84} Be

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\textsuperscript{81} Paras 53 et seq., ibid., see note 2; article 51 para. 1 American Convention, see note 6, lays down that “[i]f, within a period of three months from the date of the transmittal of the report of the Commission to the states concerned, the matter has not either been settled or submitted by the Commission or by the state concerned to the Court and its jurisdiction accepted, the Commission may, by the vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration.”

\textsuperscript{82} Paras 59 et seq., Case of González et al. (“Cotton Field”) v. Mexico, see note 2.

\textsuperscript{83} Paras 74 et seq., ibid., see note 2.

\textsuperscript{84} Against an application, see Palacios Zuloaga, see note 35, 241-242; J.M. Pasqualucci, The Practice and Procedure of the Inter-American Court of Human Rights, 2003, 91-92; for an application, see Medina, see note 13, 4;
that as it may, in general the result of the Court must be endorsed. It had two possibilities to decide and chose the one more favourable for the victims. However, there might be one point of critique. There was one argument, which, in the view of the author, was perhaps dismissed too easily by the Court: the argument of the travaux préparatoires. It is arguable whether the result of the interpretation was as clear as the Court established it in the judgment.

Therefore, the travaux préparatoires, as a subsidiary method of interpretation in case of doubt, might give the decisive argument. The travaux préparatoires definitely speak in favour of the argument of non-application. The draft document done during the preparation of the Convention of Belém do Pará contained an article 15, which explicitly laid down the jurisdiction of the IACtHR. Eventually the draft article was not accepted by the states and as a result is not contained in the final document. Apart from that point of critique, the interpretation of the Court is comprehensible and to be welcomed.

Yet, with regard to the direct application of the Convention of Belém do Pará, one could ask the question whether there is an added value to the direct application of the Convention. Could not the same result be achieved by simply using the Convention of Belém do Pará to interpret the rights in question of the American Convention? In other words: the application of the Convention may not be necessary since the American Convention already provides for the same protection. One has to bear in mind that article 7 Convention of Belém do Pará does not lay down new rights or obligations but prescribes state poli-

Cárdenas Cerón/ Lozada Pimiento, see note 37; C. Medina Quiroga/ C. Nash Rojas, Sistema Interamericano de Derechos Humanos: Introducción a sus Mecanismos de Protección, 2007, 61.

85 Article 15 Draft Text for the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women: “Any State Party may, at any time and in accordance with the norms and procedures stipulated in the American Convention on Human Rights, declare that it accepts as obligatory, automatically and without any special convention, the jurisdiction of the Inter-American Court of Human Rights over all the cases relating to the interpretation or application of the present Convention; Inter-American Commission of Women”, VI. Extraordinary Assembly of Delegates, Initial Preliminary Text and Last Version of the Draft Text for the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Item 1), OEA/Ser.L/II.3.6 CIM/Doc.9/94 of 13 April 1994, 16, cited from para. 69 Case of González et al. (“Cotton Field”) v. Mexico, see note 2.
cies in order to prevent, punish and eradicate gender-based violence. It may be true that the same result could be achieved without directly applying the Convention of Belém do Pará. However, there are several reasons why a direct application of the Convention is beneficial and desirable.

First of all, the Convention of Belém do Pará is an expression of the latest tendencies concerning human rights of women. It establishes a gender approach to human rights which concentrates on the roots and conditions that prevent women from enjoying their human rights. Moreover, it is one of the few human rights instruments that clearly apply to violations committed by non-state actors. The Convention establishes clear lines of obligations that a state has to assume, especially with the aim to produce structural changes within a state. Therefore, it helps to clarify the situation and makes it easier for women to complain. Human rights are often read without being conscious of specific implications that an interpretation might have for women. Moreover, the political and symbolic weight of a condemnation of a state for violating its specific obligations to prevent, punish and eradicate gender-based violence also has to be taken into account. Last but not least, the violation of the Convention of Belém do Pará becomes part of the operative parts of a judgment if applied directly. This does give an application of the Convention of Belém do Pará a judicial weight. The importance of a legally binding and judicable instrument cannot be underestimated. Violence against women and gender-based discrimination unfortunately are still serious and widespread problems in the Americas. An effective application of the Convention of Belém do Pará in combination with the rights established in the American Convention, therefore, seems fundamental.

Finally, it should be mentioned that the victim’s representatives further claimed the application of arts 8 and 9 Convention of Belém do Pará. This claim was correctly rejected by the IACtHR. It is clearly indicated by article 12 Convention of Belém do Pará that it exclusively applies to article 7 thereof.

86 Cárdenas Cerón/ Lozada Pimiento, see note 37, 97.
87 See Medina, see note 9, 131-132.
VI. Positive Obligations in Case of Violence against Women Committed by Private Actors

The main topic of the judgment concerned positive obligations of a state in case of violence against women committed by a private actor. Principally the conduct of a private person not acting on behalf of the state cannot be considered as an act of state and therefore, responsibility cannot be imputed to the state. The idea behind positive obligations is that a state may be held responsible for precisely such actions in response to private acts. Although a state is not the purveyor of violence against women, it may become complicit by non-action. Developments with regard to the concept of positive obligations are not restricted to gender issues. Nevertheless, creative interpretation of human rights is a useful tool for gender-based violence issues. The American Convention is formulated as gender neutral. Therefore it is necessary to use the concepts of positive obligations and gender-sensitive interpretation in the light of modern developments. Thereby the principle of due diligence is essential to define the conditions under which a state may be obliged to prevent or react to acts of private perpetrators. As mentioned above, international courts and quasi-judicial bodies have already dealt with cases involving violence against women by non-state actors. They have already made steps in the right direction.

One of the leading cases on the topic of positive state obligations was established by the IACtHR itself. In the case of Velasquez Rodríguez v. Honduras, already decided in 1988, the Court laid down the basis to hold states responsible for acts by private individuals. The findings of the case were upheld on various occasions by the Court. Bas-

89 See Thomas/ Beasley, see note 12, 41.
91 See above under Part II. above.
92 IACtHR, Case of Velasquez-Rodriguez v. Honduras, Merits, Judgment of 29 July 1988, Series C No. 4, paras 166, 174-175.
93 IACtHR, Case of Anzualdo-Castro v. Peru, Preliminary Objection, Merits, Reparations and Costs, Judgment of 22 September 2009, Series C No. 202, para. 62; IACtHR, Case of Kawas-Fernández v. Honduras, Merits, Reparations and Costs, Judgment of 3 April 2009, Series C No. 196, para. 76; IACtHR, Case of Perozo et al. v. Venezuela, Preliminary Objections, Mer-
ing its decision on the precedent set in Velasquez Rodriguez, the Court started by looking at the different obligations of states.

According to article 1 (1) American Convention the first obligation of states is the duty to respect human rights, i.e. to abstain from committing human rights violations themselves. Both the Commission and the victims’ representatives alleged the direct participation of state agents in the crimes. Due to the lack of evidence provided, the Court, however, was not able to establish a direct involvement of the state in the acts perpetrated.\textsuperscript{94} Continuing, the Court reiterates that pursuant to the obligations assumed by the States Parties under article 1 (1) American Convention a state not only has the duty to respect human rights but also has to ensure their full enjoyment (duty to guarantee). The duty may be fulfilled in various ways dependent on the right concerned. It constitutes an obligation of means, not of result. The duty to guarantee comprises the organisation of a state’s governmental apparatus as well as all structures of public power. Furthermore, four specific duties may be inferred from the duty to guarantee: the obligation to prevent human rights violations, investigate them, punish those responsible and compensate the victims.\textsuperscript{95}

First the Court examined whether the state took reasonable measures to prevent the crimes against the three victims. To establish the measures which have to be adopted by a state the Court looked at various relevant international instruments dealing with gender-based violence.\textsuperscript{96} It came to the conclusion that a comprehensive set of measures has to be adopted to comply with the requirement of due diligence. These comprise the establishment of an appropriate legal framework, including an effective enforcement mechanism and the adoption of

\textsuperscript{94} Para. 242, \textit{Case of González et al. ("Cotton Field") v. Mexico}, see note 2.
\textsuperscript{95} IACHR, \textit{Case of Velasquez-Rodriguez v. Honduras}, see note 92, para. 166.
comprehensive and effective prevention policies and practices in order to respond adequately to complaints. The prevention strategy should not only thwart the risk factors, the state should also provide for preventive measures to adequately react to specific cases. Applying the previously established criteria to the facts of the case, the Court noted that, although Mexico adopted some necessary and important measures, they were insufficient and ineffective to prevent the crimes. Mexico therefore failed to prevent the disappearance, abuse and death of the three victims. Nevertheless, the Court also clarified that a state does not have unlimited obligations with regard to acts committed by private individuals. In order to attribute responsibility to the state for the failure to prevent the crime three additional requirements have to be fulfilled:

1.) the awareness of a situation of real and imminent danger;
2.) for a specific individual or group of individuals; and
3.) the reasonable possibility of preventing or avoiding that danger.

Attention should be drawn to the way the Court applied the requirements to the facts of the case and solved the issue.

It divided the facts into two crucial periods of time: the time prior to the report of the girls’ disappearance and the time before the discovery of their dead bodies. With regard to the former, the Court did not attribute responsibility to the state. Even though the state was conscious of the general situation of risk for women in Ciudad Juárez, it could not be established that the state was aware of the real and immediate danger for the victims in the specific case. The Court noted the greater responsibility of the state to protect women in Ciudad Juárez and criticized the absence of a general policy to fight the violence against women.

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97 Para. 258, Case of González et al. (“Cotton Field”) v. Mexico, see note 2.
98 Para. 280, ibid., see note 2; this has already been established in a variety of cases before the IACtHR: IACtHR, Case of the Pueblo Bello Massacre v. Colombia, Merits, Reparations and Costs, Judgment of 31 January 2006, Series C No. 140, para. 123; IACtHR, Case of Valle-Jaramillo et al. v. Colombia, Merits, Reparations and Costs, Judgment of 27 November 2008, Series C No. 192, para. 78; see also the following cases before the European Court of Human Rights: ECtHR, Kılıç v. Turkey, Application no. 22492/93 of 28 March 2000, paras 62-63; ECtHR, Osman v. United Kingdom, Application no. 23432/94 of 28 October 1998, paras 115-116.
99 The policy could already have been implemented in 1998 when the Mexican National Human Rights Commission warned of the pattern of violence against women, para. 282 Case of González et al. (“Cotton Field”) v. Mexico, see note 2.
but it was not able to attribute international responsibility to these failures. However, the situation is different with regard to the latter period of time. After the report of the girls’ disappearance and due to the context in Ciudad Juárez, the state was aware of a real and imminent danger for the victims. Yet the state did not provide for an immediate and effective reaction and investigation of the disappearances. The failure to comply with its due diligence obligation was found to be particularly serious taking into account the context of extreme violence in Ciudad Juárez.100 Therefore, the Court found that the state had violated the rights to life, personal integrity and personal liberty of the three victims by failing to prevent the crimes.

In the following the Court continued with an in-depth analysis of the procedural obligation to investigate the crimes and punish those responsible. Again the Court started by laying down the criteria for the state to fulfill its duty. The obligations must be complied with due diligence to avoid impunity and repetition of the acts. As soon as state authorities are aware of the facts, they are under the obligation to initiate an investigation without delay. Additionally, an investigation has to be *ex officio*, serious, impartial and effective, which includes the use of all legal means at its disposal. It has to aim at establishing the truth and capturing, prosecuting and eventually punishing those responsible. It is noteworthy that the Court recognized the necessity of a wider scope of standards when dealing with violence against women within a general context of such violence.101 The Court, *inter alia*, consulted jurisprudence and adopted the reasoning of the European Court of Human Rights (hereinafter the ECtHR) with regard to the importance of a vigorous and impartial investigation in case of racially motivated crimes. According to the ECtHR, it is of special importance that a society continuously reasserts its condemnation of racism to “maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence.”102

According to the IACtHR the same reasoning can be applied in the case of violence against women. The Court went on to establish whether the state complied with the criteria laid down by the Court. It examined the different measures taken by Mexico to investigate the

100 Paras 283 et seq., ibid., see note 2.
101 Paras 287 et seq., ibid., see note 2.
crimes, solve the case and punish those responsible. The Court concluded that the state had not adopted necessary measures or that measures were not implemented or were insufficient.

With regard to the first stage of investigations, it should be repeated that Mexico already accepted its international responsibility for irregularities committed. It could be speculated whether the state, by generally accepting state responsibility with regard to the first stage of investigation, tried to avoid the detailed analysis and presentation of the facts by the Court. A judgment does have more weight and visibility if the facts are established well. However, the Court found that the irregularities during the second stage of investigations were not completely corrected as argued by the state and a wide variety of deficiencies were established. They concerned, inter alia, irregularities with regard to the handling of evidence, the false accusation and fabrication of culprits, the delay in the investigations and the absence of investigations against public officials for alleged serious negligence. The Court made clear that such deficiencies encourage an environment of impunity for the perpetrators fuelling the perpetuation of such crimes. Thereby a message that gender-based violence is tolerated by the state is sent. Therefore, Mexico also failed to comply with its duty to investigate.

In general, one can note that the Court takes time to thoroughly analyse the measures (allegedly) taken by the state. Yet the Court sometimes hints at problems establishing the facts of the case due to insufficient proof or argumentation by the Commission or the representatives. Apart from that, it lays down clear obligations for the state having special regard to gender-specific impacts of measures. Thereby the Court refers to and bases its decision on a wide variety of different sources. By interpreting the American Convention in the light of other specific international instruments dealing with women’s rights, binding or non-binding, as well as applying the standards set by the Convention

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103 This included the disputes with regard to the: “custody of the crime scene, collection and handling of evidence, autopsies, and identification and return of the victims’ remains; (2) actions taken against those presumed to be responsible and alleged ‘fabrication’ of suspects; (3) unjustified delay and absence of substantial progress in the investigations; (4) fragmentation of the investigations; (5) failure to sanction public officials involved in the irregularities, and (6) denial of access to the case file and delays or refusal of copies of this file”, para. 295, Case of González et al. (“Cotton Field”) v. Mexico, see note 2.

104 Para. 388, ibid., see note 2.

105 Cf. paras 357, 359, 389, ibid., see note 2.
of Belém do Pará, the IACtHR ensured awareness of gender-violence issues. It is essential to interpret human rights in light of the different needs of women and men in order to render them equally effective for both. The importance of the judgment, therefore, lies in the standard it sets for future cases that opens the door for further progress.

VII. Discrimination and Violence against Women

Another very important conclusion of the Court is that the three girls were victims of violence against women according to the American Convention and the Convention of Belém do Pará. Yet, even more importantly, the IACtHR does not stop at this conclusion. For the first time it declares that violence against women constitutes a form of discrimination. Next to establishing the obligations to respect human rights and freedoms and to ensure their free and full exercise article 1 (1) American Convention points out that these obligations have to be fulfilled without discrimination, inter alia, of sex.

Traditional interpretations of human rights instruments have often failed to identify the connection and interplay between gender-based violence and gender-discrimination. On the one hand, gender-discrimination facilitates gender-based violence. On the other hand, gender discrimination is reinforced by gender-based violence. It has to be taken into account that the prohibition of discrimination has two aspects. Gender-based violence impairs or nullifies basic human liberties of women, including the rights to life, liberty, and to be free from

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106 Para. 231, ibid., see note 2; see the definition of violence according to article 2 Convention of Belém do Pará above under Part II.

107 Para. 402, Case of Gonzalez et al. (“Cotton Field”) v. Mexico, see note 2; it should be noted that in the case IACtHR, Case of the Miguel Castro-Castro Prison v. Peru, see note 36, para. 303, the Court generally mentions the UN Committee on the Elimination of Discrimination against Women and “General Recommendation No 19: Violence against Women” of 30 January 1992, GAOR 47th Sess. Suppl. 38, 1, which lays down that discrimination includes gender-based violence. However, the Court does not enter into an extensive study on the context to link gender-based violence and discrimination as in the present case.

mistreatment and torture.\textsuperscript{109} Hence, the prohibition of discrimination, firstly, ensures that gender does not affect a women’s ability to enjoy human rights and fundamental freedoms. Additionally, it is not enough to extend only human rights to women. This approach does not challenge the underlying social, political and economic structures that are the roots of gender inequality. Hence, the prohibition of discrimination, secondly, aims at changing institutions and processes that inhibit women’s equality in all spheres of life.\textsuperscript{110}

The Convention of Belém do Pará expressly recognises the relation between violence against women and gender-discrimination. It further points to the historical component of traditional unequal power relations between men and women.\textsuperscript{111} It establishes that the right to be free from violence includes not only the right to be free from all forms of discrimination but also “to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination.”\textsuperscript{112} The IACtHR also considers the Convention on the Elimination of all Forms of Discrimination against Women, which defines discrimination against women as,

“any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”\textsuperscript{113}

The Convention on the Elimination of all Forms of Discrimination against Women itself does not mention violence against women as a form of discrimination. However, the UN Committee on the Elimination of Discrimination against Women makes clear in its General Recommendation No. 19 that regardless whether violence against women is

\textsuperscript{109} See Ulrich, see note 11, 646.


\textsuperscript{111} Preamble Convention of Belém do Pará, see note 7.

\textsuperscript{112} Article 6 Convention of Belém do Pará, see note 7.

\textsuperscript{113} Article 1 Convention on the Elimination of all Forms of Discrimination against Women, see note 22.
expressly mentioned, it is included within the definition of discrimination.\textsuperscript{114}

In its reasoning the IACtHR is further following the findings of the Inter-American Commission on Human Rights and the ECtHR. Both institutions already established the link between discrimination and violence against women. The existence of a general pattern of state tolerance and an ineffective judiciary towards cases of domestic violence was considered discriminatory practice.\textsuperscript{115}

The IACtHR takes into account all the previously mentioned instruments and makes some important findings: indifference of state authorities towards gender-based violence reproduces violence. This results in the perpetuation of the crimes. Impunity of those responsible sends the message that gender-based violence is tolerated. Women find themselves in a situation where they are not protected and do not feel safe anymore. Moreover, the subordination of women is based on gender stereotypes, which refer to a preconception of personal attributes, characteristics or roles that correspond or should correspond to either men or women. Stereotypes are reflected in policies and practices, as well as the acts and the language of state authorities. As a result, they become one of the causes and consequences of violence against women.\textsuperscript{116}

In previous cases the Court did establish that there was violence against women. However, it did not distinguish between general situations of violence and violence in a discriminatory context which is directed against a historically marginalized group.\textsuperscript{117} In the present case the Court expressly recognises this link and condemns Mexico for violating its duty of non-discrimination. Within this context it is important to recognise that violence against women constitutes discrimination. This recognition is more far-reaching than just to argue that violence affects women disproportionately or that laws against such violence are

\textsuperscript{114} Para. 6 UN Committee on the Elimination of Discrimination against Women “General Recommendation No 19: Violence against Women”, see note 107.

\textsuperscript{115} Cf. ECtHR, Opuz v. Turkey, see note 25; IACHR, Maria Da Penha Maia Fernandes v. Brasil, see note 32.

\textsuperscript{116} Paras 400-401, Case of Gonzalez et al. (“Cotton Field”) v. Mexico, see note 2.

not imposed in the same manner as on men. Gender-based violence is discrimination per se and requires the adoption of positive measures regardless of how violence against men is handled.\textsuperscript{118}

\section*{VIII. Torture}

Before coming to the last point, the importance of the judgment with regard to reparations, it is worth having a short look at the question whether the acts perpetrated could have been qualified as torture. The Court, \textit{inter alia}, declares the state responsible for violating article 5 (2) of the American Convention which contains the prohibition of torture or cruel, inhuman, or degrading punishment or treatment. In general this decision is to be welcomed. Nevertheless, it can be criticized that, although the Court declares a violation of article 5 (2) of the Convention, it does not discuss the topic of torture or other forms of ill-treatment at all. It seems to be a non-issue for the Court how to classify the acts committed, i.e. it does not distinguish between torture or cruel, inhuman, or degrading punishment or treatment.\textsuperscript{119} Only the concurring opinion of Judge Cecilia Medina Quiroga sheds some light on the topic.\textsuperscript{120} The judge maintains that the only reason for the Court to refrain from classifying the acts as torture is the fact that they have not been committed in official capacity. According to the judge it appears that the Court shied away from explicitly finding that torture can be committed by private actors.

The requirement of official participation or acquiescence as an element of torture is disputed in international law.\textsuperscript{121} Various instruments show different approaches. The Inter-American Convention to Prevent and Punish Torture and the Convention against Torture and Other

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{118}] See Copelon, see note 27, 134.
\item[\textsuperscript{119}] In comparison, when referring to the violation of the personal integrity of the victims’ families, the Court refers to degrading treatment, para. 424, \textit{Case of González et al. (“Cotton Field”) v. Mexico}, see note 2.
\item[\textsuperscript{120}] Concurring Opinion of Judge Cecilia Medina Quiroga in Relation to the Judgment of the Inter-American Court of Human Rights in the \textit{Case of Gonzalez et al. (“Cotton Field”) v. Mexico}, see note 2.
\end{enumerate}
\end{footnotesize}
Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter CAT) require “consent or acquiescence of a public official or other person acting in an official capacity” in their definition of torture.\textsuperscript{122} Similar to other human rights treaties, the American Convention itself prohibits torture but does not contain a definition of torture.\textsuperscript{123} In the case \textit{Bueno Alves v. Argentina}, the IACtHR established the elements for an ill-treatment to be considered torture,

1.) an intentional act;
2.) which causes severe physical or mental suffering,
3.) committed with a given purpose or aim.\textsuperscript{124}

In her concurring opinion, Cecilia Medina Quiroga established that the difference between torture and other forms of ill-treatment, according to the Court itself, seems to lie in the severity of the act.\textsuperscript{125} Furthermore, she points to new developments in international law\textsuperscript{126} and analyses the findings of various international bodies, such as \textit{inter alia} the jurisprudence of the ECtHR and the General Comment of the United Nations Human Rights Committee, which do not require the

\footnotesize{\textsuperscript{122} Article 1 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted on 10 December 1984, entered into force 26 June 1987), UNTS Vol. 1465 No. 24841; cf. article 3 IACPPT, see note 77, which reads as follows: “Article 3 IACPPT, The following shall be held guilty of the crime of torture:
\begin{itemize}
\item a. A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so.
\item b. A person who at the instigation of a public servant or employee mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto.”
\end{itemize}

\textsuperscript{123} Cf. article 3 ECHR, see note 45; article 7 International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976), UNTS Vol. 999 No. 14668.


\textsuperscript{125} She argues that the elements of “intention” and “purpose” or “aim” may also exist in cruel, inhuman or degrading types of treatment; Concurring Opinion of Judge Cecilia Medina Quiroga, see note 120, para. 3.

\textsuperscript{126} On the topic, see also Edwards, see note 16; J. Marshall, “Torture Committed by Non-State Actors: The Developing Jurisprudence from the \textit{Ad Hoc Tribunals}, \textit{Non-State Actors and International Law} 5 (2005), 171 et seq.; M.D. Evans, “Getting to Grips with Torture”, \textit{ICLQ} 51 (2002), 365 et seq.
official participation for an act to be considered torture. From the facts of the case, she establishes that the severity threshold for torture could have been established. The Court, for example, speaks of “such cruelty that it had to have caused her severe physical and mental suffering.” As a result the judge concludes that the Court is independent in the definition of torture and does not have to rely on the definitions contained in the Inter-American Convention to Prevent and Punish Torture and CAT. The findings of Judge Cecilia Medina Quiroga can only be agreed with.

In general, the distinction between torture and other forms of ill-treatment has no legal implications. Both end in a condemnation of the state due to a violation of article 5 of the American Convention. Yet the Court did make the distinction in other cases and therefore, it is important to determine the various levels of human rights abuses. The severity of a situation and the extent of a victim’s suffering should be acknowledged. Torture is one of the most heinous crimes that can be committed. A special stigma is attached to the finding of torturer. Considering the special gravity of torture, another question can be asked: is violence less grave, less atrocious solely because the same act was not perpetrated by a state official? The definition of torture in the CAT has been heavily criticised by feminist scholars as a “male”

127 ECtHR, Opuz v. Turkey, see note 25, para. 159; ECtHR, Mahmut Kaya v. Turkey, Application no. 22535/93 of 28 March 2000, paras 115-116; ECtHR, H.L.R. v. France, Application no. 24573/94 of 29 April 1997, para. 40; ECtHR, M.C. v. Bulgaria, Application no. 39272/98 of 4 December 2003, para. 151; nevertheless, it has to be pointed out that the ECtHR is not consistent in its jurisprudence. In the case ECtHR, Selmouni v. France, Application no. 25853/94 of 28 July 1999, para. 97, the ECtHR refers to the definition of torture under the CAT, see note 122; United Nations Human Rights Commission “General Comment No. 20: Replaces General Comment 7 concerning Prohibition of Torture and Cruel Treatment or Punishment (Art. 7)” (3 April 1992) GAOR 47th Sess. Suppl. 40, 193, para. 2.

128 Para. 219, Case of González et al. (“Cotton Field”) v. Mexico, see note 2.


131 See Copelon, see note 27, 135.
right against torture.\textsuperscript{132} With regard to this point, the IACtHR failed to incorporate the realities of women’s lives in the jurisprudence of the Court.

**IX. Reparations**

Lastly, it should be turned to the relevance of the judgment with regard to reparations. It is a basic principle of international law that in case of a breach of an international obligation a state must provide adequate compensation.\textsuperscript{133} In general reparations have two purposes: they ensure that the state observes certain standards of law and repair, as far as possible, injuries made.\textsuperscript{134} State Parties to the American Convention have not only accepted the duties to respect and ensure human rights, they also undertake to provide reparations to the injured parties. Article 63 (1) of the Convention lays down that,

“[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.”

Article 63 (1) authorises the IACtHR to a broad array of reparatory measures.\textsuperscript{135} Reparations are seen by the IACtHR as the generic term for the different reparatory measures that may be imposed on a state after the Court found a violation of the human rights obligations laid down in the American Convention. It distinguishes between restitu-

\textsuperscript{132} See Edwards, see note 16, 368, see also under Part II. and the public/private dichotomy of international law.


\textsuperscript{135} Compare article 50 ECHR, see note 45, which authorizes the ECtHR to afford just satisfaction.

The starting point for reparations \textit{prima facie} is to re-establish the victim to the situation before the human rights violation occurred (restitution).\footnote{137}{J. Guillerot, Reparaciones con Perspectiva de Género, 2009, 25.} If \textit{restitutio in integrum} is not possible, compensation or indemnization is granted for pecuniary and non-pecuniary damages, as well as the reimbursement of costs and expenses. The compensation of victims is the form of reparation most often applied by the IACtHR.\footnote{138}{See Carrillo, see note 136, 512-513.} Satisfaction entails symbolic or non-monetary means that provide satisfaction that redresses a moral injury that cannot be redressed by restitution or compensation. It encompasses, for example, the verification and public disclosure of the truth, commemorations of the victims, issuance of official statements accepting responsibility or apologising and the construction of monuments. Rehabilitation refers to measures that intend to help the victims recover from the harm and traumas they suffered due to violations of their human rights. This includes, \textit{inter alia}, medical and psychological care and legal and social services. Last but not least, guarantees of non-repetition make sure that an illicit act will not recur.\footnote{139}{Cf. UN Commission on Human Rights “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law” (19 April 2005) ESCOR 61st Sess. Suppl. 3, 136; Guillerot, see note 137, 26.}

The importance of reparations in the present case lies in the fact that the IACtHR takes on the topic of mainstreaming gender in reparations, i.e. the difference that gender should make when discussing reparations. It was the first time that the Court extensively considered a gender dimension for the reparations and additionally linked measures to the situation or context of systematic violence against women. In order to understand the significance of the reparations in this case, two basic ideas have to be considered.

First of all, for the question on “how to repair” it is essential to search for the true causes and consequences of the human rights violation or the context in which the violation is framed. One has to recog-
nise that violations of human rights stem from situations of inequality, discrimination and injustice. Having this in mind, it is important to always consider that violence may produce a different impact for men and women. The different needs of men and women have to be analysed. Accordingly, reparations then have to respond to all these considerations. Secondly, reparations should have an additional, transformative effect. As mentioned above, reparations primarily aim to restore the victim to his or her previous situation, i.e. the situation before the human rights violation occurred. However, one has to take into account that the original situation is to be found within a context of discrimination and violence. As a result, it is necessary to bring about a change to this situation.

Notably, the Court takes up these considerations. It points out that within, “the context of structural discrimination in which the facts of this case occurred, ... the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, re-establishment of the same structural context of violence and discrimination is not acceptable.”

Moreover, the Court lays down a few parameters which state policies should encompass in order to constitute reparations with a gender perspective,

(i) State policies have to question and to be “able to modify, the status quo that causes and maintains violence against women and gender-based murders”;

(ii) they have to lead to “progress in overcoming the unjustified legal, political, social, formal and factual inequalities that cause, promote or reproduce the factors of gender-based discrimination”, and

See Guillerot, see note 137, 100; the inclusion of a gender perspective is especially important with regard to the right to have access to justice. Women face a variety of problems to have access to judicial remedies and subsequently, to defend their rights. Therefore, it is crucial that the judicial process itself and its actors, from the attention at the police station to the deliberation of the judges, display sufficient gender sensitivity.

See Guillerot, see note 137, 106 et seq.

Para. 450, Case of González et al. (“Cotton Field”) v. Mexico, see note 2.
(iii) they have to “raise the awareness of public officials and society on the impact of the issue of discrimination against women in the public and private spheres.”

Having this in mind, it is all the more unfortunate that it seems that, due to the lack of sufficient argumentation by the Inter-American Commission and the victims’ representatives, the IACtHR was unable to decide whether the public policies implemented by Mexico constitute a sufficient guarantee of non-repetition. The same happened to a range of other issues. Apart from that, one can conclude that the Court was aware of gender issues when laying down the reparations of the case. In a variety of ways one can notice that the Court was sensitive to the specific harm that the women were exposed to. It acknowledged the necessity of special attention for the measures to repair the harm done. An example is the continuation and extension of training programs with a gender perspective for public officials. The Court points out that such training not only involves “learning about laws and regulations, but also developing the capacity to recognize the discrimination that women suffer in their daily life.” Public officials should acquire the capacity to recognise the effects stereotyped ideas and values have on women. Furthermore, the IACtHR ordered the creation of a program of education for the general public aiming at surmounting the problem of discrimination against women.

X. Conclusion

To conclude, one can ascertain that the judgment constitutes important progress in the protection of women against violence, rape and murder in the Americas. The IACtHR showed sensitivity towards the vulnerability of women in certain situations and awareness of special threats and harm to women. It questioned the fundamental roots of violence against women and the decision acknowledges that gender-based violence is a serious societal problem.

143 Para. 495, ibid., see note 2.
144 Paras 493 and 495, ibid., see note 2.
145 Cf. paras 520, 525 and 530, ibid., see note 2.
146 Cf. paras 502, 506, 512, 549, 584 and 585, ibid., see note 2.
147 Para. 540, cf. also paras 541-542, ibid., see note 2.
148 Para. 543, ibid., see note 2.
The judgment contributes to the IACtHR’s jurisprudence in various ways. First of all, the Court explicitly and clearly lays down parameters for the state with regard to its positive obligations in case of violence against women committed by private actors. The concept of positive obligations is not new for the Court. However, it is an advance that the Court for the first time comprehensively links positive state obligations with the topic of violence against women. Moreover, it puts these obligations within the context of structural discrimination. Thereby, the Court pays tribute to various sources and information. The IACtHR consistently cites and refers to relevant decisions of other human rights bodies, which strengthens its reasoning. Furthermore, it also sets new standards with regard to reparations.

Nevertheless, the judgment contains some parts which are open to debate. It is also unfortunate that the Court waited until 2009 to comprehensively touch upon the topic of gender issues. Moreover, for this to happen, a case with such unspeakable atrocities as the present case was necessary. There still lies much work ahead to eventually achieve the ultimate goal of a continent free from violence against women. The next challenge is to achieve the same gender sensitivity with other, subtler, less obvious violations of women’s rights.

Yet, the decision is a good starting point for further progress. Hopefully, the decision serves as a wake-up call for the whole region: protection of women against violence by private actors is not outside state responsibility! The judgment not only constitutes an important tool for the families of the victims who have spent years seeking justice. It also serves as a precedent for other women in the region. The same reasoning can be adopted in other cases. However, considering the protection of human rights is primarily the duty of states, more importantly, the judgment offers guidelines for states which obligations have to be fulfilled. Finally, it remains to be seen how Mexico is implementing the tasks imposed by the IACtHR which aim at structural changes. Mexico faces a difficult challenge, especially considering the current situation in Ciudad Juárez which shows a rise in general violence caused by the increase of drug trafficking. It is also clear that a “culture of discrimination” cannot be changed overnight. The challenge ahead needs a strong commitment. The judgment of the IACtHR provides the incentive that Mexico continues working towards the objective of an environment free from gender-based violence.
Implementation of International Treaties into National Legal Orders: The Protection of the Rights of the Child within the Austrian Legal System

Sonja Neudorfer/ Claudia Wernig

“Children do not become, but already are human beings”
(Janusz Korczak 1878 – 1942)


* Chapters I., II. 1., II. 1.a., II. 2., IV. by Claudia Wernig; Chapters II. 2. a., III., IV. by Sonja Neudorfer.
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I. Introduction

Today it is no longer questionable, whether or not human rights apply to all age groups. Children are nowadays undoubtedly fully-fledged beneficiaries of all human rights enshrined in various international treaties as well as in national legal orders appropriate to their age and stage of development. Moreover, bearing in mind the specific needs and

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vulnerability of children, special human rights instruments stipulating specific rights for children have been drawn up at the international as well as the regional level over the last decades. The Convention on the Rights of the Child (CRC) plays thereby an important role. Being the first comprehensive legally binding international instrument concerned with the rights of the child, this Convention obtained a huge number of States Parties shortly after its adoption, reaching thereby almost universal ratification. Given the large number of States Parties to the CRC it is all the more alarming that still millions of children all over the world suffer from poverty, violence, economic exploitation, preventable diseases, unequal access to education and legal systems that do not recognise their specific needs.

Signing and ratifying an international treaty like the CRC is only the first step. By agreeing to undertake the obligations of an interna-

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2 E. Brems, *Human Rights: Universality and Diversity*, 2001, 4; Huber, see note 1, 1137 et seq.; Feik, see note 1, AUS 26 et seq.; Berka, see note 1, 94 et seq.; Berka, *Lehrbuch Verfassungsrecht*, see note 1, 340 et seq.; Öhlinger, see note 1, 310; Adamovich/Funk/Holzinger, see note 1, 22 et seq.


tional treaty, national governments – as a rule – commit themselves to carry out all appropriate legislative and administrative actions and policies necessary to fully protect and ensure the rights guaranteed by that treaty – in a word, to implement the international treaty effectively within the domestic legal order. Continuous human rights violations in spite of existing binding international human rights treaties, however, show that this obligation is not always met by States Parties in reality.

Austria ratified the CRC in 1992. Since then several legislative and administrative reforms have been undertaken to improve the conformity of the national Austrian legal order with the principles and the provisions of the Convention. But, according to the concluding observations of the Committee on the Rights of the Child based on the first and the second periodic report of Austria, deficits regarding the implementation of the Convention in Austria still exist. The repeated recommendation of the Committee on the Rights of the Child to incorpo-

5 See in that context, for instance, the prohibition of all forms of corporal punishment by law in 1989, the establishment of Ombudsman systems for children and adolescents at the federal as well as the states level in the early 1990s, the adoption of the Parent and Child Amendment Act (Bundesgesetzblatt (BGBl) 2000/135) and the establishment of the Austrian Federal Youth Representative Council in 2001. See Committee on the Rights of the Child 20th Sess., Concluding Observations: Austria, 1999, 2, Doc. CRC/C/15/Add. 98 of 7 May 1999; Committee on the Rights of the Child 38th Sess., Concluding Observations: Austria, 2005, 1, 2, Doc. CRC/C/15/Add. 251 of 31 March 2005.

6 The Committee on the Rights of the Child is the responsible human rights treaty body for monitoring the implementation of the CRC by its States Parties via a system of periodic reporting. According to article 44 CRC States Parties must report initially two years after acceding to the Convention and thereafter every five years on the measures they have adopted to give effect to the rights guaranteed by the Convention and the progress they have made on the enjoyment of those rights. After examining each report, the Committee addresses in its “concluding observations” its concerns and general recommendations to the States Parties, based on the information enclosed in those states reports. Cf. Detrick, A Commentary on the United Nations Convention on the Rights of the Child, see note 3, 41; Van Bueren, see note 3, 389 et seq.; H. Sax/ C. Hainzl, Die verfassungsrechtliche Umsetzung der UN-Kinderrechtskonvention in Österreich, 1999, 21 et seq.

7 Committee on the Rights of the Child 20th Sess., see note 5, 2, 5, 6; Committee on the Rights of the Child 38th Sess., see note 5, 2, 3, 8 et seq.
rate the rights of the child enshrined in the Convention into the Austrian Constitution thereby attracts special attention.

Using the implementation of the CRC by Austria as an example, in the following, certain aspects considered being part of such effective implementation of an international treaty within the national legal order will be examined in more detail. Particularly, the requirements for effective remedies and the question, whether or not an inclusion of the rights guaranteed by an international treaty into the national constitutional law is required in that context, will be discussed.

II. Implementing the Convention on the Rights of the Child effectively within the Austrian Legal System

As international treaties usually say little about how States Parties have to implement their international legal obligations within their domestic legal orders, the starting point for figuring out how international law is integrated into and applied within a national legal order is – in most instances – the national constitution. Basically, two different constitutional approaches exist: the transformation approach, following the theory of dualism on the one hand and the incorporation approach, following the theory of monism on the other hand.\(^8\) Whereas states following the transformation approach give effect to international law provisions on the national level by transforming them into domestic law, in states following the incorporation approach international law provisions themselves become part of the national law once the requirements for signing and ratifying the international treaty have been satisfied. However, in practice pure forms of monism or dualism rarely exist. Rather, there are almost as many ways of implementing international law as

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there are national legal systems varying between pure monism and total dualism.⁹

1. Implementation of International Treaties into the Austrian Legal System

Since the conclusion of international treaties is not only subject to international law but also to the domestic legal order of the respective state, national law must contain provisions regarding the negotiation, conclusion and implementation of international conventions and agreements into the national legal order. In the Austrian Federal state, it is first and foremost the Federation (Bund) which has the power to conclude international treaties without being bound by the allocation of powers between the Federation and the States. Furthermore, the Austrian States (Länder) also have a limited power to conclude international treaties (article 16 Federal Constitution).¹⁰ In both cases, the conclusion of the treaties lies within the responsibility of the Federal President (article 65 para. 1 Federal Constitution).¹¹ In cases where, political treaties, treaties modifying or supplementing existing laws and international treaties amending the fundamental treaties of the European Union¹² are concerned, the parliament’s approval additionally is required.

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⁹ Dunoff/ Ratner/ Wippman, see note 8, 267 et seq.; Evans, see note 8, 428 et seq.; Detrick, A Commentary on the United Nations Convention on the Rights of the Child, see note 3, 27 et seq.; Ermacora/ Hummer, see note 8, 113 et seq.

¹⁰ Bundesverfassungsgesetz (B-VG).


¹² Whereas political treaties are considered to be treaties substantially and directly affecting the existence of the state, its territorial integrity, independence, position among states or political influence on other states, the distinction between “treaties modifying existing law” and “treaties supplementing existing law” specifies whether the matter in question was previ-
(article 50 para. 1 Federal Constitution), which must be obtained before the conclusion of the treaty. To become part of the Austrian legal system, international treaties, already binding Austria on the international level, are also to be published in Part III of the Federal Law Gazette or respectively in another appropriate manner. The rank of the international treaty within the national legal order is determined by its content: while treaties modifying or supplementing existing laws hold the rank of simple Federal law, all other international treaties are considered to be administrative regulations. However, until the amendment of the Federal Constitution in 2008, international treaties modifying or complementing the Austrian Constitution – like e.g. the European Convention on Human Rights – could also be provided with the rank of national constitutional law by the Austrian Parliament during the implementation process. As the international treaty itself has to be published in the Federal Law Gazette thereby becoming part of the Austrian legal system, one can conclude that, in the Austrian case a “moderate incorporation approach” regarding the implementation of international treaties into the national legal order applies.

Once the international treaty has obtained legal effect within the Austrian legal system, its direct applicability depends on the following terms: provisions of the international treaty have to be sufficiently clear and detailed in the sense of article 18 Federal Constitution to serve as a legal basis for administrative procedures and litigation. If that is not the case, the provisions of the treaty additionally have to be implemented by national law to obtain applicability within the national legal order. But even if the international treaty is sufficiently clear and detailed the

13 T. Öhlinger, “Art 50 B-VG”, in: K. Korinek/ M. Holoubek (eds), Österreichisches Bundesverfassungsrecht, Kommentar zum B-VG, Vol. II/1, 2009, 20 et seq.; Ermacora/ Hummer, see note 8, 116 et seq.; Stelzer, see note 11, 60 et seq.; Hausmaninger, see note 11, 28; Foster, see note 11, 59; Öhlinger, see note 1, 80 et seq.; Berka, Lehrbuch Verfassungsrecht, see note 1, 68 et seq.; Walter/ Mayer/ Kucsko-Stadlmayer, see note 11, 116 et seq.

14 Öhlinger, see note 13, 26 et seq.; Hausmaninger, see note 11, 28; Stelzer, see note 11, 61 et seq.; Öhlinger, see note 1, 83 et seq.; Berka, Lehrbuch Verfassungsrecht, see note 1, 70 et seq.

15 Öhlinger, see note 13, 19 et seq.; Ermacora/ Hummer, see note 8, 112.
Federal President as well as the parliament – under certain conditions – retain the right to decide on a so-called “reservation of implementation” during the ratification process. In that case, the international treaty – although being part of the national legal order – must always be transformed into Austrian law and its direct applicability is excluded anyway, which means that no rights or obligations can be directly derived from this treaty and no national administrative or judicial decisions can rely on this international legal act but only on the executing national law provisions. This could be seen as an important exception from the moderate incorporation approach normally applying in the Austrian case. Even though such “non-self-executing” treaties have to be considered when national legal provisions are to be interpreted “in conformity with international law”, as long as the required executing national legislation has not been enacted, the legal effect and importance of such treaties, compared to “self-executing” treaties, are rather weak, as rights or obligations can not be directly derived from this international treaty and be invoked before national courts and administrative bodies.\textsuperscript{16}

\textbf{a. Implementation of the Convention on the Rights of the Child within the Austrian Legal Order}

The CRC being considered as one of the most important human rights instruments ever adopted by the international community, was unanimously approved by the United Nations General Assembly in November 1989, opened for signature in January 1990 and entered into force within that same year, in September 1990.\textsuperscript{17} Up to now, more than 190 states have ratified the CRC, which is basically concerned with the following – so-called – three Ps: participation of children in all matters affecting their own destiny, protection of children against discrimination and all forms of neglect, violation and exploitation and provision of assistance for their basic needs such as, for example, a living standard.

\textsuperscript{16}Öhlinger, see note 13, 47 et seq.; Stelzer, see note 11, 61; Öhlinger, see note 1, 82 et seq.; Berka, \textit{Lehrbuch Verfassungsrecht}, see note 1, 69 et seq.; Walter/ Mayer/ Kucsko-Stadlmayer, see note 11, 118 et seq.

\textsuperscript{17}Detrick, see note 3, 1; Detrick, \textit{A Commentary on the United Nations Convention on the Rights of the Child}, see note 3, 18; Van Bueren, see note 3, 15; Sax/ Hainzl, see note 6, 15 et seq.
which is adequate for the child’s physical, mental, moral and social development.\textsuperscript{18}

Although Austria was one of the first states to sign the CRC, it took two more years until the Convention was finally ratified and entered into force within the Austrian legal system.\textsuperscript{19} Being convinced that the Austrian legal order was, in most instances, already in conformity with the CRC, the Austrian Parliament decided on a so-called “reservation of implementation” during the ratification process. Consequently, the direct applicability of the CRC in Austria – although being part of the Austrian legal order – is “excluded”, which – again – means that no rights or obligations can be derived directly from this Convention and no administrative or judicial decisions can rely on it but only on the executing national law provisions. While certain parts of the Austrian legal order were already in conformity with the CRC when it entered into force in 1992, making executing national law provisions in these cases unnecessary, a number of provisions guaranteed by the Convention still needed to be implemented by national law at that time.

Moreover, although, several legislative and administrative reforms have been undertaken in the last eighteen years increasing the conformity of the Austrian legal order with the CRC, deficits\textsuperscript{20} regarding the implementation of the CRC into the Austrian legal system still exist! Due to the fact that the CRC was not considered to be an international treaty modifying or complementing the Austrian Constitution during the ratification process, it – compared to other Austrian human rights sources – does not hold the rank of national constitutional but only of simple law within the Austrian legal order.\textsuperscript{21}

\textsuperscript{18}Van Bueren, see note 3, 15; Detrick, see note 3, 27; Sax/ Hainzl, see note 6, 18 et seq.; H. Sax, “Kinderrchte”, in: G. Heißl (ed.), \textit{Handbuch Menschenrechte}, 2009, 545 et seq.

\textsuperscript{19}More precisely, it became part of the Austrian system after its publication in BGBl III 1993/7.

\textsuperscript{20}See therefore Committee on the Rights of the Child 20th Sess., see note 5, 2, 5, 6; Committee on the Rights of the Child 38th Sess., see note 5, 2, 3, 8 et seq.

\textsuperscript{21}Sax/ Hainzl, see note 6, 40 et seq.; Sax, see note 18, 549 et seq.; M. Haslinger, “Bewirkt die UN-Konvention über die Rechte des Kindes einen neuen völkerrechtlichen oder menschenrechtlichen Status des Kindes in Österreich?”, in: M. Rauch-Kallai/ J.W. Pichler (eds), \textit{Entwicklungen in den Rechten der Kinder im Hinblick auf das UN-Übereinkommen über die Rechte des Kindes}, 1994, 49 et seq.
2. Effective Implementation according to the Convention on the Rights of the Child

As one of the most important principles of the law of international treaties, according to article 26 Vienna Convention on the Law of Treaties (VCLT), every international treaty in force must be performed by its parties “in good faith”. In other words, by stating that States Parties must carry out the treaty obligations in good faith, article 26 VCLT obliges them to observe the treaty provisions in their spirit as well as according to their letter and prohibits all state acts calculated to frustrate the object and purpose and thus consequently the proper execution of the treaty. Moreover, article 27 VCLT makes clear that the obligation to perform international treaties in good faith applies irrespectively of any conflicting domestic law by stipulating that a State Party may not invoke national law provisions as justification for its failure to perform a treaty. Rather, it is the duty of the treaty party under international law to ensure that all national provisions are compatible or brought into line with the international treaty provisions.22

In particular in the context of international human rights treaties, this obligation to perform an international treaty in good faith is of utmost importance. Hence, by signing and ratifying such an international human rights treaty, States Parties not only commit themselves to respect but also to ensure the enjoyment of all rights guaranteed therein to all individuals under their jurisdiction.23 The CRC, being an international treaty in terms of article 1 and article 2 para. 1 (a) VCLT and therefore falling within the scope of article 26 VCLT, specifies the general obligation of implementing an international treaty effectively within the national legal order – as laid down in article 26 VCLT – first and foremost in its arts 2 and 4.

Thus, according to article 2 CRC, it is the basic obligation of the States Parties to the CRC to “respect” and “ensure” all rights set forth in the Convention to each child within their jurisdiction. While the term “respect” implies a duty of good faith on the part of the States Parties to refrain from all actions resulting in a breach of the Conven-

22 M.E. Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties, 2009, 367, 371, 372; T. Buergenthal/ S.D. Murphy, Public International Law in a nutsbell, 2007, 119; Evans, see note 8, 196 et seq.; K. Ze-
manek, “Das Völkervertragsrecht”, in: Neuhold/ Hummer/ Schreuer, see note 8, 59.

23 Sax/ Hainzl, see note 6, 25.
tion, the obligation to “ensure” all rights set forth in the Convention, requires States Parties to take all measures necessary in order to enable children to enjoy and exercise their rights guaranteed by the Convention. Consequently, article 2 CRC includes both, negative and positive obligations, thereby setting out the result which has to be achieved by the States Parties.24

Article 4 CRC, in contrast, focuses on the manner in which this result has to be achieved. To ensure the realisation of all rights enshrined in the CRC for all children in their jurisdiction, States Parties are – according to article 4 CRC – under a duty to undertake “all appropriate legislative, administrative and other measures” for the implementation of the rights recognised in the Convention. As regards the economic, social and cultural rights recognised in the CRC, article 4 CRC specifically stipulates that States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.25

By simply requiring that national governments have to undertake “all appropriate ... measures”, the CRC has adopted a broad and, at the same time, flexible implementation approach which – in principle – does not stipulate any specific means by which the Convention has to be implemented into the domestic legal order. Rather, it is first and foremost within the discretion of each State Party to assess what measures are to be considered appropriate in terms of article 4 CRC. Nevertheless, while emphasising that there is no favoured legislative or administrative model for implementing the Convention, the Committee on the Rights of the Child – being the responsible human rights treaty body for monitoring the implementation of the CRC by its States Parties – has developed certain implementation standards in its general comments over the recent years. Thereby seeking to ensure an effective implementation of the CRC by its States Parties.

By making clear that legislative measures are to be supplemented by other measures, the Committee has identified a wide range of measures,

24 Van Bueren, see note 3, 391; Detrick, A Commentary on the United Nations Convention on the Rights of the Child, see note 3, 68 et seq.; Sax/ Hainzl, see note 6, 26.
25 Van Bueren, see note 3, 391; Detrick, A Commentary on the United Nations Convention on the Rights of the Child, see note 3, 101; Sax/ Hainzl, see note 6, 26.
necessary for an effective implementation. Comprehensive data collection, awareness-raising or the development and implementation of appropriate policies, services and administrative programmes are only few examples in this context. Regarding the required legislative measures, the Committee has pointed out the necessity of ensuring that all domestic legislation is fully compatible with the Convention. Believing that such a full compliance of the national legal order with the Convention is only one of the various obligations under article 4 CRC, according to the Committee, States Parties additionally have to ensure that the treaty provisions are given legal effect within the domestic legal orders. In a word, to implement the CRC effectively within the national legal order, the applicability of and possibility to enforce all rights set forth in the Convention within the national legal system are also required. For that reason, although the CRC does not contain a provision expressly obliging its comprehensive incorporation into the national legal order, the Committee especially welcomes such incorporation, since it is considered as one of the most effective forms of implementation.

Furthermore, pursuant to the Committee’s general comments, incorporation in that context should mean that the provisions of the Convention can be directly invoked before national courts and authorities and that the CRC will prevail whenever there is a conflict between domestic legislation and the treaty provisions. At the same time, the Committee makes clear, that incorporation by itself does not release the States Parties from their duty to ensure that all relevant domestic law is brought into conformity with the Convention. Just as there is no CRC provision explicitly requiring the incorporation of the Convention into the national legal order, no specific type of status of the Convention within the national legal order is demanded by the CRC. All the more, the Committee welcomes the inclusion of the Convention in


28 Detrick, A Commentary on the United Nations Convention on the Rights of the Child, see note 3, 27; Van Bueren, see note 3, 392; Committee on the Rights of the Child 34th Sess., see note 27, 6; Hodgkin/ Newell, see note 27, 60; Rishmawi, see note 27, 24, 25.
certain national constitutions. However, believing that this inclusion does not automatically ensure respect for the rights of the children, the Committee – again – asks for direct applicability of children’s rights set forth in constitutions and additional legislative and other measures in that context. Moreover, the Committee points out the importance of effective remedies to redress violations of the Convention within the national legal orders.

Summing up, the implementation of the CRC can only be regarded effective if two requirements are fulfilled: firstly, the domestic legislation has to be in full compliance with the Convention; secondly, the Convention must be given legal effect, which includes the need for effective remedies.

Coming back to the above made remarks about the implementation of the CRC within the Austrian legal system so far: whereas the “transformation approach” taken by Austria in case of the CRC as well as the rank of simple law seems to be in conformity with article 4 CRC, the explicit exclusion of the direct applicability of the treaty provisions within the Austrian legal order affects the required legal effect of the Convention – namely in those matters where an executing national legislation is still missing. Being aware of the bulk of measures necessary for an effective implementation of the CRC within the national legal system, including the necessity of a fully compatible domestic legal order, in the following only one aspect – namely the question, whether or not the Austrian legal system provides effective remedies in terms of the CRC – will be examined in more detail.

a. Effective Remedies – a Prerequisite for an Effective Implementation

The protection of fundamental rights can only be regarded as effective if the right to claim violations at an independent institution is guaranteed. The CRC does not explicitly contain a provision demanding a certain form of remedies. Nevertheless, the Committee on the Rights of the Child expresses in its general comment that the need for effective

29 Detrick, A Commentary on the United Nations Convention on the Rights of the Child, see note 3, 27; Committee on the Rights of the Child 34th Sess., see note 27, 7; Hodgkin/ Newell, see note 27, 62; Rishmawi, see note 27, 24; Sax/ Hainzl, see note 6, 57.

30 Committee on the Rights of the Child 34th Sess., see note 27, 7; Rishmawi, see note 27, 49 et seq.
remedies is implicitly included in the CRC and that States Parties consequently must provide effective remedies against breaches of the Convention to meet the requirements of an effective implementation. Moreover, these remedies have to be regulated in a child-friendly way. Usually the respective individuals assert violations of their rights themselves, perhaps represented by a lawyer. The CRC, however, contains guarantees created especially for the protection of children. The children’s capacity to take legal actions themselves is usually rather limited. Therefore, it has to be discussed on which prerequisites children have the right to pursue the rights enshrined in the CRC according to the Austrian procedural laws and if this form of legal protection can be considered effective within the meaning of the Convention.

Generally, minors over 14 years can be held responsible for their deeds. Thus, they have the right to act in criminal proceedings and can consequently claim the violation of constitutionally guaranteed rights themselves. Moreover, their legal representatives have the same rights as the minors themselves. In civil law and administrative matters the capacity to conduct proceedings in one’s own name depends on a person’s capacity to contract, which is regulated by the “Austrian Civil Code.” The capacity to contract can be, inter alia, limited by age. Persons that are older than 18 years are regarded adults; their capacity to contract is not restricted for age reasons. On the contrary, children under the age of seven are not able to contract except for matters which are regarded “affairs of daily life and of trivial importance.”

31 Cf. Committee on the Rights of the Child, see note 27, 7.
33 Usually parents are a child’s legal representatives. If the child does not have a parent who is able to fulfil this task, the court appoints a guardian, cf. Hausmaninger, see note 11, 251.
34 Cf. Loderbauer, see note 32, 166.
35 The capacity to conduct proceedings on one’s own has nothing to do with the need to be represented by a lawyer, which is provided under certain circumstances according to the different procedure acts. If children are not capable of conducting proceedings on their own, they have to be represented by their legal representatives, who could be represented by a lawyer themselves.
36 Hausmaninger, see note 11, 234.
37 Hausmaninger, see note 11, 244. This includes, for example, the use of public transport or the buying of snacks, but also the acceptance of small gifts. The contract becomes valid if the child fulfils her/his contractual obliga-
ally, minors between the age of seven and 14 years are provided with limited capacity to contract; they can conclude contracts which do not contain any contractual obligations for the child but only for the other contracting party. Minors between the age of 14 and 18 have an even more extended capacity to contract. They can enter into service contracts, which, however, can be rescinded by the legal representative for important reasons. Moreover, they are in charge of their own income and anything that is put at their disposal as long as they do not endanger the satisfaction of their everyday needs. Every legal action that goes beyond these limits has to be carried out by the respective legal representative.

Pursuant to §§ 1 and 2 of the “Austrian Civil Procedure Code” minors over the age of 14 years are capable of conducting proceedings in the field of civil law regarding all matters that fall within their capacity to contract on their own. Moreover, they can act in proceedings

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38 Except for articles of apprenticeship, to which the legal representative has to agree, cf. Koziol/Welser, see note 37, 57.


40 Hausmaninger, see note 11, 218.

regarding their care and upbringing or the right to personal contact.\textsuperscript{42} In proceedings that are not covered by their capacity to conduct, however, minors have to be represented by their legal representative. Children under the age of 14 are not capable to act in any proceedings on their own but are solely dependent on their legal representatives.\textsuperscript{43}

§ 9 of the Administrative Procedure Act\textsuperscript{44} provides that if the respective administrative laws do not contain specific provisions concerning the capacity to conduct proceedings on one’s own, the norms regarding the capacity to contract according to civil law have to be applied instead. However, it is not clear if this means that the provisions concerning the limited capacity to contract as described above are relevant in administrative proceedings, too, as it is quite difficult to apply them in administrative matters. From the point of view of the present authors these provisions have to be applied as well.\textsuperscript{45} Consequently, minors over 14 years of age are capable to conduct administrative proceedings on their own concerning service contracts, their own income and property put at their disposal. The Administrative Court pursues this interpretation, too.\textsuperscript{46} Moreover, the Court assumes that minors are capable to conduct proceedings on their own in matters concerning the affairs of daily life and of trivial importance as mentioned above.\textsuperscript{47}


\textsuperscript{43} Cf. Dullinger/ Kerschner, see note 39, 16; Haberl, see note 39, 56; Nademleinsky, see note 41, para. 19; Dolinar/ Holzhammer, see note 41, 200 et seq.; Bramböck/ Hutter/ Hagen/ Paumgartner, see note 41, 252 et seq.

\textsuperscript{44} Allgemeines Verwaltungsverfahrensgesetz.

\textsuperscript{45} See also J. Hengstschläger/ D. Leeb, Kommentar zum Allgemeinen Verwaltungsverfahrensgesetz, 2004, § 9 AVG para. 14; P. Oberndorfer, Die österreichische Verwaltungsgerichtsbarkeit, 1983, 82.


\textsuperscript{47} Cf. VwGH 86/11/0121, see note 46. Likewise regarding civil law proceedings, cf. Rechberger/ Simotta, see note 41, 141; Fasching, see note 41, 180 et
These considerations are not only relevant regarding proceedings at the ordinary courts or administrative authorities. As the Constitutional Court has to apply the Austrian Civil Procedure Code if a question is not regulated in its own Procedure Act the above mentioned provisions are relevant as well. The same holds true for the Administrative Court that has to apply the respective norms of the Administrative Procedure Act. Therefore, minors are able to conduct proceedings at the highest courts within the limits described above.

These deliberations show that in civil law and administrative matters minors are dependent on their legal representatives’ actions in most seq.; G. Schubert, “§ 2 ZPO”, in: H.W. Fasching/ A. Konecny (eds), *Kommentar zu den Zivilprozessgesetzen*, Vol. 2, 2002, para. 3; Ballon, see note 41, 95; Bramböck/ Hutter/ Hagen/ Paumgartner, see note 41, 252. The Administrative Court, however, is of the opinion, that proceedings at one of the highest courts cannot be regarded as an “affair of daily life and of trivial importance”. Thus, minors are not capable of conducting proceedings at the Administrative Court in these matters. Unlike the Constitutional Court the Administrative Court judges the act of conducting proceedings itself ignoring the nature of the act causing the respective proceedings, see VwSlg 11.132 (A)/1983; regarding proceedings at the Constitutional Court, see ViSlg 7526/1975; critically: J. Stabentheiner, “§ 151-153 ABGB”, in: P. Rummel (ed.), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch*, Vol. 1, 2000, para. 12.

The Constitutional Court decides about the infringement of constitutionally guaranteed rights by an administrative ruling or a decision of the Asylum Court claimed by individuals. Moreover, they can file an individual application if certain prerequisites are fulfilled claiming that a law is not in conformity with the constitution or that a regulation violates simple law, cf. Stelzer, see note 11, 79 et seq.


The Administrative Court is, *inter alia*, competent to decide on the lawfulness of rulings or on the violation of the “onus to take a decision” by administrative authorities, cf. Stelzer, see note 11, 72 et seq. There is no appeal against the decisions of the Administrative Court.

§ 62 Verwaltungsgerichtshofgesetz (VwGG); see Oberndorfer, see note 45, 81.

Regarding the Constitutional Court, see ViSlg 7526/1975; regarding the Administrative Court, see VwSlg 10.547A/1981.
proceedings. Except for matters of care and upbringing or the right to personal contact, their capacity to conduct proceedings on their own is usually rather limited. Thus, the legal representatives have to assert violations of the children’s rights on their behalf. Regarding the different levels of a child’s development it is impossible that children of all age groups act on their own in any kind of proceedings. The Austrian system, which takes into account not the individual development but the age of the respective child only, brings into line the children’s right to act on their own and the certainty needed in legal actions.

It simplifies and accelerates the proceedings if it does not have to be decided in every case if a specific child has reached the capacity to act on her/his own. As the number of proceedings in which children may act themselves increases once they get older and applies especially to proceedings that concern their care and upbringing the children’s welfare is taken into account appropriately. An extension to other types of proceedings could even come into conflict with their welfare as children could harm themselves because of their lack of experience if proceedings get too complicated. Regarding the different proceedings mentioned above, children’s constitutionally guaranteed rights can usually be effectively pursued by their legal representatives, even if the children’s capacity to conduct proceedings on their own is limited in the respective matter.

Nevertheless, problems occur if legal representatives do not claim the children’s rights either because of a conflict of interests or by simply ignoring their task. As a solution to the former courts have to appoint a curator who replaces the legal representative if two prerequisites are met: firstly, the legal representative has to act on behalf of the minor and for her-/himself or on behalf of another person in the same matter (e.g. contracts between the legal representative and the minor or between two minors represented by the same adult); additionally, there has to be a conflict of interests regarding this matter. In this case the

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53 In favour of a decision from person to person if minors over 14 years want to act on their own, Bramböck/ Hutter/ Hagen/ Paumgartner, see note 41, 282.

54 Children under the age of 14 have to be heard in these proceedings, cf. Deixler-Hübner, see note 42, 121; Klicka/ Oberhammer/ Domej, see note 42, 81.

55 Cf. J. Stabentheiner, “§§ 271, 272 ABGB”, in: Rummel, see note 47, Supplementary Vol. 1, 2003, paras 1-2; H. Weitzenböck, “§§ 271, 272 ABGB”, in: Schwimann, see note 41, paras 2-4; H. Koziol/ P. Bydlinski/ R. Bollen-
curator has to act on behalf of the minor and thus assert breaches of her/his rights.\textsuperscript{56} However, if these prerequisites are not fulfilled or if the respective legal representatives simply ignore their task to pursue the child’s rights, there is often no other institution that has the competence to do so, and this leads to a lack of children’s legal protection. If legal representatives endanger the child’s well-being severely by disregarding their task, this might lead to a complete or partial withdrawal\textsuperscript{57} of the right to custody.\textsuperscript{58} In this case a new legal representative is appointed who then may invoke the child’s rights. Nevertheless, the prerequisites of a withdrawal of the right to custody are often not fulfilled. In these cases no effective means to pursue the children’s rights do exist. The implementation of the CRC, however, can only be regarded effective if the pursuing of the guaranteed rights is ensured with regard to all children and all situations.

The “Children’s Counsellor in Custody Proceedings”\textsuperscript{59} is a recently established instrument to guarantee the children’s right to be heard. A Children’s Counsellor may be appointed by the court in highly disputed divorce proceedings with regard to children under the age of 14; in cases of special need it is possible to appoint a counsellor for children up to the age of 16 as well. As children often suffer in this situation the counsellor’s task is to support them and accompany them during the proceedings. Moreover, she/he acts as the child’s mouthpiece, passing the child’s opinion and wishes to the court, but only if the child wants to do so.\textsuperscript{60} Consequently, the counsellor has the duty to observe se-

\begin{footnotesize}
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\item \textsuperscript{56} See Barth/ Haidvogl, see note 42, 17.
\item \textsuperscript{57} Regarding the prerequisites of the withdrawal of the right to custody, see Deixler-Hübner, see note 42, 42 et seq.
\item \textsuperscript{58} See also I. Mott, “Das Kind als Rechtssubjekt oder nur Spielball familiärer Auseinandersetzungen?”, in: Rauch-Kallat/ Pichler, see note 21, 167 et seq. (175).
\item \textsuperscript{60} Cf. Barth/ Haidvogl, see note 42, 17, 19; B. Lehner, “Dem Kind eine Stimme geben’. Das Modellprojekt ‘Kinderbeistand’”, \textit{Interdisziplinäre Zeit-}
\end{itemize}
\end{footnotesize}
Thus, the counsellor guarantees the children’s right to be heard in all matters that concern them. Nevertheless, the Children’s Counselor cannot be regarded as the child’s legal representative or curator. She/he has no right to conduct proceedings on behalf of the child. Therefore, the counsellor does not have the right to make applications or to lodge an appeal claiming the violation of the child’s rights. Thus, it cannot be regarded as an independent institution as demanded above.

These deliberations show that the existing Austrian provisions concerning the children’s representation and their right to act on their own do not fulfil the prerequisites of an effective implementation of the CRC. To meet these requirements the creation of an independent institution which helps children who cannot rely on the respective support to claim their rights at the competent courts and authorities must be considered.

III. The Transformation of the Convention on the Rights of the Child into the Austrian Federal Constitution

Although an inclusion of the Convention into the national constitution is not required by the CRC, the Committee on the Rights of the Child has repeatedly recommended an incorporation of the rights of the child into the Austrian constitutional law – both, at federal and states level – in its concluding observations regarding the Austrian reports according to article 44 CRC. Whereas children’s rights have already been successfully integrated into certain Austrian States (Länder) constitutions – namely in Upper Austria, Vorarlberg and Salzburg – in the meantime, such inclusion of the rights of the child into the Federal Constitution is still a matter of discussion. Since Austria’s accession to the Convention,

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61 See Barth/ Haidvogl, see note 42, 17; Lehner, see note 60, 276.
62 See Barth/ Haidvogl, see note 42, 17; Reiter, see note 60, 84.
63 Committee on the Rights of the Child 25th Sess., see note 5, 2; Committee on the Rights of the Child 38th Sess., see note 5, 2, 3.
not only child- and youth organisations but also the relevant governmental bodies have undertaken several attempts to promote such an inclusion of children’s rights into national constitutional law. The proposal of the “Austrian Convention for the Constitutional Reform” in order to include certain rights of the child into the Federal Constitution is only one important example in that context. This proposal has failed to reach the required political agreement in the past, a new draft law regarding the inclusion of certain children’s rights guaranteed by the CRC into the Federal Constitution is currently being discussed by the Austrian Parliament.64

In the following section the question will be examined, what consequences an inclusion of the CRC into the Austrian Federal constitution would have. In particular, it will be shown, how the legal protection of the child in Austria would be changed by transforming the CRC into constitutional law. The results of that examination will help to assess, whether or not such an inclusion of the rights of the child into the Austrian Constitution would increase the effectiveness of the implementation of the CRC.

1. Consequences of the Transformation into Austrian Constitutional Law

One could argue that in order to fulfil the requirements for an effective implementation of the CRC an implementation through simple law would be sufficient. Nevertheless, constitutional law takes a special position in the legal system acting as a guideline for the whole political process. To serve this purpose constitutional law cannot be changed as easily as simple law. Although – considering the international standards – the Austrian constitution can quite easily be amended,65 it is still nec-


ecessary that two-thirds of the “National Council”\textsuperscript{66} approve the amendment while half of its members are present during the voting. Moreover, the new norm has to be declared explicitly as “constitutional law” or “constitutional provision.”\textsuperscript{67} Considering the so-called “hierarchy of norms”,\textsuperscript{68} constitutional law is supreme to all other categories of legal acts, which consequently have to be in accordance with the higher norms.\textsuperscript{69}

If the entire CRC is transformed into constitutional law, every act at the level of simple law has to be in accordance with the Convention. Of course, if only some parts of the Convention are raised to constitutional rank, the same holds true for the respective rights. However, if a law does not fulfil these standards, this does not mean that it must not be applied by ordinary courts and administrative authorities. On the contrary, courts and authorities are obliged to apply norms, even if they seem to be inconsistent with constitutional law. The act of constitutional review is not a task which may be fulfilled by any court, but it is centralised by only one court, the Constitutional Court.\textsuperscript{70}

\textsuperscript{66} The National Council is one of the two Chambers of the Austrian Federal Parliament and – together with the Federal Council – responsible for the legislation.

\textsuperscript{67} Cf. Stelzer, see note 11, 6; Hausmaninger, see note 11, 24; Foster, see note 11, 50; Berka, \textit{Lehrbuch Verfassungsrecht}, see note 1, 16; Öhlinger, see note 1, 25; Walter/ Mayer/ Kucsko-Stadlmayer, see note 11, 241.


\textsuperscript{69} Cf. Hausmaninger, see note 11, 24, 140; Foster, see note 11, 118; Schäffer/ Melichar, see note 69, 47; Berka, \textit{Lehrbuch Verfassungsrecht}, see note 1, 289 et seq.; Öhlinger, see note 1, 461 et seq.; G. Ruhri/ W.L. Weh/ R. Zitta, “Vorschläge für eine Änderung und Ergänzung des Bundes-Verfassungsgesetzes”, \textit{Österreichisches Anwaltsblatt} 66 (2004), 328 et seq. (331). See also Jahnel, see note 65, 581; G. Kucsko-Stadlmayer, “Die Beziehungen zwischen Verfassungsgerichtshof und den anderen Gerichten, einschließlich der europäischen Rechtsprechungsgane”, \textit{EuGRZ} 31 (2004),
a. Proceedings of Constitutional Review before the Austrian Constitutional Court

The Federal Constitution provides for two different proceedings of constitutional law review. The so-called “abstract judicial review” is not dependent on an actual suit in which the relevant norm must be applied. Austria is not a unitary but a federal state. Therefore, not only the Federation but also the parliaments of the nine states have legislative power. The Federal Constitution applies for both federal and state law; to achieve this principle, abstract judicial review offers the federal government the chance to claim that a state law is not in accordance with the constitution. The state governments have the same right with regard to federal law. Moreover, one third of the members of the National Council or one third of the members of the Federal Council may initiate proceedings at the Constitutional Court regarding federal law. If the respective state constitution provides for this right, one third of the members of the state parliament also have the equivalent right. Thus, these proceedings could be used to judge independently from an actual law suit the conformity of simple law with constitutionally guaranteed rights of individuals.

The second type of constitutional law review can be initiated in connection with pending proceedings only. As mentioned above, the Constitutional Court is the only institution within the Austrian system which has the right to declare a law to be unconstitutional. All other

71 Article 140 of the Federal Constitution.
72 Stelzer, see note 11, 77.
73 Cf. Stelzer, see note 11, 39 et seq.; Foster, see note 11, 47; Welan, see note 69, 63; K. Heller, Outline of Austrian Constitutional Law, 1989, 3; Berka, Lehrbuch Verfassungsrecht, see note 1, 101 et seq.; Öhlinger, see note 1, 119 et seq.; Walter/ Mayer/ Kucsko-Stadlmayer, see note 11, 381 et seq.; Öhlinger, see note 70, 242.
74 Cf. Schäffer/ Jahnel, see note 65, AUS 83; Stelzer, see note 11, 78; Heller, see note 73, 24; Welan, see note 69, 67; R. Machacek/ T. Öhlinger, “The Constitutional Court of Austria and its Judgments”, HRLJ 1 (1980), 366 et seq. (366); Schäffer/ Melichar, see note 69, 47; A.R. Brewer-Carías, Judicial Review in Comparative Law, 1989, 199; Jahnel, see note 65, 581; Berka, Lehrbuch Verfassungsrecht, see note 1, 293; Öhlinger, see note 1, 466; Walter/ Mayer/ Kucsko-Stadlmayer, see note 11, 537 et seq.; Kucsko-Stadlmayer, see note 70, 18.
courts and administrative authorities are bound by the norms in force.\textsuperscript{75} Of course, it would be highly unsatisfactory if they had to apply laws which might be unconstitutional without having the chance to challenge them. Therefore, the so-called “concrete judicial review”\textsuperscript{76} makes it possible for certain courts and authorities to initiate proceedings at the Constitutional Court in order to decide if the relevant norms are in accordance with the constitution. In contrast to the abstract judicial review, in which any law can be judged by the Constitutional Court, here only norms which have to be directly applied in a concrete proceeding can be subject to concrete judicial review. If the proceedings show that the respective law is not relevant for the pending law suit, the Constitutional Court will dismiss the application.\textsuperscript{77}

Concrete judicial review can be initiated by all courts (except for the ordinary courts of first instance), the Independent Administrative Tribunals\textsuperscript{78} and the Federal Procurement Authority.\textsuperscript{79} Moreover, the Constitutional Court can start concrete judicial review itself if it has to apply a certain law in another proceeding but doubts its conformity with

\textsuperscript{75} Cf. Hausmaninger, see note 11, 24, 140; Berka, \textit{Lehrbuch Verfassungsrecht}, see note 1, 289 et seq.; Ruhr/ Weh/ Zitta, see note 70, 331. See also Kucsko-Stadlmayer, see note 70, 16, 17, 19; Öhlinger, see note 70, 242.

\textsuperscript{76} Stelzer, see note 11, 78.

\textsuperscript{77} Cf. Stelzer, see note 11, 78. See also Berka, \textit{Lehrbuch Verfassungsrecht}, see note 1, 294; Öhlinger, see note 1, 467 et seq.; Walter/ Mayer/ Kucsko-Stadlmayer, see note 11, 535 et seq.; Kucsko-Stadlmayer, see note 70, 18.

\textsuperscript{78} The Independent Administrative Tribunals in the states are administrative authorities, their members, however, have similar guarantees as judges. Their competences are regulated in article 129 a Federal Constitution. Pursuant to this provision, they are instances of appeal in administrative penal matters, except for Federal fiscal penal proceedings. They also decide on complaints about the use of direct administrative power and on other matters if the respective laws provide for the competence of the Tribunals. Moreover, they decide on complaints alleging that an administrative authority has not met its “responsibility to take a decision” concerning civil actions in administrative proceedings, penal tax law regulated by the states and the matters explicitly assigned to them in the respective laws, cf. Stelzer, see note 11, 70 et seq.; Berka, \textit{Lehrbuch Verfassungsrecht}, see note 1, 242 et seq.; Öhlinger, see note 1, 277 et seq.; Walter/ Mayer/ Kucsko-Stadlmayer, see note 11, 441 et seq.

\textsuperscript{79} The Federal Procurement Authority is a Federal administrative authority, which is not subject to instructions and decides in the field of public procurement, cf. Stelzer, see note 11, 72; Walter/ Mayer/ Kucsko-Stadlmayer, see note 11, 345.
the constitution. However, article 140 of the Federal Constitution does not allow the parties of a pending proceeding to start concrete judicial review by the Constitutional Court.\textsuperscript{80}

In proceedings at ordinary courts\textsuperscript{81} parties may only “propose” the initiation of proceedings at the Constitutional Court. In fact, ordinary courts of second instance and the Austrian Supreme Court\textsuperscript{82} are obliged to file an application to start concrete judicial review if they have doubts about a law being unconstitutional. Nevertheless, the decision to address the Constitutional Court rests with the courts only. The individuals themselves have no means to force the courts to initiate the respective proceedings.\textsuperscript{83}

In proceedings at ordinary courts of first instance the situation is even worse. These courts do not have the right to get the Constitutional Court to deal with the norm in question even if they want to. Therefore, parties have to lodge an appeal and express their reservations at the court of second instance, which then has the right to initiate proceedings at the Constitutional Court if it shares these doubts. As many scholars think this situation is inadequate the question of whether the right to start a concrete judicial review should be extended to the courts

\textsuperscript{80} Cf. Schäffer/ Jahnel, see note 65, AUS 83; Berka, \textit{Lehrbuch Verfassungsrecht}, see note 1, 294.

\textsuperscript{81} These courts decide on civil law and criminal law matters.

\textsuperscript{82} The Supreme Court is the last instance in civil law and criminal proceedings. Nevertheless, this does not mean that the parties have the right to appeal to the Supreme Court in any case. The grounds of appeal to the Supreme Court are limited, cf. Stelzer, see note 11, 69; E. Markel, “Der OGH als oberste Instanz in Strafsachen”, \textit{Österreichische Richterzeitung} 84 (2006), 110 et seq. (110).

\textsuperscript{83} Cf. Stelzer, see note 11, 78; Berka, \textit{Lehrbuch Verfassungsrecht}, see note 1, 294; Berka, see note 1, 124; Ballon, “Verfassungswidrigkeiten in der Zivilgerichtsbarkeit und ihre Anfechtung”, \textit{Österreichische Juristen-Zeitung} 38 (1983), 225 et seq. (231); Ruhr/ Weh/ Zitta, see note 70, 330; G. Kuras, “Gedanken zum Ausbau des Grundrechtsschutzes: ‘Justice must not only be done, it must also be seen to be done’. Information als Bringschuld des Rechtsstaates”, in: Österreichische Juristenkommission (ed.), \textit{Aktuelle Fragen des Grundrechtsschutzes}, 2005, 179 et seq. (187). See also Schäffer/ Jahnel, see note 65, AUS 84; Kucsko-Stadlmayer, see note 70, 19; Öhlinger, see note 70, 243 et seq.; K. Ringhofer, “Über Grundrechte und deren Durchsetzung im innerstaatlichen Recht”, in: Rechtswissenschaftliche Fakultät der Universität Salzburg (ed.), \textit{Aus Österreichs Rechtsleben in Geschichte und Gegenwart. Festschrift für Ernst Hellbling zum 80. Geburtstag}, 1981, 355 et seq. (364-365).
of first instance is subject of debate. For the time being, however, these courts are bound by the law in force.\textsuperscript{84}

Administrative authorities – apart from the Independent Administrative Tribunals and the Federal Procurement Authority mentioned above – do also have to apply the law in force.\textsuperscript{85} Nevertheless, if parties are of the opinion that a final ruling of an administrative authority infringes their rights, they may file an application to the Administrative Court. If the Administrative Court doubts that the respective law is being constitutional, it is bound to initiate proceedings at the Constitutional Court. Of course, parties may point out their reservations to the Administrative Court as well; but the decision to consult the Constitutional Court rests with the court only.\textsuperscript{86} However, apart from appealing to the Administrative Court the parties also have the right to file a complaint directly with the Constitutional Court, if they think the law applied in an administrative proceeding is unconstitutional.\textsuperscript{87} If the Constitutional Court shares this view, it has to interrupt the proceedings and start concrete judicial review.\textsuperscript{88} Thus, the application does not initiate the judicial review itself; nevertheless, other than in proceedings

\begin{itemize}
\item \textsuperscript{84} Cf. H. Mayer, “Die österreichischen Höchstgerichte und deren Verhältnis zueinander”, \textit{Journal für Rechtspolitik} 16 (2008), 11 et seq. (11); W. Berka, “RichterInnen als GrundrechtswahrerInnen: Grundrechte und Rechtsprechung der ersten Instanz”, \textit{Österreichische Richterzeitung} 86 (2008), 114 et seq. (124); Markel, see note 82, 119; Ruhi/ Weh/ Zitta, see note 70, 328; Kuras, see note 83, 189.
\item \textsuperscript{85} Cf. Hausmainer, see note 11, 24, 140; Schäffer/ Jahnel, see note 65, AUS 84. See also Ringhofer, see note 83, 365 et seq.
\item \textsuperscript{86} Cf. Öhlinger, see note 70, 243. See also Schäffer/ Jahnel, see note 65, AUS 84; C. Jabloner, “Strukturfragen der Gerichtsbarkeit des öffentlichen Rechts”, \textit{Österreichische Juristen-Zeitung} 53 (1998), 161 et seq. (165). See also Ringhofer, see note 83, 366.
\item \textsuperscript{87} Article 144 para. 1 Federal Constitution. See Foster, see note 11, 120; Berka, \textit{Lehrbuch Verfassungsrecht}, see note 1, 278; Öhlinger, see note 1, 486 et seq.; Walter/ Mayer/ Kucsko-Stadlmayer, see note 11, 555; Jahnel, see note 65, 579 et seq.; Ballon, see note 83, 232; Jabloner, see note 86, 165; Brewer-Carías, see note 74, 201; Korinek, see note 49, 298; Öhlinger, see note 70, 243.
\item \textsuperscript{88} Cf. Schäffer/ Jahnel, see note 65, AUS 83; Jahnel, see note 65, 580; Berka, \textit{Lehrbuch Verfassungsrecht}, see note 1, 294; Walter/ Mayer/ Kucsko-Stadlmayer, see note 11, 557; Kucsko-Stadlmayer, see note 70, 19; Öhlinger, see note 1, 466. See also Ringhofer, see note 83, 366 et seq.; R. Machacek, \textit{Austrian Contributions to the Rule of Law}, 1994, 12.
\end{itemize}
at the ordinary courts, the parties do have the right to explain their doubts directly to the Constitutional Court.

In the proceedings described above individuals do not have the right to initiate constitutional review by the Constitutional Court themselves. Nevertheless, article 140 Federal Constitution also provides for an “individual application.” To file this application, however, the respective law must affect the applicant’s rights directly, i.e. not because of an administrative ruling or the decision of a court. Moreover, the Constitutional Court is of the opinion that an individual application is only admissible if the applicant has no other reasonable means to declare her/his reservations about the norm being unconstitutional at the Constitutional Court.

If the Constitutional Court declares a law to be inconsistent with constitutional law in the course of abstract or concrete judicial review, it is rescinded, which has to be published appropriately, e.g. in the Federal Law Gazette.

As mentioned above, one of the advantages of transforming the rights guaranteed in the CRC into constitutional law is that simple law must be in accordance with these rights and that this can be judged by the Constitutional Court. Of course, this means an important improvement of legal protection in the field of children’s rights. Nevertheless, individuals very rarely have the right to initiate constitutional review. However, in the field of administrative proceedings they get the chance to express their reservations directly to the Constitutional Court. Thus, the court considers the conformity of the respective law

89 Stelzer, see note 11, 79.
90 Cf. Stelzer, see note 11, 79; Hausmaninger, see note 11, 145; Berka, *Lehrbuch Verfassungsrecht*, see note 1, 294 et seq.; Öhlinger, see note 1, 471 et seq.; Walter/ Mayer/ Kucsko-Stadlmayer, see note 11, 538, 521 et seq. See also Schäffer/ Jahnel, see note 65, AUS 84; Machacek, see note 88, 12; Brewer-Carias, see note 74, 200; Jahnel, see note 65, 581 et seq.; Öhlinger, see note 70, 244; Ringhofer, see note 83, 361 et seq.; Welan, see note 69, 67 et seq.
91 Cf. Stelzer, see note 11, 79; Hausmaninger, see note 11, 145; Heller, see note 73, 24; Machacek, see note 88, 12 et seq.; Machacek/ Öhlinger, see note 74, 369; Schäffer/ Melichar, see note 69, 46 et seq.; Brewer-Carias, see note 74, 201 et seq.; Berka, *Lehrbuch Verfassungsrecht*, see note 1, 299 et seq.; Öhlinger, see note 1, 477 et seq.; Walter/ Mayer/ Kucsko-Stadlmayer, see note 11, 541 et seq. See also Kucsko-Stadlmayer, see note 70, 19, 20, 26; Welan, see note 69, 68.
with the constitution and initiates concrete judicial review if it shares these reservations.  

In proceedings at ordinary courts the rights of the individuals are more limited. In the end, it is the sole decision of the courts, if they file an application and thus offer the Constitutional Court the chance to decide about the lawfulness of the norms applied. Today, ordinary courts are more aware of their task to guarantee the protection of fundamental rights in their field of jurisdiction and consequently they respect their duty to initiate concrete judicial review as well. Nevertheless too often, they still tend to decide themselves about the lawfulness of a norm applicable in the concrete proceedings, ignoring the competence of the Constitutional Court. As the parties have no right at all to claim a law as unconstitutional before the Constitutional Court, it might take quite a long time until the Constitutional Court gets to decide about a respective law. Until then this law might have been applied in many cases even though it is not in conformity with constitutional law.

These are problems that lie within the Austrian system of legal protection and the separation of powers between the Constitutional Court and the ordinary courts and do not only affect the field of children’s rights. Of course, the improvements that are connected with the transformation of the CRC into constitutional law ought not to be diminished. Nevertheless, it must be shown that, in particular, in proceedings at ordinary courts legal protection of the individuals concerned remains inadequate. Consequently, it has been the subject of much debate, as to whether parties in civil rights and criminal proceedings should be granted the right to claim at the Constitutional Court that a law applied is unconstitutional. For the time being, however, they remain dependent on the respective court’s decision.

92 Cf. Schäffer/ Jahnel, see note 65, AUS 83; Berka, *Lehrbuch Verfassungsrecht*, see note 1, 294; Walter/ Mayer/ Kucsko-Stadlmayer, see note 11, 557.


94 See also Berka, see note 84, 119; Ruhr/ Weh/ Zitta, see note 70, 328, 330.

95 See Kuras, see note 83, 203 et seq.

96 See Mayer, see note 84, 11; Ballon, see note 83, 232; Markel, see note 82, 119; Ruhr/ Weh/ Zitta, see note 70, 328; Kodek, see note 93, 221 et seq.; Kuras, see note 83, 203 et seq.; Jahnel, see note 65, 587.
b. Enforcement of Constitutional Rights in other Proceedings

All state organs (courts as well as administrative authorities) are bound by the rights guaranteed in the constitution and consequently have to respect them in all parts of the proceedings. If the rights guaranteed in the CRC are transformed into constitutional law, parties may invoke these rights directly in proceedings at administrative authorities and courts. The following deliberations will examine in which ways this fact improves the legal protection of the individuals concerned, firstly in the field of administrative proceedings and secondly in civil law and criminal matters.

Generally, it is the task of the Administrative Court to decide about the lawfulness of the final rulings of administrative authorities. However, parties may not claim the violation of their constitutionally guaranteed rights before the Administrative Court. It is the competence of the Constitutional Court to decide about this kind of appeal. On the other hand, only the Administrative Court is competent to decide on breaches of simple law after all administrative appeal stages have been exhausted. Today it is clear that the legislator himself is also bound by the constitution. Consequently, simple law has to be organised in

97 Cf. Berka, see note 1, 115 et seq.; Berka, Lehrbuch Verfassungsrecht, see note 1, 343 et seq.; Öhlinger, see note 70, 239; M. Holoubek, “Wer ist durch die Grundrechte gebunden?”, Austrian J. Publ. Int’l Law 54 (1999), 57 et seq.; G. Kucsko-Stadlmayer, “Die allgemeinen Strukturen der Grundrechte”, in: Merten/ Papier, see note 65, 49 et seq. (65 et seq.). See also Ringhofer, see note 83, 368.


99 Cf. Berka, see note 1, 182; Machacek, see note 88, 32; Foster, see note 11, 122; Stelzer, see note 11, 74, 80; Berka, Lehrbuch Verfassungsrecht, see note 1, 277; Öhlinger, see note 1, 289; Korinek, see note 49, 299; Kucsko-Stadlmayer, see note 70, 17, 23. See also, Öhlinger, see note 70, 238, 240, 241; Oberndorfer, see note 45, 39.

100 Cf. Berka, see note 1, 114, 173 et seq.; Berka, Lehrbuch Verfassungsrecht, see note 1, 343; Kucsko-Stadlmayer, see note 97, 66; Öhlinger, see note 1, 313; Walter/ Mayer/ Kucsko-Stadlmayer, see note 11, 624; Holoubek, see
conformity with the constitution. If this task is fulfilled correctly, a violation of constitutionally guaranteed rights can usually be regarded as a breach of simple law as well.\textsuperscript{101} Moreover, laws have to be interpreted in conformity with the constitution. If a norm can be understood in different ways, the meaning has to be chosen which does fulfill the constitutional requirements. Of course, this meaning must be covered by the wording of the provision. If such an interpretation is not possible, the law is unconstitutional and can be rescinded by the Constitutional Court according to the procedure described above.\textsuperscript{102} Considering this, parties may start proceedings at the Administrative Court concerning the violation of simple law, which indirectly results in a decision on the violation of constitutionally guaranteed rights because of an administrative ruling.

Of course, parties may also assert a final administrative ruling to be unconstitutional directly at the Constitutional Court.\textsuperscript{103} This provides an additional form of administrative review and is certainly an improvement of the legal protection in administrative proceedings. However, a decision of the Administrative Court is final. There is no appeal against it to the Constitutional Court.\textsuperscript{104} Thus, a party has to decide before appealing to the Administrative Court if she/he wants to get the Constitutional Court to deal with the specific case. Nevertheless, it is possible to file an appeal at both the Administrative and the Constitutional Court at the same time.\textsuperscript{105}

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\item note 97, 58 et seq.; J. Ferk, “Die privat- und familienrechtlichen Aspekte in den Grundrechten”, \textit{Österreichische Richterzeitung} 80 (2002), 202 et seq. (202); Markel, see note 82, 111. See also: Öhlinger, see note 70, 239.
\item Cf. Berka, see note 1, 182. See also Korinek, see note 49, 300; Kucsko-Stadlmayer, see note 70, 27; Öhlinger, see note 70, 241.
\item Cf. Schäffer/ Jahnel, see note 65, 79 et seq.; Berka, \textit{Lehrbuch Verfassungsrecht}, see note 1, 23; Öhlinger, see note 1, 39; Berka, see note 1, 75 et seq. Regarding the limits of an interpretation in conformity with the constitution, see Berka, see note 84, 122 et seq.; Jahnel, see note 65, 577.
\item See article 144 para. 1 Federal Constitution; cf. Foster, see note 11, 120; Machacek/ Öhlinger, see note 74, 366; Berka, \textit{Lehrbuch Verfassungsrecht}, see note 1, 278; Öhlinger, see note 1, 486 et seq.; Walter/ Mayer/ Kucsko-Stadlmayer, see note 11, 555 et seq.; Berka, see note 1, 179 et seq.; Jahnel, see note 65, 579 et seq.; Kucsko-Stadlmayer, see note 70, 22.
\item Cf. Kucsko-Stadlmayer, see note 70, 17; Kucsko-Stadlmayer, see note 97, 68. See also Jabloner, see note 86, 165.
\item Cf. Machacek, see note 88, 32; Berka, \textit{Lehrbuch Verfassungsrecht}, see note 1, 276; Öhlinger, see note 1, 290; Berka, see note 1, 182 et seq.; Korinek, see
\end{itemize}
Summing up, in the field of administrative law there is a special type of legal protection by the Constitutional Court concerning constitutionally guaranteed rights. Individuals affected can claim not only a violation of simple law appealing to the Administrative Court, but also a breach of their constitutionally guaranteed rights appealing directly to the Constitutional Court. If the entire Convention is transformed not only into simple law, but also into constitutional law, this leads to an additional way of legal protection.

The result, however, differs with regard to civil law and criminal proceedings at the ordinary courts. Of course, like the administrative authorities the ordinary courts are obliged to respect constitutionally guaranteed rights. As mentioned above, it is first of all the task of the legislator to organise simple law in accordance with the constitution. This holds true especially for criminal and civil procedure law as well as criminal law. A violation of these norms often results in a violation of the constitution, against which parties may appeal to the next instance asserting a violation of constitutionally guaranteed rights as well as of simple law. The situation is slightly different regarding civil law, as these norms regulate the legal relations of citizens among each other and do not affect the relationship between citizens and the state. Therefore, it is not clear in which ways constitutionally guaranteed rights affect civil law disputes. Nowadays, it is assumed that these rights also have a certain effect on civil law proceedings, especially if norms that are open to interpretation in conformity with the constitution have to be applied or if the court has to weigh up different rights of the respective parties. Moreover, in general the legislator has to take fundamen-
tal rights into account when regulating civil law.\textsuperscript{111} Parties have the right to claim breaches of constitutionally guaranteed rights in the course of appeals.\textsuperscript{112}

The Supreme Court is the highest instance in the field of ordinary jurisdiction. As the Austrian Constitution provides for three highest courts of the same rank\textsuperscript{113} there is no appeal against the judgements of the Supreme Court. Therefore, parties cannot claim a breach of constitutionally guaranteed rights by a judgement of an ordinary court at the Constitutional Court.\textsuperscript{114} The Supreme Court is regarded a sufficient in-

\textsuperscript{111} Cf. Kuras, see note 83, 185; Öhlinger, see note 1, 328. See also A. Bammer, “Die Grundrechte in der Rechtsprechung der Zivilgerichte”, in: Österreichische Juristenkommission (ed.), see note 83, 63 et seq. (65-66).

\textsuperscript{112} Cf. Berka, see note 1, 185; Ratz, see note 98, 167.

\textsuperscript{113} These are the Constitutional Court, the Administrative Court and the Supreme Court, cf. Kucsko-Stadlmayer, see note 70, 17.

\textsuperscript{114} Cf. Foster, see note 11, 118; Machacek/ Öhlinger, see note 74, 366; Berka, see note 1, 185; Schäffer/ Jahnel, see note 65, AUS 81; Jahnel, see note 65, 583; Kucsko-Stadlmayer, see note 97, 68; Berka, Lehrbuch Verfassungsrecht, see note 1, 277; B.Ch. Funk, “Schützt die Verfassung im Strafverfahren?”, in: R. Soyer (ed.), Strafverteidigung – Konflikte und Lösungen, 2004, 9 et seq. (16); H. Steininger, “Empfiehlt es sich, die Zuständigkeit des Verfassungsgerichtshofs durch Einführung einer umfassenden, auch Akte der Gerichtsbarkeit erfassenden Individualverfassungsbeschwerde zu erweitern?”, in: Verfassungsgerichtshof der Republik Österreich (ed.), Verfassungstag 1994, 1995, 15 et seq. (16); Ballon, see note 83, 225; F. Ermaco-ra, “Holprige Wege im Grundrechtsschutz”, Österreichische Juristenzeitung 48 (1993), 73 et seq. (74); Markel, see note 82, 111; Korinek, see note 49, 288; Kucsko-Stadlmayer, see note 70, 17, 25, 28; Öhlinger, see note 70, 239; H. Steininger, “Grundrechtsschutz im Bereich der ordentlichen Gerichtsbarkeit”, in: H. Fuchs/ W. Brandstetter (eds), Festschrift für Winfried Platzgummer, 1995, 191 et seq. (193). See also Ringhofer, see note 83, 367 et seq.; Holoubek, see note 97, 63.
stitution for legal protection within the ordinary jurisdiction.\textsuperscript{115} However, both in criminal and in civil law procedures the access to the Supreme Court is limited. Therefore, parties do not always have the right to appeal to the highest court; often the judgement of a Provincial Court\textsuperscript{116} or a Provincial Court of Appeal\textsuperscript{117} is the final decision.\textsuperscript{118} Of course, in these cases an appeal to the Constitutional Court is inadmissible as well. Even if it is assumed that the Supreme Court is a sufficient guardian of constitutionally guaranteed rights in the field of ordinary jurisdiction, the limitation of the grounds for appeal is problematic.

Summing up, regarding the field of ordinary jurisdiction, a transformation of the rights guaranteed in the CRC into constitutional law generally has the same effects as a transformation into simple law. The individuals concerned can claim the violation of their rights in the course of appeals, but unlike administrative proceedings there is no additional means to ensure the protection of constitutionally guaranteed rights at national institutions.\textsuperscript{119} As already stated, ordinary courts nowadays are more aware of their task to protect fundamental rights.\textsuperscript{120} Nevertheless, many scholars still demand the right to appeal to the Constitutional Court against a judgement of an ordinary court.\textsuperscript{121} This

\textsuperscript{115} Cf. Schäffer/ Jahnel, see note 65, AUS 81; Jahnel, see note 65, 583; Steininger, “Empfiehlt es sich ... “, see note 114, 21; Steininger, see note 114, 198; Kodek, see note 93, 221.

\textsuperscript{116} Stelzer, see note 11, 69 (Landesgericht).

\textsuperscript{117} Stelzer, see note 11, 69 (Oberlandesgericht).

\textsuperscript{118} Cf. Stelzer, see note 11, 69; Foster, see note 11, 92, 98; Ruhri/ Weh/ Zitta, see note 70, 330. Regarding civil law, see E.M. Bajons, “Austria”, in: J.A. Jolowicz/ C.H. van Rhee (eds), Recourse against Judgments in the European Union, 1999, 25 et seq. (30-31). Regarding criminal law, see also Markel, see note 82, 110.

\textsuperscript{119} Cf. Berka, see note 1, 185.

\textsuperscript{120} Cf. Berka, see note 1, 123; Kucsko-Stadlmayer, see note 97, 69. Critically A.E. Hollaender/ Ch. Mayerhofer, “Das Gebot effizienten Rechtsschutzes und die Beschränkung des Zugangs zum OGH in Strafsachen durch dessen Judikatur”, Österreichische Juristen-Zeitung 60 (2005), 447 et seq.; Ruhri/ Weh/ Zitta, see note 70, 328, 331.

\textsuperscript{121} Cf. Berka, see note 1, 123; Hollaender/ Mayerhofer, see note 120, 456; Jahnel, see note 65, 586 et seq. Regarding this discussion, see Steininger, “Empfiehlt es sich ... “, see note 114, 17 et seq., 21 et seq. and Steininger, see note 114, 193 et seq., 197 et seq. In favour of an appeal, Ermacora, see note 114, 74; Ruhri/ Weh/ Zitta, see note 70, 330 et seq.; B. Schilcher, “Gedanken zum Ausbau des Grundrechtsschutzes”, in: Österreichische Juristenkommission (ed.), see note 83, 169 et seq. (177-178); R. Moos, “Polizei und
would create an additional type of legal protection and would certainly be an improvement for the individuals concerned.

IV. Transforming the Convention on the Rights of the Child into Austrian Constitutional Law: A Step forward towards an Effective Implementation?

Taking into account the examination above, in the following and final section, the question will be discussed as to whether such an inclusion of the rights of the child into the Austrian Constitution increases the effectiveness of the implementation of the CRC.

Although Austria has been a State Party to the CRC for eighteen years, deficits regarding the implementation of the CRC within the Austrian legal system still exist. While several legislative and administrative reforms, aimed at improving conformity with the Convention, have been undertaken over the last years – according to the Committee on the Rights of the Child – the Austrian legal system still lacks full compliance with the Convention. Ongoing areas of concern are e.g. family reunification, refugee children and juvenile justice.\(^{122}\) Moreover, because of the children’s limited capacity to conduct proceedings on their own, their rights can not be effectively pursued if parents neglect their task acting as their legal representatives. Thus, the justiciability of children’s rights still has to be improved within the Austrian legal system.

Since the direct applicability of the CRC is explicitly excluded in Austria, executing national law provisions have to be enacted to implement the rights set forth in the Convention. For assessing whether or

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\(^{122}\) Committee on the Rights of the Child 38th Sess., see note 5, 2, 3, 8 et seq.; Sax, see note 18, 552 et seq.
not transforming the CRC – or parts of it – into Austrian constitutional law would increase the effectiveness of the implementation of the CRC within the Austrian legal system, one has to distinguish between areas in which an executive national legislation already exists and those areas in which such national legislation is still missing.

As constitutional law is considered supreme to all other categories of legal acts within the Austrian legal system, as a consequence, every act at the level of simple law has to be in accordance with the constitutional provisions. From that it follows, that in case the whole Convention or parts of it are transformed into constitutional law, the conformity of existing executing national law provisions – holding the rank of simple law – dealing with certain rights set forth in the Convention could be reviewed by the Constitutional Court. In the event of a breach of the constitutionally guaranteed treaty provisions, the executing national law provisions are to be rescinded by the court. Even though the rights of individuals to initiate such constitutional review are rather limited – as noticed above –, the improvements regarding the legal protection of children’s rights in that context cannot be ignored. Transforming rights of the child as set forth in the CRC into constitutional law, however, does not automatically impose an obligation on the Austrian legislator to enact executing simple law in matters in which it is additionally required. However, if the parliament decides to do so, it is bound by the constitutionally guaranteed treaty provisions, serving as a guideline for the whole legislative process.

Regarding the applicability and the enforcement of the rights set forth in the Convention, an inclusion of those rights into constitutional law would mean an additional way of legal protection by the Constitutional Court. However, this is only true in those cases in which an executing national legislation, granting children’s rights at the stage of simple law, already exists. Furthermore, such an increase of legal protection concerning children’s rights is limited to administrative proceedings only. In contrast, rights set forth in the Convention, which are not guaranteed by national law provisions so far, might – for the first time – be invoked directly in proceedings at administrative authorities and courts, once they have been transformed into constitutional law. Thus, the improvement of the legal protection of those rights would be – compared to the cases in which an executing national legislation already exists – even higher. Even though, the same result could be reached by transforming them into simple law, including them in constitutional law improves their legal effect even more, as a violation of constitutionally
guaranteed rights could be additionally claimed before the Constitutional Court in the field of administrative proceedings.

Summing up, although an inclusion of the Convention into the national constitution is not required by the CRC, it would undoubtedly increase the effectiveness of the implementation of the CRC within the Austrian legal system. Although the required full compliance of the Austrian legal order could also be achieved by transforming the whole Convention into simple law, the review of those provisions by the Constitutional Court – being of utmost importance for ensuring an durable compliance of the Austrian legislation with the Convention – is only possible by transforming it into constitutional law. The same holds true for the necessity to ensure that the treaty provisions are given legal effect within the domestic legal orders. Even though an (additional) legal protection of the constitutionally guaranteed treaty provisions by the Constitutional Court would be restricted to administrative proceedings, an inclusion of the rights of the child into the Austrian Constitution would once and for all ensure the required direct applicability and enforceability of all children’s rights set forth in the Convention, thereby helping Austria to finally fully fulfil its implementation obligations according to article 4 CRC.
Taming the Untamable? Transnational Corporations in United Nations Law and Practice

Katarina Weilert

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VI. Conclusion
I. Introduction

Globalization is a challenge for the traditional legal system which is based upon a strong sovereign domestic legal system and a certain control of nation states by international law. Typically, the activities of transnational corporations (TNC) as main actors of globalization point to the difficulty of holding them liable for the infringement of human rights under this traditional understanding of international law. In some respects, TNCs are as mighty as nation states; however, international law focuses on nation states as primary subjects of international law. Against this background, this article highlights a critical dilemma with far-reaching implications: on the one hand, in order to establish an effective control over TNCs on the level of international law, nation states would have to give up crucial parts of their sovereignty to an international body, which has not been done so far. On the other hand, if a nation state exercises on its own total control also over the TNCs' subsidiaries located in other territories and even over foreign entities, the international law principle of sovereign equality is in danger. Firstly, there needs to be a reasonable link for a state to exercise sovereign power in extraterritorial affairs; secondly, the liability of companies touches the economic power of a state – especially if it is a developing country.


2 For the early forms of TNCs compare St. Kirchner, “The Subjects of Public International Law in a Globalized World”, Baltic Journal of Law & Politics 2 (2009), 83 et seq. (92).

3 A comparative ranking of the gross domestic product of states (GDP) and the revenue of TNCs shows that there are about 50 per cent corporations in the first 100 places. For the year 2006, there were 45 TNCs within the first 100 places, above all Wal Mart, ExxonMobil and Royal Dutch Shell. These enterprises have a higher revenue than the GDP of (for instance) Greece and Denmark; for the year 2007 seeUNCTAD, World Investment Report 2009, Annex A, 225 et seq. (ranking of TNCs by foreign assets).

4 Article 2 para. 1 of the Charter of the United Nations reads: “The Organization is based on the principle of the sovereign equality of all its Members.”
In light of this dilemma, this article provides an overview of diverse, both traditional and new international mechanisms to ensure TNCs’ adherence to human rights standards and environmental norms, identifying both the potential and the deficits of each approach. The article argues that the United Nations, as the political and legal forum of nations, has to play its part in controlling TNCs, yet its power cannot be comprehensive, but has to be complementary to nation states’ activities. The article only focuses on UN-related initiatives and does not consider others, such as the Guidelines for Multinational Enterprises issued by the Organisation for Economic Cooperation and Development (OECD).

II. Defining the Problem of Human Rights and Business

1. Implications of TNCs on Human Rights and International Environmental Standards

Before light is shed on the negligence of human rights (including labor standards) and the environmental standards by some TNCs, the positive impact that these mighty entities can have should be mentioned. It is because they have the power to bring about prosperity, progress and in general a higher standard of living, that TNCs are highly welcome in every country. In the idea of most economic systems, private entities are indispensable for the availability of daily goods and services. They serve as employers of many people, they engage in all kinds of research (not least the development of medicine), or help to insure people against different financial risks.

The World Investment Report of 2008 describes TNCs as one (important) way to fund the necessary infrastructure in low-income countries. The report mentions especially transport, electricity, telecommunications, and water. Companies are also a vehicle that transfers


6 The World Investment Report has been published annually by the UNCTAD since 1991. It analyzes foreign direct investments and has a different special focus each year <http://www.unctad.org/Templates/Page.asp?intItemID=1485&lang=1>. In the World Investment Report from 2008 the special focus lies on the “infrastructure challenge”.

new technologies and know-how. For all these reasons, states are competing with one another to offer the most attractive conditions for subsidiaries to settle in.\textsuperscript{7} Generally speaking, developing countries are not interested in expelling them by establishing high environmental and human rights standards. Even if developing countries have profound environmental laws, they often do not enforce them properly.\textsuperscript{8}

Industrialized countries are not as dependent upon the settlement of subsidiaries of TNCs as poorer countries are, so they can afford to establish a higher protection of human rights and the environment and they have the means to enforce them.\textsuperscript{9} But when it comes to the shortcomings of the foreign subsidiaries of the parent company, the industrialized countries show little concern. Many legal systems have no or few rules that are specialized to deal with transnational cases brought before their courts.\textsuperscript{10}

The most famous exemption from that is the American \textit{Alien Tort Claims Act} (ATCA).\textsuperscript{11} § 1350 (Alien’s action for tort) reads as follows,

\textsuperscript{7} Developing countries did not always appreciate TNCs, and there were times when they were concerned over their influence, compare K.P. Sauvant/ V. Aranda, “The International Legal Framework for Transnational Corporations”, in: J.H. Dunning (ed.), \textit{United Nations Library on Transnational Corporations: The International Legal Framework}, Vol. 20, 1994, 83 et seq. (97).


\textsuperscript{11} For a discussion of cases brought under the ATCA, see: A. Feldberg, \textit{Der Alien Tort Claims Act}, 2008; M. Koebele, Corporate Responsibility under the Alien Tort Statute, 2009; S. Joseph, “Taming the Leviathans: Multinational Enterprises and Human Rights”, \textit{NILR} 46 (1999), 171 et seq. (179 et seq.); A. Seibert-Fohr/ R. Wolfrum, “Die einzelstaatliche Durchsetzung
“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

United States courts are not unanimous as to whether this law only establishes the courts’ jurisdiction or whether it even provides an individual cause of action. However, in its decision *Sosa v. Alvarez-Machain*, the Supreme Court made clear that there needs to be an additional cause of action in common law. Yet the court admitted that common law also comprises some norms of customary international law and treaty law if this is self-executing. With this, U.S. courts are in fact enforcing norms of international law. This, on the one hand, helps to strengthen international law, but, on the other hand, it might clash with the doctrine of non-intervention.

How then did TNCs in the past violate international standards? The cases can be roughly put into three categories with flexible borders. Most grievously, TNCs have been part of international crimes such as

15 Feldberg, see note 11, 217.

killing and torture. Often they were supporting corrupt regimes financially in order to enhance advantages for their business. The lawsuits against Shell,\(^18\) which were settled in 2009, alleged that Shell was guilty of complicity in serious human rights violations against the Ogoni people in Nigeria. The reproaches were addressing “summary execution, crimes against humanity, torture, inhumane treatment, arbitrary arrest, wrongful death, assault and battery, and infliction of emotional distress.”\(^19\) Shell was accused of having cooperated with the Nigerian military regime. As Shell agreed to pay 15.5 million US$, it is very likely that the cases were at least in the main points well-founded.

Shell is not a solitary case, but stands for a group of cases where, for the sake of profit, companies are abetting regimes in order to achieve their economic aims even at the risk of committing international crimes.\(^20\) There is another case, Presbyterian Church of Sudan et al v. Talisman Energy, Inc., which deals with similar allegations.\(^21\) The plaintiffs brought a suit in the US Federal Court, yet the court dismissed the lawsuit in September 2006. On 2 October 2009 the Second Circuit Court of Appeals affirmed the dismissal. In April 2010 the plaintiffs went to the Supreme Court and they currently hope that the court will overturn the dismissal of the case. The oil company Talisman Energy is being accused of “complicity in the Government of Sudan’s … campaign of war crimes, crimes against humanity, and genocide.”\(^22\) Talisman, acting through its agents, is maintained to have funded the military actions and given prolonged logistical support. The army has been pursuing a strategy of ethnic cleansing with the aim of banishing the non-Muslims from the oil concession area in Southern Sudan. In this territory, a “paper subsidiary” of Talisman Energy\(^23\) is involved in drill-

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\(^{18}\) Altogether three different lawsuits were filed: Wiwa v. Royal Dutch Petroleum, Wiwa v. Anderson, and Wiwa v. Shell Petroleum Development Company. The history of the cases is presented by the Center for Constitutional Rights, \(<http://ccrjustice.org/ourcases/current-cases/wiwa-v.-royal-dutch-petroleum>\>.

\(^{19}\) Center for Constitutional Rights, see note 18.

\(^{20}\) Compare also Saage-Maas, see note 10, 167.

\(^{21}\) Evangelischer Entwicklungsdienst (ed.), Konflikte und Friedensarbeit, infokletter April 2002, No. 19, 5 et seq.

\(^{22}\) Opening Brief for Plaintiffs-Appellants in the United States Court of Appeals for the Second Circuit, 26 February 2007, 1.

\(^{23}\) The subsidiary (Talisman (Greater Nile) B.V.) is completely dominated by Talisman Energy (Opening Brief, see note 22, 16 et seq.)
ing for oil. Thus the depopulation helped Talisman Energy to boost its profits.24

A second category of cases can be defined as the negligence of standards of international environmental law. The Shell-Case serves also as example for this dimension of wrongdoing by destroying the Ogoni ecosystem: Shell was accused of having contaminated the local water supply, the agricultural land and of having polluted the air by gas flaring.25 Another notorious case is the devastating accident in a chemical plant of Union Carbide India Limited (UCIL) in Bhopal. The gas tragedy took place in December 1984, killing thousands of people and injuring thousands more.26 There have been different litigations before U.S. courts and Indian courts. The most current judgment has been pronounced by an Indian court in June 2010, convicting seven former senior employees of Union Carbide’s Indian Subsidiary of “death by negligence”. Also the transnational corporation Monsanto has been accused of severe environmental devastation, beginning with the herbicide “Agent Orange” in the Vietnam war. Health problems, that are likely to be caused by the scattered dioxin, continue to the present day, ranging from cancer to deformations of newborns, even in the third generation. In another case, settled 2003, concerning polychlorinated biphenyls (PCB) contamination in Anniston (Alabama, United States), Monsanto agreed to a payment of about 700 million US$. Today, Monsanto is criticized above all because of its production of genetically modified seeds, blamed for continuously developing its dominant market position, misusing its patent law to the detriment of the local farmers and for alleged influence of political decisions. Another multinational company, Trafigura, together with a local dumping company, Tommy, was responsible for dumping waste in Abidjan (Côte d’Ivoire) in August 2006. As a consequence, at least 16 people were killed and thousands poisoned.

A third category concerns the rights of employees. The decision for the location of a subsidiary company is often primarily influenced by a

24 For reasons of clarity and comprehensibility, the facts of this case and Talisman Energy’s chain of subsidiary corporations, are considerably shortened in this paper. Due to the “corporate veil”, the district court did not assume a legal responsibility of Talisman Energy.


26 Compare for the proceedings Feldberg, see note 11, 82 et seq.
Today, the costs for loans vary so much from industrialized to developing countries, that it pays for an enterprise to shift its production overseas. A current example in Germany was the closing of the Nokia subsidiary in Bochum in June 2008. The production was transferred to Romania. The company justified its decision with the comparably high level of loans and other costs in Germany. In terms of profit and in light of the world-wide competition, these decisions are reasonable. But as to the fact that Nokia could achieve a high profit of 7.2 billion Euro in 2007, it shows that the sole profit-orientation of companies clashes with the social reality that they provoke. Even if the competition “forces” TNCs to produce abroad, they are not forced to deny basic labor rights in order to maximize their own profit.

Thus Oxfam International accuses TNCs in the fruit-picking-sector in Chile of exploiting its workers, mainly female employees. Besides the problems of wage dumping, there are cases where the safety at work was substandard. One of these was the Thor Chemicals Holdings Ltd., a United Kingdom based company, which used to produce mercury-based chemicals in England. When it was revealed that the employees had elevated mercury levels in their blood and urine, the production was transferred to South Africa (in about 1986). Thor Chemicals did not establish any safety arrangements in the new plant, but rather re-


29 “In the fruit-picking sector, 75% of women work more than 60 hours a week in season, on temporary contracts, and a third of them do not earn even the minimum wage. Half these women have no contract, and therefore there is no welfare system to support them if they fall sick.” <http://www.oxfam.org/en/campaigns/trade/real_lives/chile>.

placed the workers when it became obvious that mercury had accumulated in their bodies. Three workers died, not to speak of those who were poisoned to varying degrees. A suit for compensation was filed against the parent company and its Chairman in the English High Court on behalf of 20 employees. It was reasoned that Thor Chemicals had been negligent and had not done what was necessary to protect the employees in South Africa. In 1997, Thor Chemicals agreed to a settlement of 1.3 million £. Further claims followed.

2. TNCs and their Role in International Law

The examples above show that TNCs have great social and political impact and are responsible for our environment in a special way. Globalization has increased the influence and power of TNCs and has raised questions of their legal status at the international level, as TNCs can, to a certain degree, “choose” between different national laws when they decide for the settlement of a new subsidiary. As a result of globalization, some TNCs appear as mighty global players that can be on par with nation states or might even outplay them. Despite that, international law is still focused on the entity of nation states as the main players. Of course, states are not the only subjects of international law. But even the UN, as the most important international organization and subject of international law, is based on the power of states and the principle of their sovereignty. Thus the UN can hardly make any binding decisions. TNCs, on the contrary, do not need any such transfer of power by the states, but they draw their actual dominance from the economy. By means of globalization they became quite independent of their nation states. This power has provoked the assumption that TNCs

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32 Compare Backer, see note 31, 120 et seq.

33 Kirchner, see note 2, 89, but see also his “communication-approach” (below note 37).

34 On this topic M. Herdegen, *Völkerrecht*, 6th edition, 2007, § 40 para. 14; Security Council Resolutions made under Chapter VII of the UN Charter are legally binding; additionally, it is disputed whether also Resolutions under Chapter VI are legally binding.
are also subjects of international law. The question of who is a subject of international law has to be redefined, according to a group of academic writers. Karsten Nowrot states that the aim of international law in light of the new realities calls for a (at least partially) new dogmatic way of the concept of subjects of international law.\textsuperscript{35} The mighty position in the international arena implies the – rebuttable – presumption that these entities are subjects of international law. Accordingly, they are bound by international law with respect to the realization of global welfare.\textsuperscript{36} Other writers go even one step beyond this assumption. They leave the whole concept of “subjects of international law” aside.\textsuperscript{37} This discussion reflects how deeply TNCs have changed the political power structure. The modification or even the abandonment of the category of “subjects of international law” would have far-reaching impact on the international law theory and presumably also on the structure and position of the UN.

If one sticks to the well-established structures of international law, how can TNCs be held accountable? The first option, one could see already from the given cases. The “states” can control TNCs by their laws and courts. But this mechanism regularly does not function very well. Host-states, where the subsidiary is established, are normally less developed countries that urgently need a flowering economy to handle their numerous problems. They are not interested in discouraging TNCs to locate a new subsidiary in their country. Rather they make concessions to them in order to prevent them from settling in another country. Additionally, host-states often suffer from corrupt structures


\textsuperscript{36} Nowrot, see note 35, 696, para. 29. See also D. Kinley/ R. Chambers, “The UN Human Rights Norms for Corporations: The Private Implications of Public International Law”, \textit{Human Rights Law Review} 6 (2006), 447 et seq. (479 et seq.), speaking of different types of personality (480).

\textsuperscript{37} A short overview of this argument is given by Saage-Maß, see note 10, 166. Compare also Kirchner, see note 2, 83 et seq., who puts forward his thesis according to which “all actors gain their power from the ability to communicate” (94), yet he does not seem to completely abandon the concept of being a subject of international law, but only shows that this traditional concept is not as decisive any more in a world which offers modern ways of communication: “In a world which is driven by communication, it is up to all actors to safeguard this elementary prerequisite of the new PIL [Public International Law]” (94).
and deficiencies in their administrative infrastructure.38 On the contrary, home-states, which usually are industrialized countries, often have reasonable laws and infrastructure to protect the citizens on their territory from abuse. But their legal system is frequently not ready to deal with transnational cases. Even if it provides a legal remedy for the wrong conduct of the subsidiary, the referral to the doctrine of forum non conveniens might hinder an action against the subsidiary in the home-country of the parent company if the court is of the opinion that the more appropriate forum would be a court in the host-state.

If the subsidiary has taken a foreign nationality,39 questions arise as to the admissibility under international law of bringing an action against it before the courts of the home-states (extraterritorial jurisdiction).40 Even if an action against the subsidiary is admissible, this might not be fully satisfactory as an action against the subsidiary might not be as successful as suing the parent company, if the latter has less limited liability and is respectively financially stronger. Therefore, in many cases the claimants are bringing the parent company to trial if possible (as for instance, under the ATCA). But the parent company is regularly only liable for its own default. This means that no liability of the subsidiary automatically provokes a legal responsibility of the parent company. The default of the parent company can either consist in an “action” or in an “omission” (if there was a duty to act).41 Whether the parent company can be held responsible is often the point of contention. For example, in the above mentioned case Presbyterian Church of Sudan et al v. Talisman Energy, Inc. the plaintiffs lodged an appeal because the district court did not see the legal responsibility of the parent company Talisman Energy.

Besides these “national” (and not comprehensive) legal actions, there is no court on an “international” level to hold TNCs directly ac-

40 For more details, see K. Weilert, “Transnationale Unternehmen im rechtsfreien Raum? Geltung und Reichweite völkerrechtlicher Standards”, ZaiRV 69 (2009), 883 et seq. (891 et seq.).
41 Weilert, see note 40, 895.
countable. Under the ICJ statute neither states nor other entities have the power to bring an action against TNCs. Only the International Criminal Court (ICC) has some – very limited – jurisdiction. But even here TNCs cannot be sued directly.\(^\text{42}\) Only the manager of the company can be taken to the ICC. According to article 5 of the Rome Statute the ICC has jurisdiction over the following crimes only: the crime of genocide, crimes against humanity, war crimes and the crime of aggression. This leads to the question what role the UN plays and could prospectively play in implementing human rights standards \textit{vis-à-vis} TNCs.

The UN is predestined for this problem in a twofold way: firstly, the protection of human rights is closely connected to the UN.\(^\text{43}\) The Universal Declaration of Human Rights as proclaimed in 1948 embraced, even at that early stage, social human rights (arts 22 et seq.). Secondly, the United Nations is “the” forum for problems that cannot be solved by the states on their own, but only together, as the UN embraces virtually all states. Having said that the UN is not a supranational body, and as the intentions of the states differ on the matter of TNCs, the UN is limited in its options. In order to analyze the impact of the UN, a chronological overview of its attempts and initiatives to handle TNCs will be given.

### III. Binding UN Law Towards Taming TNCs

#### 1. An Overview of Binding Conventions

First, one has to look at the prominent and legally binding UN Conventions on Human Rights: the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The ICCPR covers the basic rights such as the right to life (article 6) and protection against torture and inhuman treatment (article 7). Also included are the right to form and join trade unions (article 22), and the prohibition of discrimination (article 26). Beyond that,\(^\text{44}\) the ICESCR

\(^{42}\) Article 25 para. 1 Rome Statute.

\(^{43}\) Compare Arts 1 para. 3; 13 lit. b; 55 lit. c; 62 para. 2; 68 Charter of the United Nations.

\(^{44}\) The ICESCR guarantees also the right of non-discrimination (article 3) and the right to form and join trade unions (article 8).
provides the right of everyone to the enjoyment of just and favorable working conditions, which includes, *inter alia*, fair wages, safe and healthy working conditions, and reasonable limitation of working hours (article 7), social security (article 9), maternity protection and the protection of children (article 10), as well as the improvement of all aspects of environmental and industrial hygiene (article 12 lit. b). Besides these Covenants of 1966, there are other multilateral UN treaties which address special problems such as discrimination against women\(^45\) and the protection of children.\(^46\) Furthermore, there is also the UN Convention against Corruption (2003) with its article 12 regarding the prevention of corruption in the private sector. In the field of international environmental law, the most important conventions are the UN Convention on Biological Diversity of 1992, and the UN Framework Convention on Climate Change of the same year.

Besides that, there are several ILO-conventions. Its conventions are legally binding for those states that have ratified them. They specifically cover the fields of the four core fundamental labor standards: namely, the freedom of association and collective bargaining, abolishing of forced labor as well as child labor, and the prohibition of discrimination in respect of employment and occupation.

### 2. Problems in Giving Effect to International Conventions

On the one hand, there are provisions that address the said problems. On the other hand, all these norms of international law are not, in the first place, composed to solve the problems caused by TNCs. They only deal with them peripherally. But, much more importantly, these norms address in the first instance only the states as parties to the conventions. The states committed themselves towards the other contracting states by the obligations laid down. Thus the provisions of the con-

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vention are binding on the contracting states and the states have to give effect to these rules within their national legal order.47

The means by which treaty law forms part of national law differs among the legal traditions. In Germany, treaty law is transformed into national law by an act called “Zustimmungsgesetz” pursuant to article 59 para. 2 German Basic Law (Grundgesetz). But this transformation is not enough in itself to oblige companies to the single provisions of the covenants. Moreover, the provision must be “self-executing and horizontally applicable”. A norm is self-executing (directly applicable) if it is clear enough and does not depend on further action.48 Some of the mentioned provisions are quite clear, e.g. article 6 ICCPR, “Every human being has the inherent right to life.”. Others need clarification e.g. article 7 ICESCR, the rights of fair wages, safe and healthy working conditions and reasonable limitation of working hours. It has been even debated whether any right of the ICESCR is self-executing due to article 2 para. 1 ICESCR.49 In the end, it falls within the jurisdiction of the states to decide whether a provision is self-executing.50 But even if the treaty-norm is self-executing, the addressees of the treaties are, in the first place, states, and, generally treaties are not horizontally applicable. The ICESCR nearly always explicitly speaks of the “the States Parties to the present Covenant” which have to recognize the given rights. The Committee on Economic, Social and Cultural Rights has emphasized that multinational private enterprises are not bound by the Covenant,

47 For the relationship of international law and municipal law compare I. Brownlie, Principles of Public International Law, 7th edition 2008, 31 et seq.
48 CESCR, Doc. E/C.12/1998/24 of 3 December 1998, General Comment No. 9, The domestic application of the Covenant, para. 10 (“norms which are self-executing (capable of being applied by courts without further elaboration)).”
49 Article 2 para. 1 ICESCR: “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”
but nevertheless have responsibilities with regard to the right to work.\textsuperscript{51} With respect to the ICCPR, the Human Rights Committee has dismissed any direct horizontal effect,

“The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law.”\textsuperscript{52}

But at the same time, the Committee has emphasized “... the positive obligations on States Parties to ensure Covenant rights” “will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.”\textsuperscript{53}

This 	extit{duty to protect and fulfill} is well known in international human rights law.\textsuperscript{54} Terminology differs at this point. A good explanation of

\textsuperscript{51} CESC\textit{R}, Doc. E/C.12/GC/18 of 6 February 2006, The Right to Work, General Comment No. 18, adopted on 24 November 2005, para. 52: “While only States are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society – individuals, local communities, trade unions, civil society and private sector organizations – have responsibilities regarding the realization of the right to work. States parties should provide an environment facilitating the discharge of these obligations. Private enterprises – national and multinational – while not bound by the Covenant, have a particular role to play in job creation, hiring policies and non-discriminatory access to work. They should conduct their activities on the basis of legislation, administrative measures, codes of conduct and other appropriate measures promoting respect for the right to work, agreed between the government and civil society.”


\textsuperscript{53} See note 52.

\textsuperscript{54} Joseph, see note 11, 175 et seq., speaking of “horizontal” application of international human rights, but meaning the duty to protect (“the duty of states to give effect to human rights between private parties”) with further references; J. von Bernstorff, \textit{Die völkerrechtliche Verantwortung für menschenrechtswidriges Handeln transnationaler Unternehmen}, INEF Forschungsreihe Menschenrechte, Unternehmensverantwortung und Nachhaltige Entwicklung (05/2010), 8 et seq.
the essence of this duty is given by the Maastricht Guidelines, a document put forward by independent experts of human rights,

“The obligation to protect requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights.”

If the states do not adhere to their commitments, there are treaty-based mechanisms such as the examination of the inter-state communications according to article 41 ICCPR or the examination of individual communications according to the first optional protocol to the ICCPR as well as the newly established and (not yet entered into force) complaint and inquiry mechanism in accordance with the optional protocol of the ICESCR. Neither of these treaty-based mechanisms, nor a procedure before the ICJ includes a way of taking an action against a company itself. It is only the states parties that can be blamed for their failure to respect, protect or fulfill their duties under the conventions.

To sum up, the UN “hard laws”, i.e., the UN binding conventions, are not sufficient to tame TNCs. In the first place, their provisions are not designed for the special problems of TNCs; the social rights are often ambiguous, and the environmental provisions are not ample enough. Furthermore, only states and not TNCs can be held accountable directly. This leads to the question whether the UN has resolved the special questions related to TNCs, and to what extent.

56 Before the ICJ, there is the additional problem that in cases of infringements of human rights in the host-state regarding the host-states’ nationals, no other state is injured. Only in cases of infringements of obligations erga omnes other states are “injured”. Compare also article 54 Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the ILC on the Work of its 53rd Sess., GAOR 56th Sess., Suppl. No. 10, 43, Doc. A/56/10 (2001).
IV. Non-Binding Approaches at UN-Level Towards Taming TNCs

1. From UNCTAD to UNCTC and Vice Versa

When UNCTAD was founded in 1964, the problems of TNCs were not on its agenda. Today, the authority of UNCTAD is underlined by the fact that 193 countries are members of it. The idea of its foundation was to improve trade and development worldwide, and to put a special focus on the developing countries. These economically weaker countries should be helped in their integration into the community of developed countries. Although this aim is not specific for TNCs, the reduction of an economic decline would abolish the root of some of the problems.

Initially, the focus of Member States was upon the benefits that Foreign Direct Investments (FDI) are able to bring about. In light of this, their emphasis was on the abolition of obstacles that were hindering industrialized countries from investing in developing countries. It did not take a decade to change this view considerably. By the early 1970s, TNCs were observed as economically very powerful entities responsible for a number of evils. The developing countries feared losing part of their sovereignty and suffering damage to their economy, including social and environmental aspects.

In November 1972 the Chilean President Allende gave a speech at the UN General Assembly. He maintained that International Telephone and Telegraph had intervened in Chile’s domestic affairs. After that, the UN initiated a study on Multinational Corporations in World Development. In 1973 ECOSOC appointed a “Group of Eminent Persons” with the mandate to advise on the activities and the nature of TNCs as well as their influence on development. As a consequence of that, the UN Commission on Transnational Corporations (UNCTC)

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57 T. Fredriksson, “Forty years of UNCTAD research on FDI, Transnational Corporations”, Transnational Corporations 12 (2003), 1 et seq. (2 et seq.).
58 Id., 4.
59 Id., 4.
60 Id., 5.
was founded as a permanent intergovernmental forum.\textsuperscript{62} UNCTC commenced its work in 1974 and existed for 17 years. Its main focus was to phrase international arrangements concerning TNCs, for instance a Code of Conduct on Transnational Corporations.\textsuperscript{63} Furthermore, UNCTC provided data on TNCs and FDI as well as legal rules (national and international) concerning both. With its publications it made these data transparent.\textsuperscript{64} In addition to that, it analyzed how TNCs affected the economy and social life, especially in developing countries. Finally, UNCTC offered the developing countries advice on their negotiations with TNCs.\textsuperscript{65}

The work of UNCTC was embedded in the whole political setting which was influenced by the cold-war-climate. Thus, in the 1970s the concern was to control TNCs as the developing countries feared their sovereignty to be at stake.\textsuperscript{66} In the 1980s the prospects and positive influence of TNCs were increasingly apparent. The developing countries did not fear FDIs anymore, but wanted to profit from them.\textsuperscript{67} In 1992 UNCTC was closed down due to an organizational reform of the economic sector of the UN. Its important work was taken over by UNCTAD. It would be wrong to assume that UNCTAD had been silent on

\begin{itemize}
  \item \textsuperscript{62} The information on UNCTC is based on Fredriksson, see note 57, and the information provided by UNCTAD <http://unctc.unctad.org/aspx/index.aspx>. Compare also P.T. Muchlinski, “Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD”, in: M.T. Kamminga/ S. Zia-Zarifi (eds), Liability of Multinational Corporations under International Law, 2000, 97 et seq.
  \item \textsuperscript{63} This Code of Conduct was not finished and was given up after 1992 when the work of the UNCTC was shifted to UNCTAD. The states, having different viewpoints, were then no longer interested in finalizing these rules.
  \item \textsuperscript{64} Important publications are: Multinational Corporations in World Development (survey given every five years) and superseded by the World Investment Reports since 1991; The CTC Reporter (published twice per year) and substituted since 1992 by the journal Transnational Corporations (annually).
  \item \textsuperscript{65} Fredriksson, see note 57, 5; <http://unctc.unctad.org/aspx/UNCTCOrigins.aspx>.
  \item \textsuperscript{66} See for further reading of the UN and TNCs, S. Tesner, The United Nations and Business, 2000, 16 et seq.
  \item \textsuperscript{67} Kinley/ Chambers, see note 36, 455-456: “… with the end of the Cold War and the growth of the free trade and investment movement, the emphasis began to shift away from the demands of host countries to their need to attract foreign companies and thus to deregulation.”
\end{itemize}
the issue of TNCs during UNCTC’s existence, but it did not hold an expert role comparable to that of UNCTC between 1974 and 1992.

Today the focus of UNCTAD is still not to hinder FDI and TNCs, but to make them profitable and helpful for all countries involved, as the states generally appraise both as beneficial; yet to date, there still remain differences between developing countries and industrialized countries. Thus the intentions of states in respect of international regulations of corporations have diverged up to now. TNCs have become even more widespread today, and with their enormous revenue, they are economically comparable to states. The most prominent publications of UNCTAD are the annual World Investment Reports that always draw attention to a special issue analyzing FDI with respect to the development implications, at the same time providing a political and economical analysis and statistical data.


The ILO, as specialized agency of the UN, works in many fields that are relevant for the problems around TNCs. For example, the ILO combats child labor, strives for safe working conditions, campaigns to ensure the freedom of association and the right to collective bargaining, and encourages social security. Besides these activities, already in 1977 the ILO addressed the issue of TNCs in a special way by adopting the “Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy”. The phrasing of this Declaration came at a time where TNCs were, above all, seen as a threat to developing countries. The Declaration was later amended in 2000 and in 2006. It is to be understood as a set of “guidelines to MNEs, governments, and employers’ and workers’ organizations in such areas as employment, train-

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68 For more details, see Fredriksson, see note 57, 6.
69 Kirchner, see note 2, 91.
70 Backer, see note 31, 123 et seq.
ing, conditions of work and life, and industrial relations.” The provisions are called explicitly “voluntary” and they are not legally binding. Thus they form part of international soft law.

The Governing Body of the International Labour Office, which adopted the Tripartite Declaration, is composed of 28 government members, 14 employer members and 14 worker members. This reflects the structure of the ILO as a “tripartite organization” and this composition is unique on the international level. Thus it is not only the traditional subjects of international law that come together in a round table discussion, but also the employers who are close to the interests of TNCs, and the workers who are in a more dependant role and have only limited influence in daily operations. The fact that the Tripartite Declaration is not legally binding is a “minus” compared to the binding ILO-conventions, but at the same time it was, in a way, the precondition that the three groups could agree on these “rules” at all. The Tripartite Declaration sees the positive potential of TNCs and aims to foster them while minimizing the arising problems.

Under the first topic (“General Policies”), the Tripartite Declaration emphasizes the “sovereign rights of States.” In the Procedure for the Examination of Disputes concerning the Application of the Tripartite Declaration, it is stated that the Procedure “cannot be invoked in respect of national law and practice” which means that “questions regarding national law and practice should be considered through appropriate national machinery.” This reflects that half of the members of the tripartite governing body of the ILO are still the governments.

The second issue of the Tripartite Declaration is the topic of “employment.” In light of the high unemployment (especially in developing countries), multinational enterprises are prompted to provide new jobs. They shall act “in harmony with national social development policies” (para. 17). But there is the problem that exactly those rules on social security (for example unemployment insurance) are missing in many developing countries. The companies are requested to employ nationals of the host-state (para. 18) and they shall employ sub-contractors of the host-state “for the manufacture of parts and equipment” to increase jobs in developing countries (para. 20). The problem of unemployment was pressing in the 1970s, as well as, today although some economic

factors have changed considerably. Due to the outsourcing of production, the problem of unemployment (especially among people with fewer qualifications), becomes a bigger problem in industrialized countries as well. Currently, the financial crisis has provoked an even greater risk of unemployment all over the world, but with dramatic impact in developing countries where social security is lacking. In addition to that, the Tripartite Declaration aims at employment opportunities without discrimination of people regardless of their race, color, sex, religion, political opinion, national extraction or social origin (para. 21 et seq.).

As a third topic, vocational training is stipulated to enhance the skills and career opportunities of the employees. Fourthly, the Tripartite Declaration also addresses “conditions of work and life.” TNCs shall offer wages, benefits and conditions at work comparable to the local standards, and, if these do not exist, they “should provide the best possible wages, benefits and conditions to work, within the framework of government policies” (para. 34). The problem with those commitments is their considerably vague nature. Also one of the big ILO issues, the abolition of child labor, is addressed (para. 36). Moreover, “adequate safety and health standards” shall be observed (para. 37). Fifthly and lastly, standards of industrial relations are addressed, embracing the freedom of association and collective bargaining. These rights shall not be diminished by any special offers that developing countries make to TNCs in order to attract them for their location (para. 46).

How efficient has the Tripartite Declaration been? Any assessment is difficult because one does not know how things would have developed without this Declaration. As the provisions of the Declaration cannot be enforced by any lawsuit, there is no hard evidence of its impact. However, the rules are seen as important, in that they address significant problems and name difficulties. They increase the sensibility for the needs of employees and their situation, especially in developing countries, and in this manner promote other legal mechanisms. In order to foster and review the adherence to the Tripartite Declaration, the

75 Compare also A. Clapham, Human Rights Obligations of Non-State Actors, 2006, 215, going even one step further when maintaining “I could offer the interim conclusion here that, despite the fact that the Tripartite Declaration contains only recommendations, the Declaration provides material evidence that the international labour law regime has come to include human rights obligations for national and multinational enterprises.”
ILO has set up a follow-up program (Multinational Enterprises Programme).\textsuperscript{76} The program, \textit{inter alia},\textsuperscript{77} includes periodic surveys which monitor how the principles of the Declaration are observed. In order to analyze this, a questionnaire is sent to the Member States, national employers’ and workers’ organizations in order to collect information on the implementation. The Sub-Committee (to the Committee on Legal Issues and International Labor Standards) evaluates the data, and afterwards the Governing Body will adopt decisions in which it gives recommendations for future actions. However, the reports would have a greater impact if they named the TNCs with regard to their misconduct.\textsuperscript{78} Since 2008, a Helpdesk has been set up where managers and workers can obtain guidance on questions regarding the Tripartite Declaration.\textsuperscript{79} Those questions might be (for example) about the rights of workers in the supply chain or how one can foster the improvement of labor standards of a subcontractor.

In the end, the ILO, as specialized agency of the UN, has set up “rules” which, albeit not legally binding, help to define standards. As they address not only states, but also TNCs, they help to create a consciousness of responsibility within the companies. But without the follow-up program and the further pushing of the ILO, those principles would remain ineffective. But in view of the accompanying efforts, their acceptance comes closer to other binding conventions which also often face serious shortcomings as to their actual observance.

3. The Global Compact (2000)\textsuperscript{80}

a. The Global Compact’s Concept and Distinctiveness

The Global Compact is a new approach to handle the challenges of globalization. But experts disagree in their assessments of the value and

\textsuperscript{76} <http://www.ilo.org/empent/WorkingUnits/lang--en/WCMS_DOC_EN T_DPT_MLT_EN>.

\textsuperscript{77} For the other aspects of the follow-up-program compare Clapham, see note 75, 216 et seq.

\textsuperscript{78} See also Hillemanns, see note 74, 74; Clapham, see note 75, 216.


\textsuperscript{80} The information given in this section relies to a large extent on the Global Compact Website.
the effects of the Global Compact. Some even fear that TNCs are not
tamed by it, but instead become “partners of the UN” with even more
influence in the political sphere.

The Global Compact was initiated by the former Secretary-General
of the UN Kofi Annan. In January 1999, he presented his idea about
this initiative at the World Economic Forum in Davos (Switzerland) at
the annual meeting. The official start took place in July 2000 at the
Global Compact Meeting in New York. With the support of the Inter-
national Chamber of Commerce (ICC), about 50 enterprises showed
their interest at this early stage. In 2010, over 7700 corporate partici-
pants and stakeholders have committed themselves to the Global Com-
pact. There is no direct mandate in the UN Charter to establish the
Global Compact; nevertheless, the Compact is clearly supported by
several Resolutions of the UN General Assembly.81 It has been also
recognized by the G8 at several meetings, including recently in
L’Aquila in July 2009.

The Global Compact is no international treaty, but a network-based
initiative and platform which brings together companies, NGOs and
the UN with its different agencies. Thus the Compact connects states,
businesses and NGOs as three very different players on the global
stage. Sabine von Schorlemer identifies three levels of this network.82
On the first level, there is the UN (as a network with its UN agencies),
and especially the Global Compact Office of the Secretary-General.
The Global Compact Office is “formally entrusted with the support
and overall management of the Global Compact initiative.”83 The Gen-
eral Assembly has encouraged it *inter alia* “to promote the sharing of
best practices.”84 On a second level, the network embraces the UN and
further core participants (such as companies and, for example, the ICC,
and academic participants as well as NGOs). On a third level, there are

81 UN General Assembly resolutions recognizing the Global Compact:
A/RES/60/1 of 16 September 2005; A/RES/62/207 of 22 December 2005;

82 S. von Schorlemer, “Der “Global Compact” der Vereinten Nationen – ein
Faust’scher Pakt mit der Wirtschaftswelt?”, in: S. von Schorlemer (ed.),

83 <http://www.unglobalcompact.org/AboutTheGC/stages_of_development
html>.

other initiatives, which originally pursued another purpose than creating global rules, but now form part of the Global Compact.

The core of the Global Compact are ten principles. They cover some basic human rights, labor and environmental standards and a commitment against corruption. The principles are taken from other human rights agreements, namely the Universal Declaration of Human Rights, the ILO’s Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and finally the United Nations Convention Against Corruption. Thus the content of the principles is not new and does not go beyond the already existing international documents.

In relation to human rights they are quite unspecific and read as follows: Principle 1: businesses should support and respect the protection of internationally proclaimed human rights; and Principle 2: they should make sure that they are not complicit in human rights abuses. Principle 3 to 6 concern labor standards. Principle 3: businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining; Principle 4: the elimination of all forms of forced and compulsory labor; Principle 5: the effective abolition of child labor, and Principle 6: the elimination of discrimination in regard to employment and occupations. The following four principles deal with environmental standards, and provide in Principle 7: businesses should support a precautionary approach to environmental challenges; Principle 8: they should undertake initiatives to promote greater environmental responsibility, and Principle 9: encourage the development and diffusion of environmentally friendly technologies. And lastly, Principle 10 sets forth: businesses should work against corruption in all its forms, including extortion and bribery.

While states are parties of ILO-conventions and other multilateral treaties, the Global Compact has inter alia TNCs as its parties which commit themselves directly to the principles. Thus the companies are not “bound” via their nation state, but they themselves make the decision whether to join the Compact and its principles or not. The procedure for participation is quite easy. Besides the filling in of a registration form, the company only has to send a letter (“letter of commitment”) signed by its chief executive to the Secretary-General of the UN in which it expresses its support for the ten principles. It further commits itself “to making the Global Compact and its principles part of the strategy, culture and day to day operations” of the company and “to engaging in collaborative projects which advance the broader development goals of the United Nations, particularly the Millennium Devel-
velopment Goals.” Also the letter includes the intention to an annually re-
port about the “company’s efforts to implement the ten principles.”
Thus there is neither a signature under any “Global Compact Treaty”
nor any officially conferred membership.85 In addition to that, a (rela-
tively small) financial contribution is asked for,86 which nonetheless all
combined will amount to a considerable sum.

As the Global Compact is not a specialized agency of the UN, it is
not funded by the UN. The funding of the core business is donated by
the public sector. Additionally, there exists a Foundation for the Global
Compact,87 which is authorized to fundraise on behalf of the UN
Global Compact Office for activities which are going beyond this core
business.88 The Foundation for the Global Compact also accepts dona-
tions from corporations “provided that acceptance of the donation
would not threaten the integrity of the Foundation, the UN Global
Compact Office or the initiative as a whole.”89

As the Global Compact is a non-binding treaty and has no means of
enforcing its principles, the heart of this initiative is the “communica-
tion on progress” (COP) to which the companies oblige themselves. If
a company fails to give any COP, this shortcoming will be displayed on
the website of the Global Compact initiative as “non-communicating
participants.”90 As to the high number of documents listed on this page
to date, more than 1200), the failure to communicate seems not to be
an insignificant problem. On the other hand, there are the “notable
communications on progress.”91 The notification of these outstanding
COPs was introduced in 2004 in order to display model communica-

85 von Schorlemer, see note 82, 527.
86 <http://www.unglobalcompact.org/HowToParticipate/Business_Participat-
ion/index.html>, “For companies with annual sales/revenues of USD 1 bil-
on or more, the suggested annual contribution is USD 10,000; For com-
panies with annual sales/revenues between USD 250 million and USD 1
billion, the suggested annual contribution is USD 5000; For companies
with annual sales/revenues of less than USD 250 million, the suggested an-
nual contribution is USD 500”.
org/faq.php>.
88 Global Compact Netzwerk Österreich, FAQ <http://abcst.at/content/
ungen/site/de/unglobalcompact/faq/index.html#frage9>.
org/faq.php>.
90 <http://www.unglobalcompact.org/COP/non_communicating.html>.
tions which might inspire other companies and thus help to implement the aims of the Global Compact.

A COP is considered “notable” if all requirements set forth in the COP policy are met and if, additionally, the report shows two of the following features, i.e. either a “strong statement of continued support” or a good “description of practical actions taken” to implement the ten principles or a “measurement of outcomes that allows for checking progress” or a “Reporting process [that] ensures reliability, clarity and timeliness of information and includes stakeholder dialogue.” As with all reports, the Global Compact Office does not control whether these communications are accurate. Therefore, the communication progress remains a tool which companies can misuse. However, stakeholders and the public will assess the reports so that, in a way, a review does take place.

It becomes clear that all the mechanisms of the Global Compact are “soft” and there are no real sanctions, but only the loss of image by being perceived as “non-communicating” or even taken off the webpage if listed longer than one year as “not communicating”. If a company wishes to join the Global Compact again, it must once more apply as a participant and give a correct and actual COP. The incentive for being part of the Global Compact is the hope of the companies that it will pay in the long run if they enjoy a good reputation. They anticipate that the adherence to ethical norms will be rewarded by profit. To give an example: work accidents “cost” four per cent of the global gross domestic product. If the working conditions are elevated, companies directly profit from this advancement.

The Global Compact is only one (non legally binding) initiative to ease the waves of globalization. But it is distinct in that it was initiated by the former Secretary-General of the UN. However, the Compact is often not even counted in the category of “soft law”, as it is not a declaration, recommendation or resolution of an international organization or a state conference. Therefore, it is also distinct from the ILO Tripar-

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92 Compare “ethical consumerism”.
95 Von Schorlemer, see note 82, 428; A. Emmerich-Fritsche, “Zur Verbindlichkeit der Menschenrechte für transnationale Unternehmen”, AVR 45 (2007), 541 et seq. (551).
tute Declaration, which forms part of soft law. The Global Compact could be described more accurately as supporting existing international standards by a direct communication with TNCs. The distinctiveness does not lie in any new standards, but in the approach to address TNCs not only via the nation states but via different stakeholders.

The network that is created between the UN agencies, companies, business-associations, labor organizations, NGOs, the academic sector and public sector organizations and even cities, is unique in that it is very broad and enjoys the authority of the UN. Furthermore, it brings together opposing “partners”; as one has to keep in mind that some NGOs are founded to “control” TNCs and to point out their shortcomings. Embedding both in one network affords the opportunity that the communication between NGOs and TNCs is improved and that the “concept of the enemy” is thwarted. But it might also seem as if NGOs and TNCs now, above all, have a friendly relationship and for that reason some NGOs fear losing their influence.

The Global Compact is not a “code of conduct” instructed from the UN to the TNCs and thus is distinct from the “Draft United Nations Code of Conduct on Transnational Corporations”96 and the UNCTAD code “The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.”97 Instead, it was initiated as a platform for dialogue. How the Global Compact will develop in the future is not foreseeable at the moment. Its open and imprecise beginning was part of the concept to develop a new setting which, not least, will be shaped by its participants.

The innovative idea is that the Global Compact believes in self-regulation and that companies will not refuse to take on their responsibilities in order to realize the ten principles.98 This hope is not necessarily born due to the accomplishments of TNCs in the fields of human rights and sustainable development, but it is primarily part of the con-

viction that the problems of the globalized economy cannot be solved against the will of the main players in the economy.99

Last but not least, the Global Compact uses the internet not only for information about itself, but also as medium to display non-communicating participants, and to give information about the whole process. This transparency is indispensable for the success of the concept of the Compact. As there is no means of enforcing the ten principles, the companies shall be motivated by being able to present themselves as cherishing their commitments to the principles of the Global Compact. The idea of this third option between “official enforcement” and mere letter of intent is unique for the Global Compact.

b. Strengthening the Reliability of the Global Compact

As a reaction to criticism regarding the lack of accountability for the behavior of the participating companies, the Global Compact Advisory Council was founded in 2002. It is the first UN advisory body incorporating eminent persons of both the public and the private sector. These 17 persons, business leaders, labor leaders and leaders of civil society organizations were to support the Secretary-General to solve the problems of globalization in a cooperative manner.100 The Advisory Council, meeting twice a year, had been criticized right from the beginning as to the dominance of its participating business managers.101 The Council was entrusted with the improvement of the quality and actual impact of companies participating in the Global Compact. Furthermore, it was to attract new participants to the Global Compact and to help to uphold its integrity.102 The Council was active until 2004, when it was dissolved by the UN Secretary-General. After a broad review, a new governance framework was established. Part of this new framework is the Global Compact Board which the UN Secretary-General appointed for the first time in April 2006. This new advisory body has its meetings annually. It shall help to develop the Compact with its policy and strategic

101 Von Schorlemer, see note 82, 529.
advice. Thus it gives recommendations directed to the Global Compact Office, participants and other stakeholders. It should also advance the integrity of the Compact. Furthermore, the Global Compact Board has the mission to better connect the global and the local levels of the Compact. More than 70 local networks are an important addition to the Global Compact. They aim for the Compact’s principles, but are self-governing. They are connected mainly by annual meetings (“Local Networks Forum”).

In July 2007 the “Geneva Declaration on Responsible Business Practices” was adopted by the participants of the Global Compact Leaders Summit. At the Leaders Summit, which takes place once every three years, the leading participants of the Global Compact and other stakeholders come together for discussion and to give recommendations and action imperatives to shape the Global Compact. The Geneva Declaration clarifies that globalization and especially TNCs are not labeled as a “threat” in the Compact, but above all seen as positive,

“Business, as a key agent of globalization, can be an enormous force for good. Through a commitment to corporate citizenship and the principles of the UN Global Compact, companies can continue to create and deliver value in the widest possible terms. In this way, globalization can act as an accelerator for the diffusion of universal principles, creating a values-oriented competition for a ‘race to the top’.”103

Besides this accentuation of the positive impact of TNCs, the problems are also addressed. So globalization is described as creating “an ever widening range of environmental, social and governance issues” (para. 1). Companies are not “blamed” for their wrongdoing, but the declaration (in line with the concept of the Global Compact) focuses more on an incentive for companies to strive for the implementation and adherence to the ten principles, “Companies that proactively adopt and implement corporate citizenship practices – through the UN Global Compact principles or other similar corporate responsibility initiatives – are better positioned to ensure the sustainability of their operations and the markets and communities in which they do business and depend on.” (para. 2)

Furthermore, the importance of the COP is highlighted because the value of the Global Compact is firmly connected inter alia with the potential of stakeholders to assess the progress of TNCs (compare para.

4). After clarifying “the role of business in society” (paras 1-9), “actions for UN Global Compact Participants” are identified (paras 10-16). The actions put forward are quite unspecific and only cover general commitments. So, *inter alia*, the participants of the Global Compact confirm their commitment to the ten principles and also show their willingness to encourage supply chains and to commit to them. Finally, the Geneva Declaration lays down postulations on governments (“actions for Governments”, paras 17-21). Here, governments are urged “to ratify and effectively implement relevant conventions and declarations, including the ILO core labour standards and the United Nations Convention against Corruption.” (para. 18)

This again shows that the Global Compact does not go beyond the already existing international law, but goes in another direction to give life to these rules. It also reminds us that in international law the indicator of whether a rule is effective or not, is not necessarily its binding or non-binding character. There are many binding treaties which are not observed by the parties and we have in international law only a few examples of effective law enforcement on the international level (as for example the European Convention on Human Rights with its European Court of Human Rights).

The Global Compact utilizes “integrity measures” in order to guarantee its quality and to ensure that it can serve its aims. As these measures are neither a monitoring mechanism nor an assessment of the actions of TNCs, they only cover the prevention of misuse of the Global Compact and do not guarantee that TNCs will stick to their commitments. Rather, the integrity measures above all serve to protect the reputation of the Global Compact and thus help to bring about good efforts.

At first, there is a superficial check mainly whether the company applying to join the Global Compact is involved in the production or selling of antipersonnel landmines or cluster bombs, or whether any sanctions are being imposed against it by any international institution. In addition to that there is a formal procedure before the Global Compact Office concerning the “systematic or egregious abuses” of the principles of the Global Compact. The Global Compact website itself provides examples of infringements which are considered serious,104

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104 <http://www.unglobalcompact.org/AboutTheGC/IntegrityMeasures/Integrity_Measures_FAQs.html>.
1. murder, torture, deprivation of liberty, forced labor, the worst forms of child labor and other child exploitation
2. serious violations of individuals’ rights in situations of war or conflict
3. severe environmental damage
4. gross corruption
5. other particularly serious violations of fundamental ethical norms.

If such an issue is submitted in writing to the Global Compact Office, the Office will, if it holds the accusations to be reliable, contact the company and request written comments on the matter.\textsuperscript{105} After that, the Global Compact Office has discretion to choose between several possible ways that could help to solve the problem.\textsuperscript{106} In the end, the company might be listed as “non-communicating” or even be removed from the Global Compact website.\textsuperscript{107}

\textsuperscript{105} “If an allegation of systematic or egregious abuse is found not to be prima facie frivolous, the Global Compact Office will forward the matter to the participating company concerned, requesting i. written comments, which should be submitted directly to the party raising the matter, with a copy to the Global Compact Office, and ii. that the Global Compact Office be kept informed of any actions taken by the participating company to address the situation which is the subject matter of the allegation. The Global Compact Office will inform the party raising the matter of the above-described actions taken by the Global Compact Office.”

\textsuperscript{106} “i. Use its own good offices to encourage resolution of the matter; ii. Ask the relevant country/regional Global Compact network, or other Global Compact participant organisation, to assist with the resolution of the matter; iii. Refer the matter to one or more of the UN entities that are the guardians of the Global Compact principles for advice, assistance or action; iv. Share with the parties information about the specific instance procedures of the OECD Guidelines for Multinational Enterprises and, in the case of matters relating to the labour principles, the interpretation procedure under the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. v. Refer the matter to the Global Compact Board, drawing in particular on the expertise and recommendations of its business members.”

\textsuperscript{107} <http://www.unglobalcompact.org/AboutTheGC/IntegrityMeasures/index.html>, “If the participating company concerned refuses to engage in dialogue on the matter within two months of first being contacted by the Global Compact Office under sub-paragraph (b) above, it may be regarded as “non-communicating”, and would be identified as such on the Global
The last integrity measure concerns the misuse of the logo of the UN or the Global Compact’s name and logo. Participants may, under certain conditions, use the UN emblem if they have received prior written authorization. The display of the UN logo by a company can evoke wrong assumptions. The keyword often used here is the “bluewashing” of a company. Therefore, there are several possible sanctions that can be imposed in such cases of misuse.

Furthermore, an important feature to uphold the reliability of the Compact, is the duty to give a COP, which is not to be confused with the Global reporting initiative. Both international corporate citizenship initiatives developed independently from one another. Nevertheless they have some features in common as they are both operating on a voluntary basis and provide, via the reports, information on the impact of corporations which are offered to the public. The Global reporting initiative was initiated by the Coalition of Environmentally Responsible Economies (CERES) and UNEP. The Global reporting initiative focuses on sustainability reports. This value reporting shall give public insight into an entity’s economic, social, and environmental performance. Thus the Global reporting initiative aims at transparency and for this reason developed standards to make sustainability reports comparable. These guidelines which have been developed through a multi-stakeholder approach, are consistently reviewed and refined. Recently “third generation” (G3) Sustainability Reporting Guidelines were accepted at an international conference which took place in 2006. The Global reporting initiative is not restricted to TNCs, but also applies to smaller corporations, governments and NGOs.

Due to the high standards and broad acceptance of the G3 Sustainability Reporting Guidelines, they can be used as a model to issue an outstanding COP.\textsuperscript{108} The Global reporting initiative and the Global

\textsuperscript{108} UN Global Compact Principles and Corresponding GRI G3 Performance Indicators, \texttt{<http://www.unglobalcompact.org/docs/communication_on_progress/Tools_and_Publications/UNGC_PRINCIPLES_AND_the_GRI_}
Compact complement each other in that the Compact focuses on giving effect to its ten principles while the Global reporting initiative aims mainly at transparency and thus making reports comparable. In 2006, both initiatives (Global reporting initiative and Global Compact) “have united in a strategic alliance”\footnote{<www.globalreporting.org/newseventspress/latestpressreleases/2006/pressreleaseungc-gri.htm>, UN Global Compact and Global Reporting Initiative form Strategic Alliance Move to Further Advance Responsible Corporate Citizenship.} at a global conference.

c. Criticism of the Global Compact

There are many skeptical voices raised against the Global Compact. First of all, there is the fear that TNCs will profit more from the Global Compact than it demands of them. In a way, with the Compact, corporations have been upgraded to be “partners” of the UN without paying the price to be legally bound and to fear any sanctions. The concern that corporations gain even more power by negotiating with the UN at eye level is not to be dismissed, but in fact, TNCs are already making treaties with states and are often quite strong negotiating partners.\footnote{Nowrot, see note 35, 358 et seq., 366 et seq.}

Thus the Global Compact matches their actual position as global players. As long as the Compact remains a non-binding network, corporations are also not being “upgraded” to subjects of international law. The fear of a privatization of international governance\footnote{Von Schorlemer, see note 82, 532.} as well as the concern that the UN will become a forum where private entities have a say must nevertheless be present in order to watch carefully the further development of the Global Compact and other such initiatives. It is a balancing act, on the one hand, to recognize that TNCs as mighty global players cannot be solely bound by traditional state doctrines of law and force, and on the other hand, not to come to a point where TNCs can freely negotiate about the law that they are bound by. If it became true that TNCs would substantially help to finance the Global Compact, this would clearly undermine the independence of the Compact.\footnote{Id., see note 82, 538.}

The argument that the Global Compact creates the impression that the UN and TNCs have the same interests in common\footnote{Id., see note 82, 535.} does not seem
to be compelling. It is apparent that the United Nations as a political entity has different interests than economic global players. Managers of corporations primarily seek to maximize their own profit and are acting on behalf of a minority. Thus private entities might be expected to act in accordance with human rights, labor and environmental standards, but they cannot be deemed to be responsible for the welfare of a majority. Their main interests are private and not public. States as a union of all citizens, on the contrary, have to serve many different interests. Depending on the form of government, their administration can usually not survive if they fail to meet the basic needs of the vast majority. In a democracy, this becomes very evident. To sum up, the “natural” interests of corporations are limited to economic questions while states have to bear in mind a whole bunch of policies.

One of the most frequent arguments against the Global Compact concerns the mere voluntary character. Only binding regulations endorsed with sanctions are alleged to be effective. It is beyond question that rules which are contrary to the “natural” or “selfish” interests of corporations have a greater chance to be observed if there are judicial-like means to give effect to them. But the UN has not been given any authority by the states to enact any binding rules on TNCs, or to impose sanctions. In addition to that it was largely due to the non-binding character and the lack of controls that TNCs committed themselves to the Compact. Furthermore, it raises many questions whether any binding alternative to the Global Compact would be legally possible or politically desirable. Any binding treaty to which TNCs could become a party (as they are now “participants” of the Global Compact) would finally award corporations the status of being subjects of international law. It furthermore then seems that states in a way could decide on their own to which degree they want to be bound by human rights. Any other alternative, for example a new multilateral treaty between states establishing an international court with the competence to impose sanctions in cases of violated human or environmental rights, would have nothing in common with the Global Compact, and thus would not just be the “binding alternative” to it. Therefore, the criticism as to the non-binding character of the Global Compact means to completely forget about this idea and not just to enhance the Compact by making it binding.

Besides that, it is argued that there should be at least a control over the accuracy of the COP. On a voluntary basis this control is, in a way, being brought about by the encouragement to produce the COP after the pattern of the G3 Sustainability Reporting Guidelines.
Finally, the fear that the Global Compact empowers TNCs at the cost of NGOs has some substance to it. Being united in one network, NGOs might seem to work together with the corporations rather than controlling them. Then again, NGOs receive more information about the corporations’ performance via the Compact and the opportunities for constructive dialogues are improved.

d. Assessment of the Global Compact

With the Global Compact, the UN decided to follow new paths to solve the problems of globalization and the shortcomings of TNCs in the four areas covered by the ten principles. Considering that the UN is made up of states, it is remarkable that it provided this platform for non-state-actors. Doing this the UN considered the reality that these players are very influential today. Solutions cannot be found without giving a hearing to TNCs. While NGOs already cooperated with the UN in different ways, reaching from the accreditation for a UN conference up to a consultative status with the ECOSOC, the inclusion of TNCs is a new dimension. However, the critics have to be taken seriously, especially in view of the further development of the Compact. To put it simply: a monster of globalization should not be tamed in a way that strengthens it rather than tames it. But so far, especially due to its non-binding nature, the UN has found a notable way to try to overcome the initial insufficiency of states to master the problem, without touching the sovereignty of states in this area. The striking feature of the Compact lies in its avoidance of the categories of “law” and “law enforcement”, because it rather focuses on how corporations can take advantage of allegiance to the principles. This, at the same time, leads to a rising sense of responsibility, and, via the reports, to an ever better supervision by other non-state actors.

\[114\] There used to be “The Alliance for a Corporate-Free UN” as a counter-movement to the Global Compact. It was made up of different NGOs, but does not exist anymore. Compare for more details on this Alliance von Schorlemer, see note 82, 544 et seq.

Also on the level of the UN, but in its legal nature and focus very different from the Global Compact, was the attempt to establish UN-Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights (in the following: UN-Norms).\(^{115}\) Advocates of the Global Compact even saw these Norms as being in competition with the volunteer-based platform and network-oriented Global Compact.\(^{116}\) Right after the adoption of the UN-Norms by the Sub-Commission on the Promotion and Protection of Human Rights in August 2003 Georg Kell, executive head of the Global Compact, published a statement of the Global Compact to “clarify” the relationship of both. After emphasizing the voluntary and encouraging character of the Global Compact, he stated, “The Global Compact is meant to complement and not substitute regulation. Regulatory authority lies entirely with governments and governments will have to make decisions on the Norms as adopted by the Sub-Commission of Human Rights. From the perspective of the Global Compact, we always welcome efforts that help to clarify complex human rights questions and that foster practical changes.”\(^{117}\)

But before looking at the content of the UN-Norms and their legal nature, their origin will be examined.

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\(^{115}\) There have been prior attempts to create a code in respect to business and human rights, compare Kinley/Chambers, see note 36, 455 et seq.; see also the comparing overview of the UN-Norms and the Draft United Nations Code of Conduct on Transnational Corporations (U.N. Code of Conduct on Transnational Corporations, *JLM* 23 (1984), 626 et seq.).


a. Origin of the UN-Norms

In 1999 a working group\textsuperscript{118} was established by a Sub-Commission\textsuperscript{119} of the former Commission on Human Rights\textsuperscript{120} for an initial period of three years\textsuperscript{121} which was later extended.\textsuperscript{122} The working group decided to work on a “code of conduct for TNCs based on the human rights standards”\textsuperscript{123} and to accomplish this aim by involving the relevant business community, NGOs and related UN agencies.\textsuperscript{124} The first draft (“Draft Human Rights Code for Companies”), which was published in May 2000, was to be followed by several adapted drafts.\textsuperscript{125} The final draft of the UN-Norms together with a commentary on them was then given to the Sub-Commission\textsuperscript{126} which adopted both documents in August 2003. The Sub-Commission asked the Commission on Human Rights to also accept the UN-Norms.\textsuperscript{127} But the Commission did not decide on the adoption of the UN-Norms. Instead of having a vote, in 2004 the Commission on Human Rights asked the Office of the High Commissioner for Human Rights (OHCHR) to examine not only the UN-Norms, but also the content and legal nature of other initiatives and standards dealing with TNCs and other business enterprises and their impact on human rights.\textsuperscript{128} The OHCHR consulted stakeholders,

\begin{itemize}
  \item \textsuperscript{118} Sessional Working Group on the Working Methods and Activities of Transnational Corporations.
  \item \textsuperscript{119} Sub-Commission on the Promotion and Protection of Human Rights; until 1999: Sub-Commission on Prevention of Discrimination and Protection of Minorities.
  \item \textsuperscript{120} The Commission on Human Rights was replaced by the UN Human Rights Council in 2006.
  \item \textsuperscript{122} Sub-Commission Resolution 2001/3 of 15 August 2001, para. 4.
  \item \textsuperscript{123} Doc. E/CN.4/Sub.2/1999/9 of 12 August 1999, para. 32.
  \item \textsuperscript{124} Doc. E/CN.4/Sub.2/1999/9 of 12 August 1999, paras 32, 37; see also Nowrot, see note 116, 7.
  \item \textsuperscript{125} The drafts can be downloaded under <http://www1.umn.edu/humanrts/links/normsdrafts.html>.
  \item \textsuperscript{126} Sub-Commission on the Promotion and Protection of Human Rights (the renaming was due to ECOSOC Decision 1999/256 of 27 July 1999, lit. b (ii)). This Sub-Commission ceased to exist in 2006.
  \item \textsuperscript{127} Sub-Commission Resolution 2003/16 of 13 August 2003, para. 2.
including all Member States, TNCs, employers’ and employees’ associations, NGOs, related international organizations and agencies as well as treaty monitoring bodies. After the consultation process the OHCHR gave its report and therein it saw the UN-Norms as “an attempt in filling the gap in understanding the expectations on business in relation to human rights.” Due to many critical voices of many states, employer groups and some businesses, the OHCHR did not clearly recommend the Commission on Human Rights to adopt the UN-Norms. Very carefully it stated, “there is merit in identifying more closely the ‘useful elements’ of the draft Norms .... The High Commissioner therefore recommends to the Commission to maintain the draft Norms among existing initiatives and standards on business and human rights, with a view to their further consideration.” Taking into account that these other initiatives are non-binding, there is no standing proposal to give the UN-Norms a binding status.

Back at its session in 2004, the Commission on Human Rights appreciated the UN-Norms as containing “useful elements and ideas”, but it also made very clear that it was only a draft and therefore had no legal standing. One year later, the Commission decided to further examine the subject of businesses and human rights by requesting the appointment of a Special Representative.

b. Content of the UN-Norms

The UN-Norms suggest a “shared responsibility” of states and TNCs or other business enterprises with regard to human rights. The idea was to close the gap that exists if only states are under an international obligation. The preamble speaks of “the States” as bearing the “primary re-


130 Ibid., para. 19.
131 Ibid., para. 52 (d).
132 UNCHR Resolution 2004/116 of 20 April 2004, see also Ghana/ Rahman, see note 128, 138: “The Commission uses strong language in stating that the draft proposal was not requested, that it has no legal standing and that the Sub-Commission should not perform any monitoring function in this regard.”
134 For a further detailed illustration of the content, see Backer, see note 31, 142 et seq.
sponsibility” in respect of human rights, and, in the same sentence, mentions corporations to be “also responsible” for human rights. Thus the term “responsibility” is used for both states and corporations alike even though normally only states are legally bound by international law whereas corporations are only bound if international law is transformed into national law and if the provisions are self-executing and horizontally applicable. This idea is repeated right at the beginning of the UN-Norms, in the general obligations which read as follows,

“States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.”

This quotation is perceived to be the guideline for the understanding of the UN-Norms. The “obligations” (a term which even sounds stricter than “responsibility”) of TNCs are quite far-reaching, embracing not only restraint from violating activities, but also the proactive use of their influence for the promotion of human rights.

The following obligations are nearly all put in the wording: “TNCs … shall/shall not …”. Thus the norms form a catalogue of obligations for corporations and states in that they are asked to provide the “necessary legal and administrative framework for ensuring that the Norms and other relevant national and international laws are implemented” by corporations (para. 17).

The list of the particular obligations of corporations starts with the general right to non-discrimination (para. 2). This is followed by rights concerning the security of persons, primarily the prohibition of engaging in international crimes (para. 3). Also the security of persons is in danger when states conclude security arrangements with companies. Those agreements shall be in accordance with international human

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136 Ibid., commentary.
137 Ibid.
Weilert, Transnational Corporations in United Nations Law and Practice

rights law as well as the national laws and professional standards (para. 4). The commentary further explains that those agreements “shall not be used for activities that are exclusively the responsibility of the State military or law enforcement services.” Also the principle of proportionality is to be observed when it comes to the use of force by security personnel.

After this section on the security of persons, follows a listing of the rights of workers. The UN-Norms prohibit forced or compulsory labor (para. 5) as well as child labor (para. 6). They oblige businesses to provide a safe and healthy working environment (para. 7) as well as a remuneration that ensures an adequate standard of living (para. 8). The last worker-right concerns the freedom of association and the right to collective bargaining (para. 9). Here companies are requested to grant not only more rights than the state has enacted, but also to protect employees “from procedures in countries that do not fully implement international standards” regarding these freedoms. With this the UN-Norms go beyond a mere responsibility of companies for their own acts but ask them to be a pioneer for human rights where a state fails to implement these standards. It is commendable if companies play this role, but it seems to overshoot the mark if they are legally obliged to do so.

A further section of the UN-Norms deals with the respect for national sovereignty and human rights. Very broadly, corporations are asked to,

“recognize and respect applicable norms of international law, national laws and regulations, as well as administrative practices, the rule of law, the public interest, development objectives, social, economic and cultural policies including transparency, accountability and prohibition of corruption, and authority of the countries in which the enterprises operate” (para. 10, emphasis added). At first glance this norm looks like a very expansive obligation as it refers, inter alia, to all applicable norms of international law. But the wording “recognize and respect” could also mean a limited scope in comparison to the phrase “obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights” as used in para. 1. The official commentary on para. 10 especially emphasizes the duty to respect, but in respect of intellectual property rights the commentary additionally speaks of the duty to “protect and apply” these rights. Thus there is much room for interpretation as to the scope of this norm. The duty to respect economic, social

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138 Ibid., para. 9, commentary (e).
and cultural rights as well as civil and political rights is contained in a further norm (para. 12). The official commentary on para. 12 especially highlights the right to health, food, water and housing. Furthermore, the UN-Norms address the issue of bribery (para. 11).

Also the UN-Norms contain obligations regarding consumer protection (para. 13). The last obligations concern environmental protection. The duties of corporations exceed the fulfillment of national laws as they are also asked to act in accordance with international law as well. Thus even where national standards are poor, corporations shall uphold the higher international standards.

The UN-Norms not only give a list of different obligations, but they further embrace general provisions of their implementation. In so doing, the UN-Norms want to avoid having an agreement regarding high standards that lack any practical consequences. Primarily, the UN-Norms deal with the implementation by corporations before they move on to the implementation via states and intergovernmental bodies or even other actors. The norms embrace both direct and indirect ways of implementing the obligations.

To begin with, business enterprises “shall adopt, disseminate and implement internal rules of operation in compliance with the Norms” (para. 15). Additionally, corporations are asked to give periodic reports on the implementation and to take “other measures” to fully implement them. Thus corporations shall set up rules and train their managers and workers correspondingly. Furthermore, the UN-Norms state that corporations “shall be subject to periodic monitoring and verification by United Nations, other international and national mechanisms already in existence or yet to be created” (para. 16). The official commentary explains that the UN human rights treaty bodies should supervise the implementation of the UN-Norms in a threefold way: they should establish “additional reporting requirements for States”, they shall give General Comments as well as recommendations how to understand the treaty obligations. Also the commentary states that corporations should create a mechanism for workers to lodge a complaint in cases of alleged

139 For the implementation compare, D. Weissbrodt/ M. Kruger, “Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights”, *AJIL* 97 (2003), 901 et seq. (915 et seq.).

violations of the UN-Norms. Furthermore corporations are encouraged to give periodic assessments. A subsequent paragraph focuses on the states’ duty and thus provides that,

“States should establish and reinforce the necessary legal and administrative framework for ensuring that the Norms and other relevant national and international laws are implemented by transnational corporations and other business enterprises.” (para. 17)

Finally, the UN-Norms address the topic of damages and provide for reparation, restitution, compensation and rehabilitation on the level of the corporations as well as – especially regarding criminal sanctions – on the level of national courts and/or international tribunals (para. 18).

c. Assessment of the UN-Norms

The UN-Norms were met with a divided response. The supportive voices came primarily from NGOs, but also from states, businesses and even academics.\textsuperscript{141} For example, Amnesty International highlighted the UN-Norms in comparison to the OECD Guidelines, the ILO Tripartite Declaration and the Global Compact as “the most comprehensive statement of standards and rules relevant to companies in relation to human rights.”\textsuperscript{142} Amnesty International also saw the obligations of states and companies to be in a proper balance. Another appreciating press release was given by the Business Leaders Initiative On Human Rights (BLIHR). The UN-Norms were recognized as an “important contribution” and the promise to consider them for their own work was given.\textsuperscript{143} Other positive reactions stress that the UN-Norms would help to “identify the responsibilities of business in relation to specific human rights”\textsuperscript{144} and that the Norms help to fill in the gap that arises where a state does not want or is not able to sufficiently protect human

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rights.\textsuperscript{145} Also it is emphasized that the UN-Norms address the issue of a remedy in cases of human rights violation.\textsuperscript{146}

One of the critical voices came from the International Chamber of Commerce (ICC) and the International Organisation of Employers (IOE),

“If put into effect, it will undermine human rights, the business sector of society, and the right to development.”\textsuperscript{147}

The response of the ICC/IOE deals with many different aspects. First, they argue that only states are the addressees of international human rights duties and not private persons. “Only States have legal obligations ... only a State can violate human rights.”\textsuperscript{148} However, the ICC/IOE acknowledge that the state has to enact national laws in order to fulfill its international obligations.\textsuperscript{149} “But the private person’s breaking of a national law is not a ‘human rights violation’: it is a state law violation.”\textsuperscript{150}

Saying this, the ICC/IOE reject all tendencies considering TNCs as (partial) subjects of international law. Therefore the ICC/IOE blame the Sub-Commission for having “misrepresented” human rights law and that the Sub-Commission would have “by its own authority ... changed international law.”\textsuperscript{151} Moreover, the ICC/IOE object the UN-Norms as being too vague and arbitrary.\textsuperscript{152} Taking these thoughts together, the ICC/IOE point to the fact that private entities as addressees of duties will gain the power to determine the meaning of their vague content which would normally be in the authority of the state.\textsuperscript{153}

The UN Special Representative on the issue of human rights and TNCs and other business enterprises (John Ruggie)\textsuperscript{154} also criticized

\textsuperscript{145} Ibid., para. 21 (g).
\textsuperscript{146} Ibid., para. 21 (f).
\textsuperscript{148} Ibid., 3.
\textsuperscript{149} Ibid., 4.
\textsuperscript{150} Ibid., 5.
\textsuperscript{151} Ibid., 18.
\textsuperscript{152} Ibid., 20.
\textsuperscript{153} Ibid., 23. But the ICC/IOE fail to notice that the interpretation of international law does not necessarily lie in the exclusive authority of the States. Rather, on several occasions, treaty bodies and international courts and tribunals engage in the interpretation of treaty law as well.
\textsuperscript{154} See below under Part V.
the UN-Norms quite harshly. In his words, “the Norms exercise became engulfed by its own doctrinal excesses” and they contain “exaggerated legal claims and conceptual ambiguities.” The Special Representative pointed to the fact that there is a contradiction if the UN-Norms on the one hand claim to only display established international legal principles and on the other hand create “non-voluntary” obligations that are directly binding on corporations to a certain degree. The extension of state-based human rights obligations to corporations “has little authoritative basis in international law – hard, soft or otherwise.” Furthermore, the UN Special Representative points to the dubious co-mingling of obligations of states and obligations of businesses. “By their very nature … corporations do not have a general role in relation to human rights like states, but a specialized one.” The UN-Norms fail to establish a distinction according to the different social roles that states and corporations have. In the end the UN-Norms confer even more duties on corporations than on states because they embrace even treaty-law which is not binding on all states or norms which are not part of a treaty at all. This mixture of duties between states and corporations invites “endless strategic gaming.” Corporations are not democratic entities and thus their duties should not be confused with those of states.

Other critical voices also stress that the approach of the UN-Norms is too negative towards corporations while in fact there are many positive impacts of business. They further accuse the UN-Norms of exceeding the obligations of states in that corporations shall be on duty even where the host-state is not internationally bound. States would become less burdened to implement human rights.

To sum up, the critical points brought forward are quite convincing. Furthermore, if the UN-Norms became a binding treaty, it seems that it would not be possible anymore to argue that TNCs are not subjects of international law. “The de facto assertion of power by TNCs is used

156 Ibid., para. 60; compare also Backer, see note 31, 179.
157 Ibid., para. 60.
160 Ibid., para. 68.
162 Nowrot, see note 116, 26. For the debate about the human rights obligations of corporations as non-state actors during the drafting procedure
as the basis for extending their de jure authority into areas usually reserved for state power alone."\(^\text{163}\) This is not what states agree on today,\(^\text{164}\) although there have been developments in this direction over the last decades.\(^\text{165}\) It is very questionable whether one should substantiate the factual and political power of TNCs with a legal one. This empowering could imply the danger that TNCs themselves will begin to decide on their obligations towards human rights. Additionally, it is questionable whether this *de-facto* replacement of parts of domestic corporate law by international law will satisfy the requirements of a democratic legislature.\(^\text{166}\) These concerns would even remain if the states agreed to the UN-Norms as binding treaty because of their far-reaching impact.

The future impact of the UN-Norms is not quite clear. They aspire to establish a binding framework and thus exceed the voluntary ILO Tripartite Declaration and the UN-Global Compact.\(^\text{167}\) But to date they do not have the status of any binding treaty nor do they form part of customary international law,\(^\text{168}\) and their place between other soft-low-mechanisms is not entirely clear. Even if the Commission on Human Rights or the Human Rights Council had adopted the UN-Norms,

\(^{163}\) Backer, see note 31, 176.

\(^{164}\) Kirchner, see note 2, 91: “For the time being, though, TNCs neither have the status nor the obligations under international law which would be adequate given their factual economic power.” (but see also his “communication approach” above note 37); R. Schwartmann, *Private im Wirtschafts-völkerrecht*, 2005, 454.

\(^{165}\) For a dissenting opinion see Kinley/ Chambers, see note 36, 479: "It is only through the behaviour of the principal actors, states, that we can establish which entities have legal personality. The behaviour of states in respect of TNCs indicates, at the very least, an emerging recognition of their legal personality."

\(^{166}\) Backer, see note 31, 164: “... it reflects a clever idea: assert the autonomy and supremacy of international law over domestic law by imposing international law standards through private law, thereby making state acceptance of those standards less relevant to implementation.”

\(^{167}\) Weissbrodt/ Kruger, see note 139, 913.

\(^{168}\) Kinley/ Chambers, see note 36, 482, who also emphasize that this does not exclude that some Norms in their respect to states might display existing treaty-law or customary international law.
they would not have the legal character of a binding treaty.\textsuperscript{169} Amnesty International assumed that these Norms could be a “catalyst for national legal reform” as well as a “benchmark to judge the adequacy of national law and regulations.”\textsuperscript{170} These effects would have to be assessed, but they do not display the original conception of the UN-Norms as binding TNCs independent of states and their commitment to these Norms. As long as they are neither transferred to a binding treaty nor “hardened” into customary international law nor placed into the setting of another broader soft-law initiative, they will have only indirect effect influencing the further developments in this area on the national and international level. Thus they might be referred to as means interpreting binding treaty law even though not in a formal sense.\textsuperscript{171} Whether the UN-Norms will gain even more impact in the future, for example, by being adopted as a General Assembly Resolution or by moving on to become customary international law,\textsuperscript{172} cannot be foreseen today. Yet for the latter, there is a long way to go and despite many writers dwelling on this eventuality of becoming part of customary international law, it should be borne in mind that the norms put forward a new legal attitude towards corporations which will not be easily adopted by the state practice and \textit{opinio iuris} of states. It even seems that for this new category of international law, the practice and \textit{opinio iuris} of TNCs should also be claimed.


1. Appointment of the Special Representative

The setback that the UN-Norms suffered at the intergovernmental stage was at the same time the birth of a new means to elaborate further

\textsuperscript{169} Kinley/Chambers, see note 36, 483.
\textsuperscript{170} Amnesty International, see note 142, para. 4.
\textsuperscript{171} Kinley/Chambers, see note 36, 485.
\textsuperscript{172} Schmidt, see note 140, 240.
on this controversial topic.\textsuperscript{173} In February 2005 the OHCHR identified in its report the need for further consideration and a more detailed study of several issues.\textsuperscript{174} In July 2005, the Secretary-General appointed Mr. John Ruggie (United States of America) as Special Representative on human rights and transnational corporations and other business enterprises. Thus it was again under Kofi Annan, that a new track of examining the relationship of human rights and TNCs was initiated.

The strength of the appointment of a Special Representative lies in its independence from other UN-organs and in its potential to profoundly analyze problems. Thus John Ruggie could combine academic research, extensive consultations and broad empirical studies while enjoying the standing and respect of his highly esteemed position which opened many doors.

2. Initial Mandate: Establishing the “Protect, Respect and Remedy” - Framework

His first mandate lasted from 2005 to 2008 and goes back to a Resolution of the United Nations Commission on Human Rights.\textsuperscript{175} In this resolution the requested mandate was described as follows,

\textsuperscript{173} Business & Human Rights Resource Centre, UN Secretary-General’s Special Representative on Business & Human Rights, Introduction by the Special Representative to his work, <http://www.business-humanrights.org/SpecialRepPortal/Home/Introduction>.

\textsuperscript{174} Doc. E/CN.4/2005/91 of 15 February 2005, para. 52 (e): “The principal issues that would benefit from further clarification and research include the concepts of ‘sphere of influence’ and ‘complicity’; the nature of positive responsibilities on business to ‘support’ human rights; the human rights responsibilities of business in relation to their subsidiaries and supply chain; questions relating to jurisdiction and protection of human rights in situations where a State is unwilling or unable to protect human rights; sector specific studies identifying the different challenges faced by business from sector to sector; and situation specific studies, including the protection of human rights in conflict zones.”

\textsuperscript{175} UNCHR Resolution 2005/69 of 20 April 2005, Doc. E/CN.4/RES/2005/69. Votes against this resolution came from the United States and Australia as they refused any international binding code of human rights for TNCs, while South Africa’s vote against the resolution was due to its desire for a stronger mechanism.
“(a) To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;

(b) To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;

(c) To research and clarify the implications for transnational corporations and other business enterprises of concepts such as "complicity" and "sphere of influence;"

(d) To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;

(e) To compile a compendium of best practices of States and transnational corporations and other business enterprises;”

Furthermore, the resolution asked the Special Representative explicitly to consult all stakeholders, namely the Global Compact, international and regional organizations as well as other UN initiatives. By this means the Special Representative can profit from and be a link to these different stakeholders.

During this initial mandate, the Special Representative reported three times to the Commission on Human Rights and then to the Human Rights Council. The interim report of February 2006176 to the Commission on Human Rights starts with a short analysis of the changes that globalization brought about. He recalls the fact that in 1945 "States were the sole international decision-makers of any significance,"177 so that the UN established a "State-based international order." This has changed radically, especially from an economical point of view.178 The Special Representative shows a business-friendly attitude already in this first report: “economic development, coupled with the rule of law, is the best guarantor of the entire spectrum of human rights.”179 He goes on to differentiate between different industry sectors and their inclination to neglect basic rights. Then he analyzes how the social-political context is a decisive marker for the infringement of human rights. He states that due to the lack of effective public institu-

177 Ibid., para. 9.
178 Ibid., para. 10.
179 Ibid., para. 21.
tions in some countries, responsible TNCs might undertake some part in governmental operations. Others, however, would take advantage of their influential and powerful position. \(^{182}\)

The second (interim) report was given one year later to the Human Rights Council in February 2007.\(^{181}\) In this report the Special Representative dwells on five subjects: (1) the State Duty to Protect, (2) Corporate Responsibility and Accountability for International Crimes, (3) Corporate Responsibility for Other Human Rights Violations under International Law, (4) Soft Law Mechanisms, and (5) Self-Regulation.

The states’ duty to protect against human rights abuses by third parties is vital in the concept of international law as put forward by John Ruggie. From a legal perspective, states are still the main players in international law. Both the core human rights treaties and customary international law not only oblige states to respect the given rights, but also to protect their citizens from a third party’s abuse. A key issue is the topic of extraterritorial jurisdiction. The report states that the question whether the protection of human rights allows for extraterritorial jurisdiction is not solved yet.\(^{182}\)

Even if it comes to corporate responsibility and accountability for international crimes, the report shows that any criminal or civil liability takes place mainly at the national level because the ICC has no jurisdiction over corporations.\(^{183}\) As to the question of corporations being subjects of international law, the report does not clearly favor any answer. But it seems that the report follows a traditional legal approach. It does not assume direct responsibility of corporations for human rights violations under international law.\(^{184}\) The report then turns to the soft law mechanisms and examines different non-binding obligations such as the ILO Tripartite Declaration and the OECD Guidelines. It concludes that these different soft-law mechanisms, which aim at holding corporations accountable, are preparing the way for binding norms. Finally, the report deals with self-regulation. Those regulations are imposed by the corporations themselves in order to meet the expectations of consumers, civil society and local communities.

\(^{180}\) Ibid., para. 29.
\(^{182}\) Ibid., para. 15.
\(^{183}\) Ibid., paras 15-32.
\(^{184}\) Ibid., para. 44.
After these two interim reports, the final report was given in April 2008.\textsuperscript{185} Here the three-pillar-concept (also called UN-framework) “protect, respect and remedy” is fully displayed. Thus Ruggie identifies (1) a State duty to protect against human rights abuses by third parties, (2) a corporate responsibility to respect and (3) the need for access to remedies.\textsuperscript{186} Knowing that his concept will not solve the whole problem, he acknowledges, “There is no single silver bullet solution to the institutional misalignments in the business and human rights domain.”\textsuperscript{187} In a way some passages read as if the report wants to apologize for not giving the one solution; for example, it recalls that international law is not adapted to the “complexities and dynamics of globalization.”\textsuperscript{188} Globalization has not yet been accompanied by necessary national and international legal changes. One handicap is the legal construction according to which a parent company is legally distinct from its subsidiaries and cannot, as a rule, be held responsible for the acts and omissions of the subsidiary.\textsuperscript{189}

The report sees the three pillars as a “complementary whole”. In a nutshell, the importance of these three elements is put in the following words,

“the State duty to protect … lies at the very core of the international human rights regime; the corporate responsibility to respect … is the basic expectation society has of business; and access to remedy [is vital], because even the most concerted efforts cannot prevent all abuse.”\textsuperscript{190}

The three pillars are not isolated from one another, but are in their distinctiveness at the same time complementary. The 2008-report holds, according to its more traditional approach, that the states are to be pri-

\textsuperscript{185} Doc. A/HRC/8/5 of 7 April 2008.
\textsuperscript{186} As shaped through the following Report, the formula reads today: “The State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others; and greater access by victims to effective remedy, judicial and non-judicial.” (Doc. A/HRC/14/27 of 9 April 2010, para. 1).
\textsuperscript{187} Doc. A/HRC/8/5 of 7 April 2008, para. 7.
\textsuperscript{188} Ibid., para. 10.
\textsuperscript{189} Ibid., para. 13.
\textsuperscript{190} Ibid., para. 9.
States are aware of their duty to protect, but they have often not grasped the “diverse array of policy domains” through which they could implement their duties. Measures that could be taken range from establishing a corporate criminal accountability to better co-operation on the international level. However, some of the suggestions remain very vague and do more to display the problem than to give any guidance. Turning to the second principle, the corporate responsibility to respect, one has to bear in mind that Ruggie’s mandate followed the lack of intergovernmental acceptance for the UN-Norms. This might be one reason for his quite careful approach to any corporate norms. The term “responsibility” falls short of a “duty” and refers to non-binding instruments – this use of the language differs from the UN-Norms which describe with the term “responsibility” the binding duty of states. The corporate responsibility to respect embraces soft law (such as the Tripartite Declaration), as well as any other commitments undertaken due to social expectations. Against the background of the UN-Norms, the report dismisses the idea of a “limited set of rights” for which corporations are responsible as well as “primary” obligations of states versus “secondary” obligations of corporations. Corporations shall respect human rights as given in the international bill of human rights or the relevant ILO-conventions, even though they are not formally bound by them. This means that corporations have to adopt due diligence practices in order not to infringe these human rights. Thus to respect human rights is not merely passive, but involves an active part. The report goes on, according to the mandate as set out above, to differentiate between the “sphere of influence” and “complicity” of corporations.

Finally, the report turns to the access to remedies. This pillar of the concept helps to give effect to both the first and second concept. Remedies can be either non-judicial or judicial, state-based or non-state-

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191 Ibid., para. 50: “The human rights regime rests upon the bedrock role of States. That is why the duty to protect is a core principle ...”.
192 Doc. A/HRC/8/5, see note 187, para. 27.
193 For example, para. 38 where the states and other actors are asked to “work towards developing better means to balance investor interests and the needs of host States to discharge their human rights obligations.”
194 Doc. A/HRC/8/5, see note 187, para. 23.
195 Ibid., paras 51 et seq.
196 For more details of this active part, ibid, para. 59 et seq.
197 Ibid., paras 65 et seq.
based. The Special Representative finds these mechanisms to be insufficient and identifies the need for action as well for a single remedy as for the whole concept. The 2008-report concludes with a statement that is self-evident and at the same time crucial for the question of what the UN can do to improve the situation, 

“The United Nations is not a centralized command-and-control system that can impose its will on the world – indeed it has no ‘will’ apart from that with which Member States endow it. But it can and must lead intellectually and by setting expectations and aspirations.”

This shows the frame of what the UN can accomplish. The UN cannot enact any binding regulations, the states themselves must act. But the UN can intellectually lead the states, offer visions and elaborate ways states could go.

3. Extension of the Mandate: Identifying Practical Ways for the “Protect, Respect and Remedy” - Framework

In 2008 the mandate was extended until 2011 by the Human Rights Council. In its resolution the Council very much appreciated the work of the Special Representative and his “comprehensive, transparent and inclusive consultations conducted with relevant and interested actors in all regions”. The Council agreed in its resolution with Ruggie “stressing that the obligation and the primary responsibility to promote and protect human rights and fundamental freedoms lie with the state”. TNCs are said to have – just in line with Ruggie – a “responsibility to respect human rights.” Thus the Human Rights Council shares the view that international law is legally binding only on states which leads to the problem of “weak national legislation and implementation” which “cannot effectively mitigate the negative impact of globalization on vulnerable economies.” The Human Rights Council unanimously approved the “protect, respect and remedy” approach. The new mandate of the Special Representative builds on the findings of the given reports and asks him to provide practical steps for the three-pillar-policy framework.

198 Ibid., para. 87.
199 Ibid., para. 107.
The report of the Special Representative given in April 2009 was published under the impact of the economic crisis.\textsuperscript{201} The report further elaborates on the “protect, respect and remedy” policy framework. As to the state duty to protect, it states that this duty refers to “a standard of conduct, and not a standard of result.”\textsuperscript{202} This means that the states cannot be blamed for the fact that a corporation violated a concrete human right, but the state can be held responsible for its failure “to take appropriate steps to prevent it and to investigate, punish and redress it when it occurs.”\textsuperscript{203} The special problems of TNCs are their extraterritorial branches. But exactly this extraterritorial part of the “duty to protect” is still unclear. The 2009-report holds in line with prior reports that “States are not required to regulate the extraterritorial activities of businesses incorporated in their jurisdiction, nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis, and that an overall test of reasonableness is met.”\textsuperscript{204} However, the CESC\textsuperscript{R} has encouraged home states to take on legal or political means to prevent infringements by subsidiaries and to establish extraterritorial liability.\textsuperscript{205} The 2009-report of the Special Representative further examines how states should fulfill their duty to protect and in this regard addresses the need to change national corporate law.\textsuperscript{206} Here the insufficiencies are grounded in the fact that traditionally corporate law and human rights law are two different branches which are not closely related to one another. But there are examples of changes to this traditional separation. The report gives “best practices” of improvements in this area and points to new legal developments in different national laws. In addition to an improvement of their corporate law, states are asked to change their practice of investment agreements. Those agreements are concluded between home-states and host-states in order to

\textsuperscript{201} Doc. A/HRC/11/13 of 22 April 2009.
\textsuperscript{202} Ibid., para. 14.
\textsuperscript{203} Ibid., para. 14.
\textsuperscript{204} Ibid., para. 15.
\textsuperscript{205} Most recently CESC\textsuperscript{R}, Doc. E/C.12/GC/19 (2008) of 4 February 2008, General Comment No. 19, para. 54 “States parties should extraterritorially protect the right to social security by preventing their own citizens and national entities from violating this right in other countries. Where States parties can take steps to influence third parties (non-State actors) within their jurisdiction to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law.”
\textsuperscript{206} A/HRC/11/13, see note 201, paras 24 et seq.
minimize certain risks for the foreign investor. Yet in the past, there have been treaty clauses which impeded the host-state’s legitimate policy objectives, such as the implementation of human rights obligations.\footnote{Ibid., para. 30.} Therefore, the report points to a Norwegian draft model bilateral investment treaty (BIT) which was made public in December 2007 and tries to better balance the protection of investors with the public goods of the host-state.\footnote{The BIT and the Commentary on the BIT can be downloaded via Investment Treaty Arbitration, <http://ita.law.uvic.ca/investmenttreaties.htm>.} Yet this example is already out-dated as Norway has given up this draft model. There were critics from both sides, civil society claiming that the protection of investors would impair legitimate interests of the host-states and other groups that held the protection of the investor to be insufficient.\footnote{Investment Treaty News (ITN), published by the International Institute for Sustainable Development, <http://www.investmenttreatynews.org/cms/news/archive/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty.aspx>.} The 2009-report then examines how international cooperation could help the states to better fulfill their duty to protect. In the understanding of the Special Representative, this means “States working together through awareness-raising, capacity-building and joint problem-solving.”\footnote{Doc. A/HRC/11/13, see note 201, para. 38.} These efforts are not limited to initiatives by the UN. States’ cooperation is most needed in conflict situations such as civil war. Typically in these conflict settings the most serious human rights abuses by corporations are taking place.

The 2009-report further elaborates on the corporate responsibility to respect. Again the Special Representative emphasizes that corporations – apart from binding national law – only have the responsibility to obey “social norms”. But this “social license“, as he calls it, could be decisive for the success of the business. Yet the Special Representative does not provide concrete steps and guidance to the business in the 2009-report. He only gives more details on how to understand this concept of corporate responsibility to respect. Thus he points to the problem that human-rights-treaties are “written by States, for States.”\footnote{Ibid., para. 57.} This makes it difficult for corporations to understand them and to apply these rights to their company. The OHCHR has pushed the development in this area with a publication that “translates” these
rights into a business context. The report also mentions the dilemma of different standards in national and international law. This concerns, above all, the freedom of association, gender equality, freedom of expression and – with a view to the internet and telecommunication – the right to privacy.

Addressing the third pillar “access to remedy”, the 2009-report identifies a substantive need for action. Even though there is a “State obligation to provide access to remedy” there is not yet laid down a corresponding “individual right to remedy” in many human rights conventions. Also the international law is not entirely clear on the question of whether national law should establish litigation for corporate entities (and not only managers acting on behalf of the corporation) and whether states have the obligation to implement overseas liability. The first Addendum of the 2009-report dwells on these legally and politically important questions regarding how far the states are obliged to grant access to remedy in cases of infringement of rights by non-state parties. Remedy also involves non-judicial mechanisms. Those can be found on the company level, national level and international level. Non-judicial mechanisms on the international level are integrated into some voluntary initiatives, but often they are not realized. Therefore the Special Representative launched a new website: Business and Society Exploring Solutions – A Dispute Resolution Community. In cases of disputes between a company and its external stakeholders this internet platform offers information on how to settle the differences in a non-judicial way. With this, the Special Representative made an effective contribution of giving effect to voluntary based initiatives.

The most recent report of the Special Representative was given in April 2010. This report dwells on how to further operationalize and promote the three-pillar-framework and it prepares the final set of guiding principles which will stand at the conclusion of the Special Representatives’ mandate in 2011. The 2010-report recalls the initial idea of “principled pragmatism” which means that the approach is not
merely academic (upholding human rights in principle), but also pragmatic with a clear view to what works best. For that reason, the Special Representative has collected rich material from research, consultations and practical experiments.\textsuperscript{217} The strategy was to embrace different stakeholders and to test the new framework.

In his 2010-report, the Special Representative once more stresses the “primary role” that states have in respect to human rights and business and identifies the states’ insufficient “policies and regulatory arrangements” in order to manage the complex relation of business and human rights.\textsuperscript{218} One predominant problem is the omission to enforce existing laws. Often public departments and agencies, responsible for different aspects of business such as corporate law, investment and insurance, are not working together, but in isolation from one another. In light of this, the Special Representative recognizes five “priority areas through which States should strive to achieve greater policy coherence and effectiveness as part of their duty to protect.”\textsuperscript{219}

(1) Safeguarding the ability to protect human rights. A great effort would be made if bilateral investment treaties were reviewed in such a manner that human rights policies of the host-state are enabled. Also contracts between host-states and foreign investors should not make exemptions from new social or environmental laws (“stabilization clauses”).

(2) Doing business with business. In cases, where states are owners of business, they can serve as a good example in their recognition of human rights. Also, if states enter into a contract with non-State-corporations, they can choose to only make a deal with corporations that aim at observing human rights.

(3) Fostering rights-respecting corporate cultures. This includes that states should refer to international human rights standards when they establish Corporate Social Responsibility (CSR) guidelines. Also the report strongly encourages CSR reporting policies.

(4) Conflict–affected areas. In these areas human rights are typically very poor and governments are asked to provide information so that reputable corporations do not unintentionally take part in abuses committed by others.

\textsuperscript{217} Doc. A/HRC/14/27, see note 216, paras 7 et seq.
\textsuperscript{218} Ibid., para. 18.
\textsuperscript{219} Ibid., para. 19 et seq.
(5) Extraterritorial jurisdiction. This last topic is very controversial and the report only gives rough ideas, while promising to further elaborate on these questions.

As for the “corporate responsibility to respect” the 2010-report again stresses that international human rights law currently does not impose direct obligations. The Special Representative claims to offer a “strategic concept for addressing human rights systematically” by giving a pathway as to how to avoid infringements of human rights. Key elements are the improvement of compliance with domestic laws as well as to create an awareness of where human rights are at risk (“due diligence process”). The exercise of “human rights due diligence” shall, in the perspective of the 2010-report, lead to more responsibility. Finally it shall be “a game-changer for companies: from ‘naming and shaming’ to ‘knowing and showing’.”

The last pillar of the framework, access to remedy, is examined by providing information about company-level, state-based non-judicial, as well as judicial mechanisms, and collaborative and international mechanisms. The 2010-report identifies significant gaps in all of these types of mechanisms to provide remedies in cases of infringements of human rights by corporations. In particular, as to the state-based “judicial mechanisms”, the 2010-report again highlights the difficulties concerning the liability of parent companies. Legal concepts of “negligence”, “complicity” or the concept of “agency” have enabled liability in some national jurisdictions, but many legal questions remain unclear to date. Furthermore, problems relating to extraterritorial jurisdiction demand clarifying and a “principled approach” of the different domestic laws. In addition to that, the 2010-report identifies practical obstacles as to the proper functioning of judicial mechanisms.

220 Ibid., para. 55.
221 Ibid., para. 56.
222 Ibid., para. 80. This is further explained: “Naming and shaming is a response by external stakeholders to the failure of companies to respect human rights, Knowing and showing is the internalization of that respect by companies themselves through human rights due diligence.”
223 Doc. A/HRC/14/27, see note 216, paras 88 et seq.
224 Ibid., para. 106.
225 Ibid., para. 107.
4. Assessment of the Mandate of the Special Representative

The work of the Special Representative has been appreciated by the Human Rights Council, many states, leading business entities as well as some NGOs. Yet it has also been criticized as not having brought any groundbreaking new ideas, and as being very state-oriented. Some might blame the Special Representative for not being courageous enough as he did not identify binding duties for companies on the international level and did not make proposals in this direction. But as we have learned from the history of the UN-norms, despite globalization and despite TNCs being mighty global business players, states, as the most important subjects of international law, still favor a more traditional approach. Thus it is not astonishing that the reports of the Special Representative gained much affirmation by states as they fear that their sovereign rights would be damaged if companies were bound directly on international level.

The mandate of the Special Representative was and still is very helpful on the complex issue of TNCs and human rights. All his findings are firmly rooted in international law and are not mere political claims. They shed light on the many different and difficult problems going on with this issue. Of course, political claims and visions can foster the development of international law, but if they have no legal basis, they cannot achieve sustainable changes.

The focus on states should be appreciated as states should realize that they have a duty to protect and that this duty implies a range of different obligations up to the establishment of access to remedy. With this, the Special Representative does not let TNCs off the hook. On the contrary, he insists on a comprehensive corporate responsibility to respect. These are the first steps to enforce those responsibilities on the basis of non-judicial mechanisms, but more importantly, civil society today carefully watches the behavior of TNCs and puts social pressure on them.

So, what did the Special Representative accomplish? He has identified a new workable framework which rests on the three said pillars.

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227 Compare von Bernstorff, see note 54, elaborating on the responsibility of states in the context of human rights and TNCs.
This framework avoids a competition between states and TNCs, but allocates both of them broad and far-reaching homework. It is the basis upon which this field of business and human rights will be shaped in future. The impact that this will have for the future mainly depends on how this framework will be filled with concrete acts, initiatives and commitments.

VI. Conclusion

The United Nations has gone different ways to regulate TNCs. In line with traditional international law, international conventions oblige states to control TNCs in several respects. While there is no single binding convention including a more or less comprehensive list of state duties in respect of TNCs, the state duties in respect of human rights (including social rights) and environmental standards are spread over a number of conventions. Yet international treaty law fails to adequately consider the globalized character of TNCs that are not subject to the jurisdiction of one sole state. Different legal drawbacks and the uncertain willingness of most states to effectively implement international obligations, have signaled the necessity of finding new approaches.

In particular, one early and more specific way to improve TNCs’ consciousness of international human rights standards was the Tripartite Declaration of the ILO as a specialized agency of the UN. The Tripartite Declaration is distinct from mere inter-state-declarations in that apart from governments, employers and workers also have a say. This Declaration has had at least a reasonable impact for the further discussion and awareness of the problem on the international stage. Its soft law character does not automatically negate its actual influence. In addition, binding conventions also struggle with serious deficits in their enforcement machinery. Yet finally, the Tripartite Declaration largely remained a set of rules on paper that could not bring about the necessary changes.

Against the background of these insufficiencies, the UN initiated a truly new approach with the Global Compact. This is an interactive instrument to improve the adherence of TNCs to human rights and environmental standards. It is based on the communication of different stakeholders and can be characterized as a decentralized way to accomplish observance of the 10 principles. The Global Compact is not a vertical taming of TNCs, but rather a horizontal shaping of them. Yet there are considerable loopholes which enable companies to take part in
the Compact and at the same time fail to effectively foster essential changes. Thus the Compact is a necessary, but very insufficient means to make TNCs observe human rights standards and environmental norms.

If the UN-Norms had been adopted in form of a treaty, the lack of binding character of the Global Compact would have been compensated. But, at the same time, the UN-Norms would have considerably undermined essential pillars of international law by upgrading TNCs to the level of states and signaling the transformation of corporations from business-entities into political-entities.\(^{228}\) Indeed, it cannot be excluded that international law might move in that direction in the future, thus reflecting a new world order. But in the view of the present author, this should not be the aim, and to date, the majority of states rejects the far-reaching implications that would come with the issuance of binding norms at the UN-level. It seems that the traditional international legal order that rests primarily on sovereign states, despite all its weaknesses, guarantees freedom and human rights more effectively compared with a conception of international law which is not based on these predominantly democratic\(^ {229} \) entities.

The unsatisfactory situation led to the appointment of the United Nations Special Representative to analyze the problem and develop further practical ways to go. Instead of providing broad visions, the Special Representative has built his three-pillar framework on the contemporary understanding of international law. This gave reason for criticism as he did not satisfy the expectations of some people to move towards a new world order. Nevertheless, it seems that the Special Representative fulfilled his role very well in light of the fact that he acts on behalf of the UN as an international organization based on the idea of sovereign member states. Accordingly, the Special Representative emphasizes the state duty to protect and thus clearly does not abdicate the states from their responsibilities. Even though the problem of TNCs cannot be

\(^{228}\) Backer, see note 31, 177: “The Norms effectively transform the corporation from an entity whose primary purpose is to maximize profits—that is, from a purely economic creature—into an entity whose principal purposes are encompassed in the great human rights treaty framework of the United Nations ...”.

solved on the national stage, it would be inadequate to shift it solely to the international arena and to expect the UN to develop a solution merely at the supra-national-level. Although or because the Special Representative did not create a “new international order” for business and human rights, his framework is increasingly accepted by governments, international organizations and business. As a result, the Special Representative has been quite successful in strengthening the human rights with a view to business. Arguably, it is just because the Special Representative built his three-pillar concept on international law as it stands, that he could achieve more and could suggest improvements which in the end will result in a further development of human rights law.

As the Special Representative precisely put it, there is “no single silver bullet solution.” In other words, there have to be attempts from different stakeholders at different levels. Therefore, the existing approaches (such as binding conventions, soft law declarations and global networks) all make some contribution to solve the problems. It is not all about law and its enforcement, but also about communication between the different stakeholders and also about enhancing the awareness of businesses that exploitation of human and environmental resources will not pay in future. Healthy and stable conditions – politically, socially as well as environmentally – are the basis for a sustainable economy.

To sum up, the UN has launched several initiatives to “tame” TNCs, which will have to be better connected in the future as they are, so far, quite isolated from one another. The UN will have to further monitor the developments, to improve existing mechanisms and to think ahead for new options. The mandate of the Special Representative should be extended in some form in the future as his reports are an important “think tank”, as he communicates intensively with different stakeholders and identifies paths which rest on a necessary consensus to be practical. The Special Representative himself reminds us that “unless an advisory and capacity-building function is anchored firmly within the United Nations” all effort by the Special Representative as a “de facto United Nations focal point for business and human rights” will cease.

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231 Doc. A/HRC/14/27, see note 216, para. 126.
Naming a State – Disputing over Symbols of Statehood at the Example of “Macedonia”

Michael Ioannidis*
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V. Conclusions
I. Introduction

For someone attending a session of the United Nations General Assembly, looking for the delegation of the “Republic of Macedonia” can prove much more difficult than expected. Trying under “M” will be as unfruitful as under “R” – and even if one is as familiar with the UN system as to know that the exclusive official UN reference for this country is “the former Yugoslav Republic of Macedonia” (fYROM),¹ looking under “F” will be equally disappointing: the delegation is only to be found next to that of Thailand.

The surprising choice of the article “the” before the appellation “fYROM” as the decisive word for UN protocol purposes was neither a change of the relevant practice nor an oversight of the UN nomenclature officials. It has rather been the result of a fierce diplomatic fight between the newly independent republic and another UN member, Greece. The latter strongly opposed the use of the term “Macedonia” as the classificatory word, while the applicant state rejected the remaining options as unacceptable or even derogatory.²

Peculiar as the disagreement over classification terms and a seating place might sound, it is indicative of both the importance that two states attached to state symbols and the difficulty of accommodating their competing views.³ It also gives a characteristic picture of an international dispute standing out because of its unusual subject: the two neighbouring Balkan states do not argue over an uncertain demarcation of boundaries or free trade impediments. In the centre of their dispute rather lies the use of a single word for the purposes of state denomination, namely that of “Macedonia”.

¹ In the following, the full UN reference “the former Yugoslav Republic of Macedonia” will be abbreviated to “fYROM”.
³ In addition to that, the resort to transitional solutions of the “innovative”, middle-way character presented above is typical of the way the Macedonia naming dispute between Greece and the so-proclaimed “Republic of Macedonia” evolved in the last twenty years.
In short, Greece objects to the use of the appellation “Macedonia” as the denomination of its northern neighbour, which, since its independence in 1991, has used this term as its constitutional name. Greece argues instead that the interests it claims could only be taken into account with the addition of a qualifier to the word “Macedonia”.

Originating from the symbolic use of this single word, the dispute soon went beyond a simple question of semantics and generated a series of important practical implications which range from a delayed recognition of the country to the imposition of a trade embargo and the recent blocking of the opening of talks for accession to the European Union (EU). But beyond its rather unusual subject and these important ramifications, the Macedonia naming dispute deserves examination from an international law perspective for an additional reason. It can be treated as a paradigmatic expression of the question whether the choice of symbols of sovereignty, and the name of a state in particular, is an issue that should be understood to be at the sole expediency of the state it is to represent. Interestingly, other cases also exist at the international level that could provide for a background to this question. State symbols, as names, flags or other insignia, have indeed occasionally been contested by states which projected their interests to their use and sought to influence their choice. These cases are better understood if one takes a closer look at the nature and function of a state name.

A term, when called to represent a state, usually carries already a variety of symbolic meanings. These can be geographic, national or of another kind. With the choice of a particular denomination a state sanctions its collective identity by connecting itself with certain “pre-state meanings”. Although this connection is usually unproblematic, there

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4 Which would amount to the use of a compound name, like “North Macedonia” or “Vardar Macedonia”.

5 The efforts “to find a negotiated and mutually acceptable solution to the name issue with Greece, in the framework 817/93 and 845/93” were identified among the key priorities regarding “the former Yugoslav Republic of Macedonia’s preparations for further integration with the European Union”, article 3.1 of the Annex to the Council Decision of 18 February 2008 on the Principles, Priorities and Conditions contained in the Accession Partnership with the former Yugoslav Republic of Macedonia and Repealing Decision 2006/57/EC, 2008/212/EC, Official Journal L 080, 19 March 2008, 32 et seq. (34). See in detail under III. 1. e.

might be cases where the attributes linked with a symbol drastically diverge from the characteristics of the state adopting it. An example can be a state adopting a geographical reference that clearly is an imprecise description of its territorial reach: one could imagine a single European state being named “Europe”. Such cases may create tension with entities that have an interest in the prior symbolic uses of the word that is now elevated to state denomination. This is all the more so, when symbols are used to reinforce political aims ranging from territorial interests to national affiliations and taking into account the potential of the state-connected use to absorb other meanings. When a state uses a symbol for its international representation, all other meanings lose, to a significant extent, their independence and are frequently understood as attributes of the particular state. Issues of this nature have largely escaped the attention of international law or have been subsumed to other facets of international disputes, in particular minority or territorial questions. Most of these dimensions of symbol contestation are present in the dispute over the term “Macedonia”. Because of this reason, the Macedonian naming dispute will be addressed here as the most prominent example of disputing over symbols of statehood.

This investigation will start with an overview of the possible meanings of the term “Macedonia”, and a distinction between its two non-state meanings, geographical and historical-cultural, and its use as state symbol (under II.). Although no claim needs to be made for historical or ethnographical completeness, some general references will be made that are necessary to approach the symbolic content over which the parties argue. The next part is dedicated to the development of the naming dispute over the period of the last twenty years (III.1.) and the presentation of other cases that also have involved the contestation of state symbols, namely that of Ireland and Austria (III.2.). The focus of this part will be the controversy over the name, leaving aside other related questions like territorial or minority issues. A general approach to the problem of contesting the use of state symbols under international law will follow in Part IV. and some concluding remarks will be made under V. The thesis that will be developed from this practical and theoretical analysis is that the choice of a state name can have, under some conditions, an importance that exceeds the boundaries of the named entity. In such cases, the question of naming a state should not be ad-

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7 As it is clear that, what the two countries are disputing over is their connection with some particular meaning ascribed to the term “Macedonia”.

dressed as a solely domestic matter, but rather from an international perspective.

II. Terminological Demarcations and their Background

For controversies having at their centre the use of a word, terminological clarifications are indispensable: it is exactly the existence of overlapping or competing meanings of the words used as state symbols that fuel the investigated disputes. Therefore in the following, the three main different meanings of the word “Macedonia” as used in the contemporary discourse will be presented as an example of the dimensions a term used as state name might have.

1. The Geographic Reference

Macedonia is firstly used to identify the broad geographical region in the central part of the South Balkans, which is comprised by parts of Greece, Bulgaria, Serbia,8 Albania and the state here referred to as the “fY Republic of Macedonia”.9

Identifying by a single name broad geographical areas, as Scandinavia, the Balkans or even Europe, cannot be of course decisive. Such references are rather a product of historical developments and contextual usage, lacking therefore any accuracy.10 Nevertheless, today’s usage of the geographical term “Macedonia”, originating from the descriptions of middle of the 19th and early 20th century authors and cartographers,11 seems to converge to an area reaching from the Široke, Skopska Crna Gora and Šar mountains (north) to the Aegean coast and Mount

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8 The “fY Republic of Macedonia” recognised Kosovo as a state and demarcated its boundaries with the latter entity in October 2009.

9 This form is based on the terminology adopted by the UN, it serves presentation purposes only and does not imply as such any opinion for the positions of the disputing parties. For this reason quotation marks will be used.

10 For the case of Macedonia in particular see H.R. Wilkinson, Maps and Politics: Review of the Ethnographic Cartography of Macedonia, 1951, 1-2.

11 See among them V. Mantegazza, Macedonia, 1903, 2; Encyclopaedia Britannica, Macedonia, 1911, 11th edition, and the maps of F. Bianconi, Carte commerciale de la province du Macedoine, 1885; V. Kanchov, Carte Ethnographique de la Macedoine: Point de vue bulgare, 1900.
Olympus (south) and from the lower Nestos river (east) to Pindus and Korab ranges and the lakes of Ohrid and Prespa (west). This region covers roughly 67,000 square kilometres and its population, irrespective of ethnicity or nationality, can be estimated at 5 million.

This area today is administered by five countries. In terms of territorial proportions, roughly 50 per cent are held by Greece, 40 per cent by the “FY Republic of Macedonia” and 10 per cent by Bulgaria. In the Greek part live around 2,500,000 people and the population of the “FY Republic of Macedonia” is around 2,066,000 people. The multi-ethnic character of the area (comprising Greeks, Slav-Macedonians, Bulgarians, Albanians and Roma), is effectively displayed in the French word “macédoine”. What is of utmost importance in this context is that the broad area described above is solely defined by geographic criteria and does not coincide with any single administrative division, neither state nor local. In this respect, it is a denominator similar to those of “Scandinavia” or “Iberia”. For these reasons the term “Macedonia” was, and still is, widely used in social and economic life, irrespective of the ethnical group of the user, amounting to a super-ethnical feature of regional and cultural identity.

13 Barker, see note 12, 4.
14 And these subdivisions are usually referred to respectively as Greek Macedonia (or Aegean Macedonia), Bulgarian Macedonia (or Pirin Macedonia), Vardar Macedonia (administered by the “FY Republic of Macedonia”), Mala Prespa and Golo Bardo (administered by Albania) and Goro and Prohor Pchinski (administered by Serbia – Goro region is now under the administration of Kosovo authorities).
15 Encyclopaedia Britannica, see note 12. The absolute numbers for Greece and the “FY Republic of Macedonia” being 34, 200 and 25, 713, ibid. Cf also Zotiades, see note 12, 29 at fn. 73.
19 See the documentation of these uses of the unqualified term “Macedonia” for commercial, associational, athletic and cultural purposes in: Museum of
2. The Historical Reference

Another common meaning of the term “Macedonia” refers to a particular period of its historical-cultural past, namely the ancient kingdom of Philip II of Macedon located in the southern part of this area. Because of the importance this kingdom gradually acquired, in particular during the reign of king Alexander III (known as Alexander the Great, the son of Philipp II), it is commonly referred to as “Macedonia” without any further temporal or geographical qualification.20

Any further elaboration on the ethno-cultural character of this entity and its positioning in the ancient Greek world are beyond the scope of this article.21 Suffice to mention that this symbolic meaning also, along with the geographical one, exceeds current administrative boundaries. Macedonia, in this historic, cultural meaning, has been traditionally connected, by a significant part of the Greek population, with its cultural and historical self-perception. The reasons for this self-perception, which is very prominent among the inhabitants of the Greek part of “Macedonia”, seem to include the location of the original kingdom being in the Greek part of the region and its connection with the subsequent Hellenistic period, and other ethnographic characteristics (e.g. language).22

21 The main question here is whether ancient Macedonia was one of the independent states into which ancient Greece was divided, or an originally non-Greek, but later Hellenized kingdom. The special literature on the issue is overwhelming, focusing on elements like the language, the political institutions, religion and the perception of the Macedonians by the (other) Greeks, see among many others J. Hall, “Contested Ethnicities: Perceptions of Macedonia within Evolving Definitions of Greek Ethnicity”, in: I. Malkin (ed.), Ancient Perceptions of Greek Ethnicity, 2001, 159 et seq.; Hammond, see note 20 and the exhaustive references made there.
Since 1991, however, this perception of “Macedonia” has also been a point of reference for the new Republic, where significant efforts have been made to accommodate this part of the history of the region with the predominantly Slavic character of its population. Such efforts have formed an increasingly significant part of the process of designating the developing, separate national identity of the Slavic population inhabiting the “FY Republic of Macedonia” as simply “Macedonian”.

3. The Administrative Reference

Coming now to what is most interesting from a legal perspective, the designation “Macedonia”, is also being used to describe administrative divisions both at local and state level.

a. The Reference to a Regional Administrative Division

The first time since antiquity that the description “Macedonia” was used to identify an administrative structure, was in 1914, one year after the First Balkan War, which ended the Ottoman rule in this area. The modern Greek state used the term to name the northern part of the territories that it had incorporated after the Balkan Wars. Since this area covered the major part of geographical “Macedonia” and coincided to a significant extent with what is believed to be the original territory of the homonymous ancient kingdom, Greek authorities named this administrative division “General Government of Macedonia”. “Macedonia” was since then repeatedly used by Greek law as a term describ-

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23 See the choice of the flag referring to the royal insignia of the Macedonian dynasty, the renaming of the Skopje main airport and the Corridor X highway to “Alexander the Great”, and the references in post-1990 historiography, U. Brunnbauer, “Serving the Nation: Historiography in the Republic of Macedonia (FYROM) after Socialism”, Historein 4 (2003), 161 et seq. (167); Drezov, see note 22, 54 (denying the existence of such a connection).

24 See above under II. 2. Since then the boundaries of Greek Macedonia have remained unchanged.

25 In Greek the title was “Geniki Dioikisi Makedonias”, article 1 of Law 524/14, Official Gazette of the Greek Kingdom, 31 December 1914, Issue A, 404.
ing a number of different administrative entities, and can be found today in the appellation of three districts and a General Secretariat.

Post World War II Yugoslav authorities were next in employing the term “Macedonia” for the administrative purposes of structuring the Federal People’s Republic of Yugoslavia. Article 2 of the 1946 Yugoslav constitution, declared “the People’s Republic of Macedonia” as one of the six republics comprising the Federal People’s Republic of Yugoslavia. This reference replaced the denomination “Vardarska Banovina (Vardar Region)”, under which the province covering the Macedonian part of the Kingdom of Yugoslavia was known from 1929 to 1941, and was itself changed to “Socialist Republic of Macedonia” in 1963. The dissolution of Yugoslavia in 1991 marked the end of the use of “Macedonia” within the federal structures of Yugoslavia and the term was used for the first time since antiquity to refer to a sovereign entity.

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28 “General Secretariat of Macedonia and Thrace” as a subdivision within the Ministry of Interior, article 3 of the Presidential Decree 185/09, Official Gazette of the Greek Republic, 7 October 2009, Issue A, 213.

29 Giving in this way effect to the 1943 Declaration of the Anti-Fascist Council of National Liberation of Yugoslavia (AVNOJ) laying down the basic principles for the future organisation of Yugoslavia and the proclamation of the Republic on 2 August 1994 by the Anti-Fascist Assembly of the National Liberation of Macedonia (ASNOM), E. Barker, Macedonia: Its Place in Balkan Power Politics, 1950, 94-96. For the one year period 1944-1945, the denomination “Democratic Macedonia” was used.

30 Article 83 of the Constitution of the Kingdom of Yugoslavia, proclaimed on 3 September 1931.

b. The Reference to a State Entity

The constitution of 1991 declared the independence of a new state using the appellation “Republic of Macedonia”.

The independence of this country was a comparatively peaceful step in the process of the disintegration of the former Yugoslavia. Nevertheless, the emergence of a state in such a tumultuous area could not have been uncontroversial. Especially for a country with a limited degree of national homogeneity. In 2002, 64.17 per cent of the population identified themselves as “Macedonians” (of Slav origin), 25 per cent as “Albanian” and 10.66 per cent as of other national affiliation.

Bulgaria thus, e.g. although it was amongst the first to recognise the new state, denied the existence of a separate “Macedonian language”, as it considered the Slavic tongue spoken there as Bulgarian dialect. The Albanian element of the country, on the other hand, proved keen in challenging its renewed subordination to a Slav-speaking majority.

This ethnic tension escalated in an armed conflict in 2001 and led to the rearrangement of the inter-community relations with the signing of the so-called Ohrid Agreement.

Greece from the very first moment was concerned about the name and the flag chosen by its new neighbour. For these reasons, it raised vigorous objections to its international recognition, which proved to substantially contribute to the already economically and politically unstable situation of the country.

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33 For succession questions arising from the disintegration of Yugoslavia, see A. Zimmermann, Staatennachfolge in völkerrechtliche Verträge, 2000, 303 et seq.


35 Drezo, see note 22, 51. The “language dispute” arisen thereof had practical implications at the level of bilateral agreements and was finally settled in 1999 with the adoption of the formula “the official language in the Republic of Macedonia and the official language in Bulgaria”, M.C. Wood, “Macedonia”, in: Max Planck Encyclopedia of Public International Law, para. 31.

36 After the Federal Yugoslav.

III. Disputing over Symbols: A Peculiar Category of International Controversy

Disputes over the use of symbols of statehood are neither common, nor do they usually escalate to international disputes of importance. This is probably due to the states normally abstaining from choosing symbols that could cause confusion or are inadequate in conveying a picture of their authority. Nevertheless, there have been cases where the competing meanings of symbols caused controversies between countries claiming an interest in their use. Among them, the controversy over the use of the word “Macedonia” is a particular one.

1. The Case of Macedonia: Character and Evolution of the Dispute

a. The Introduction of the Term in the International Context

Although “Macedonia” was a term in use even before the independence of the now homogenous Republic, the turning point for the naming dispute was the emergence of a state bearing this, as already explained, very rich, in symbolic meanings, name. Confusions before this point were rather avoided by the construct of combining “Macedonia” with the relevant national term. Greek authorities also referred to the inhabitants of the geographic region of Macedonia by the terms “Greek Macedonians”, “Bulgarian Macedonians” and “Slav Macedonians” or used the initials “SRM” or the compound “Yugoslav Macedonia” to indicate the Federal Yugoslav Socialist Republic of Macedonia.

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39 The extent to which a separate nation in the Yugoslav part of Macedonia actually existed is still contentious. Important political reasons however existed for this decision, the adoption of which ultimately resulted in the creation of a separate national identity within the Slavic population of Macedonia. The main purpose of fostering the development of such an identity seems to be the replacement of the Bulgarian national consciousness shared by a significant part of Slav-Macedonian population, Danforth, see note 12, 65-66.
though rather indifferent to the gradual process of ethnogenesis taking place in the Slavic, non-Bulgarian part of Macedonia, \textsuperscript{41} Greece was inventive in using terms that would diversify the language spoken in this part \textsuperscript{42} from the meaning given to the term “Macedonia” by Greece and Bulgaria. \textsuperscript{43} On the eve of the collapse of Yugoslavia, Greece elevated the frequent recourse by the Yugoslav authorities to the undistinguished term “Macedonia”, employed there to express and support the emergence or cultivation of a national identity of Macedonian Slavs, \textsuperscript{44} even to an issue of human rights. \textsuperscript{45}

\textsuperscript{41} If there was a new nationality in the stage of formation within the borders of Yugoslavia, it should be referred to with an appellation that cannot be confused with the other ethnicities inhabiting broader Macedonia. This perception was sometimes nevertheless presented as a negation of the existence of a separate national identity as a whole. To this misperception Greek statements and policies seem to have contributed significantly.

\textsuperscript{42} In the case of language, Greece did not accept the characterisation of the Slavic language spoken in the SRM as “Macedonian”. Typically evasion in this context of the practical problems resulting from this stance is the one adopted for the purposes of a ten km free-contact zone created at the Greek-Yugoslav borders. Greek objections to the Yugoslavian insistence that travel documents be written in both Greek and “Macedonian” resulted in the relevant instrument referring to the Greek and “one of the official languages of the Socialist Federal Republic of Yugoslavia”, among which there was of course a Macedonian one, Kofos, see note 40, 372. On the characteristics of the Macedonian language and its role in the Macedonian ethnogenesis, see also Danforth, see note 12, 67.

\textsuperscript{43} Kofos, see note 40, 379. For the strategic reasons that prompted the modest response of Greece to the internal structuring and ethnogenetic process of the SFRY, see E. Kofos, “Greek policy considerations over FYROM”, in: J. Pettifer (ed.), \textit{The New Macedonian Question}, 2001, 226 et seq. (232).

\textsuperscript{44} In this process, the term “Macedonia” was increasingly reserved to identify the Slavic element inhabiting the federal Socialist Republic of Macedonia. For the other parts of the broader Macedonia, the denominations “Aegeatic Macedonia (Egejska Makedonija)” and “Pirin Macedonia (Pirinska Makedonija)” were commonly used. Both references were in some contexts implying not only a geographical but also an ethnic unity of broader Macedonia and were thus utilised as to promote Yugoslav policy considerations. Clearer in the last direction has been the appellation “Macedonia under Greece.”

\textsuperscript{45} The Greek delegation in the Commission on Security and Cooperation in Europe (CSCE) presented its position in this rather uncommon moment of tension in the Greek-Yugoslav relations as follows: “Any attempt to usurp their [the Greek Macedonians’] name and to tamper with their heritage is
It was however only after the declaration of independence of the “fY Republic of Macedonia” and the emergence of an international actor claiming the use of the multifaceted Macedonian symbols that the controversy over the name “Macedonia” escalated to its current dimensions and character.

The dispute was now transformed to an issue referring to the symbolic representation of a state entity, and as such involved a multitude of international actors, from third countries to international organisations. Most importantly in this context, the use of the term as state name presented now for the first time the possibility of its de facto monopolisation by one party. Furthermore the security aspects of the controversy were gradually marginalised and substituted by the role of state symbols in the representation of mutually exclusive identities. Although the presentation of the issue through the prism of security will continue for a great part of the dispute, this will be mostly because of the respective concerns sounding more understandable to third parties than obscure and complicated issues of identity and symbolic representation. Thus, the international dispute over the term “Macedonia” progressively led to arguments over the sovereignty of choosing state symbols and the question of what constitutes a potentially unacceptable misnomer in international relations. The most important field in raising these arguments was its international recognition and the admission of the new republic to international organisations.


46 The latter, closely connected with minority issues, have been brought forward by Yugoslavia and the “fY Republic of Macedonia” on occasions after 1980, reviving claims going back to the Greek-Yugoslavian and mainly Greek-Bulgarian relations of the 1920s. Indicative of the eventual establishment of the dispute as one regarding the symbolic representation of the newly proclaimed Republic, is that even issues as controversial and important as the minority ones have been drastically utilised as means of pressure and negotiation.

47 See, Kofos, see note 40, 381 and this collective band in general.

48 See for example the submissions of Greece in the case brought against it by the European Commission as a result of the imposition of the embargo (application for interim measures) ECJ, Case C-120/94 R, Commission v. Greece [1994], ECR I-03037, para. 8.

49 Kofos, see note 40, 398 and 401.
b. Recognition from the European Communities

Greek reaction resulted firstly in the differentiated approach of the European Communities (EC) to the recognition of the “FY Republic of Macedonia” compared to that of other former Yugoslav Republics. Already the Declaration on Yugoslavia\textsuperscript{50} called “for constitutional and political guarantees ensuring that [the applicant state] has no territorial claims towards a neighboring Community State and that it will conduct no hostile propaganda activities towards a neighboring Community State.”\textsuperscript{51} Adopting the Greek position to a very significant extent, the 1991 EC Declaration is particularly interesting as, in the discussion over the meaning and potential of state symbols, it classifies the constitutional name of a sovereign country as a means of propaganda, that potentially precludes its international recognition.\textsuperscript{52} Although the so-called \textit{Badinter Arbitration Commission}\textsuperscript{53} opined a few months later that “the use of the name ‘Macedonia’ cannot imply any territorial claims against another state”,\textsuperscript{54} the EC Presidency announced on 15 January 1992 that, although Slovenia and Croatia were to be recognised, “as regards [FYROM] a number of important problems remain to be resolved before the Community and its Member States may reach a similar decision.” In May of the same year, the EC Council stated that the Community and its Member States were “prepared to recognize FYROM as a sovereign and independent State, within its present bor-


\textsuperscript{51} Id.

\textsuperscript{52} See under IV. 1. a.

\textsuperscript{53} Officially referred to as “the Arbitration Commission on the Conference on Yugoslavia” and set up to provide advice to legal questions arisen from the disintegration of the SFRY, the Commission was also asked to deliver opinions on whether the “Socialist Republic of Bosnia-Herzegovina”, the “Republic of Croatia”, the “Socialist Republic of Macedonia” and the “Republic of Slovenia” had satisfied the conditions for recognition laid down by the Council of Ministers of the European Community on 16 December 1991, see A. Pellet, “The Opinions of the Badinter Arbitration Committee: A Second Breath for the Determination of Peoples”, \textit{EJIL} 3 (1992), 178 et seq. (178).

\textsuperscript{54} After the rejection of any territorial claims being included in the constitution of the country, Opinion No. 6 on the Recognition of the Socialist Republic of Macedonia by the European Community and its Member States, reproduced in Türk, see note 50, 80.
...ders, under a name which is acceptable to all the parties concerned.”\(^{55}\) A stance that became even more strict in June when the European Council at Lisbon declared that the Community would recognise the country under a denomination which “does not include the term Macedonia.”\(^{56}\) By effectively granting Greece a veto in respect of the name of the new country,\(^{57}\) the European Council elevated thus the use of “Macedonia” to a factor *per se* precluding the recognition of the country using it. Recognition by other states was also substantially delayed because of the Greek objections. Although a few states did assume bilateral relations with Skopje using the referral “Republic of Macedonia”;\(^{58}\) most of them awaited the further development of the controversy.

c. Admission to the United Nations

The admission to the United Nations was the next decisive stage of the dispute. As suggested by Security Council Resolution 817 (1993),\(^{59}\) this admission was a rather unusual one\(^{60}\) for three reasons. Firstly, the admitted country was not identified with a name, but rather “provisionally referred to for all purposes within the United Nations as ‘the former Yugoslav Republic of Macedonia’ pending settlement of the difference that has arisen over the name of the State.”\(^{61}\)

This provisional referral was already a compromise for both parties as the application was submitted on behalf of the “Republic of Mace-

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57 Kofos, see note 40, 239.

58 These were Croatia, Bulgaria, Belarus, Lithuania, Slovenia and Turkey.


60 Wood, see note 2, 238.

61 It is important to note that the notion “the former Yugoslav Republic of Macedonia” was not used as the name of a state – even a provisional one – but only as a reference, see Wood, see note 2, 239.
and Greece took the position that admission “prior to meeting the necessary prerequisites, and in particular abandoning the use of the denomination ‘Republic of Macedonia’, would perpetuate and increase friction and tension and would not be conducive to peace and stability in an already troubled region.”

To allay some of the concerns resulting from the unprecedented use of a former constitutional status in the denomination of an independent country, the President of the Security Council clarified in a separate statement, that the reference “the former Yugoslav Republic of Mac-
donia” carried “no implication whatsoever that the State concerned had any connection with the Federal Republic of Yugoslavia (Serbia and Montenegro)” and that “it merely reflected the historic fact that it had been in the past a republic of the former Socialist Federal Republic of Yugoslavia.”

Secondly, the new flag, being contested by Greece because it depicted at the time the insignia of the royal house of ancient Macedonia, would not be among the ones hoisted outside the UN Headquarters, neither at the admission ceremony nor later. This was understood to be among the steps that had to be avoided in order not to escalate the conflict any further. The Security Council offered a proposal to “all parties concerned,” that was also send to the UN Secretariat, responsible for such matters of protocol. It would ultimately take until Oc-

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63 By a subsequent letter to the President of the Security Council, however, Greece considered the denomination “former Yugoslav Republic of Macedonia” an “acceptable basis for addressing the issue of the application” of this country for admission to the United Nations.
64 See note 62.
65 The issue of the flag was among the main objections raised in the letter to which the Security Council Resolution suggesting the admission of FY-ROM made particular reference. Greece expressed in this letter the consideration that “the hoisting and flying at the United Nations of the flag bearing the Sun of Vergina would result in great damage to the efforts undertaken [to settle the dispute] and render more difficult if not defeat, a solution”, Doc. S/25543.
66 By the aforementioned Statement of the President of the Security Council, see Doc. S/25545.
67 See also, Wood, see note 2, 239.
October 1995 for (a different) flag to be raised on behalf of the “fY Republic of Macedonia” outside the New York Headquarters.

Thirdly, and maybe most importantly, the Security Council Resolution did not confine itself to recommending to the General Assembly the admission of the applicant,\(^68\) but went on to make a specific reference to the existence of the naming dispute, urging the parties to “continue to cooperate with the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia in order to arrive at the speedy settlement of the difference.”\(^69\) The contested legal character of these references accompanying the admission of the “fY Republic of Macedonia” to the UN will be discussed below.\(^70\) It suffices here to stress that the Security Council operated extremely carefully and inventive in this process of admission. It connected directly the need for these unusual deviations from the normal protocol with the “interest of maintaining peace and good neighbourly relations in the region.”\(^71\)

Although the above presented solution was clearly referring to purposes of the admission to the UN and for the use within the UN system,\(^72\) the cumbersome acronym was soon employed by many other international actors. As it was understood to be a convenient way to approach Skopje without provoking Athens, a significant number of states went on to establish relations with the “fY Republic of Macedonia” using the appellation “fYROM”.\(^73\)

Greece itself, however, not only refrained from this practice and refused recognition of the country even under “fYROM”, but, amidst an escalation of the crisis, imposed a trade embargo on its northern neighbour. Fuelled by the insistence of the two countries on rather inflexible positions,\(^74\) the embargo\(^75\) proved extremely harmful to the economy of a landlocked country situated in the middle of war-torn

\(^{68}\) Which was never referred to as “Republic of Macedonia” but rather as “the State whose application is contained in document S/25147.”

\(^{69}\) Op. para. 1, S/RES/817, see note 59; Wood, see note 35, para. 2.

\(^{70}\) Under IV. 2. a.

\(^{71}\) S/RES/817, see note 59.

\(^{72}\) Wood, see note 2, 239.

\(^{73}\) Japan, the Russian Federation, the United States and all EC countries had recognized “fYROM” until early 1994.

\(^{74}\) Either a name without any reference to “Macedonia” (Athens) or the unqualified denomination “Republic of Macedonia” (Skopje).

\(^{75}\) Allowing entrance from Greek custom points only to food and medicine.
Balkans. Response to this instrument of pressure came from a rather unexpected direction, as the EC Commission filed a suit against Greece before the European Court of Justice (ECJ) arguing violation of the common export rules. Assessing the merits of the case, Advocate General Jacobs concluded that “it would be wrong to rule that Greece could not invoke Article 224 of the Treaty on the ground that there was no serious international tension constituting a threat of war.” No final decision was, however, issued by the ECJ, as the Commission asked for the discontinuance of proceedings after Greece reached an agreement with the “FY Republic of Macedonia” providing inter alia for the lifting of the trade restrictions.

d. Interim Accord

This so-called Interim Accord, signed in 1995, was the first effort of the two countries to regulate their complicated relations by means of

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76 The Commission sought namely a declaration that Greece has made improper use of the powers provided for in article 224 of the Treaty by imposing an trade embargo on FYROM and that, in doing so, Greece has failed to fulfil its obligations under article 113 of the Treaty and under Council Regulations Nos 2603/69, 288/82, 3698/93 and 2726/90, Opinion of Advocate General Jacobs on the Case C-120/94, Commission v. Hellenic Republic [1995], ECR I-01513, para. 26. The Court dismissed the Commission’s application for interim measures on the ground that no urgency justifying such measures was shown, Order of the Court in the Case C-120/94 R, Commission of the European Communities v. Hellenic Republic [1994], ECR I-03037, para. 93.

77 Opinion of Advocate General Jacobs, see note 76, paras 56, 60. Making it clear however that “it is not for the Court to determine who is entitled to the name “Macedonia”, the star of Vergina and the heritage of Alexander the Great, or whether FYROM is seeking to misappropriate a part of Greece’s national identity, or whether FYROM has long-term designs on Greek territory or an immediate intention to go to war with Greece”, para. 54.

78 Order of the President of the Court in Case C-120/94, Commission of the European Communities v. Hellenic Republic [1996] ECR I-01513, para. 5.

international law. The main objective of this regulation was to address the secondary effects of the naming dispute which presented insuperable practical obstacles to every aspect of bilateral cooperation. The Interim Accord was thus a “framework agreement” covering many aspects of common interest and providing for the establishment of diplomatic relations between the parties with the creation of Liaison Offices. Greece recognised its cosignatory as “an independent sovereign state” under the provisional designation “fYROM” and assumed the obligation not to obstruct any application made by the “fY Republic of Macedonia” for membership in international organisations, as soon as this application is made under the same reference. On the other hand, the “fY Republic of Macedonia” undertook to abandon the insignia of the ancient Macedonian royal house as national symbols, and most crucially to remove the Vergina sun from its flag, as well as to interpret its constitution as to clarify notions understood as irredentist by Greece.

The element that was not part of the settlement, justifying its designation as interim, was however the name itself. Although the parties agreed to continue negotiations until the settlement of the difference

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81 Zaikos, see note 80, 24.
82 An analysis of the aspects of the Interim Accord going beyond the name dispute at interest here can be found in Kofos, see note 80.
83 Article 1 paras 1 and 2 Interim Accord, see note 79.
84 Letter to C. Vance, Special Envoy of the Secretary-General of the United Nations dated 13 September 1993, United Nations — Treaty Series, see note 79, 12. In the agreement as such no reference of any designation was made whatsoever. Instead the formulation adopted was “[t]he Party of the First Part recognizes the Party of the Second Part as an independent and sovereign state, under the provisional designation set forth in a letter of the Party of the First Part of the date of this Interim Accord”, article 1 (1).
85 Article 11 (1) of the Interim Accord, see note 79. Greece reserved thus the right to object to any such application made under the name “Republic of Macedonia”.
86 Article 7 (2) of the Interim Accord read together with the letter to C. Vance, Special Envoy of the Secretary-General of the United Nations dated 13 September 1993, United Nations — Treaty Series, see note 79, 15.
87 Article 6 of the Interim Accord, see note 79.
that they both recognised exists,\textsuperscript{88} the only other reference to the outstanding name dispute was the right of either party that “believes one or more symbols constituting part of its historic or cultural patrimony is being used by the other party”, to bring such alleged use to the attention of the other party.\textsuperscript{89} Characteristic of this insistence of the parties to secure their position regarding the name issue was that their identification in the agreement was only with regard to their capital cities (“the Party of the First Part” as having Athens as its capital and “the Party of the Second Part”, with the capital Skopje).\textsuperscript{90} This intent to defer the naming dispute to future political negotiations was also expressed in the clause governing the settlement of disputes concerning the Interim Accord. It was agreed that those disputes could all be submitted to the ICJ with the explicit exception of the dispute over the name.\textsuperscript{91} The “provisional reference” “fYROM” was also in the case of bilateral relations acknowledged as a functional compromise serving short-term diplomatic purposes which avoided addressing the complex issues lurking behind the state denomination.

Greece officially referred to the “fY Republic of Macedonia” under the provisional name “fYROM”, often transcribed in Greek (ΠΓΔΜ/PGDM),\textsuperscript{92} and did not pose any objections to its membership in all international organisations.\textsuperscript{93} Negotiations for the final solution of the dispute went on a regular basis, without however reaching any common agreement as to what should be the permanent name of the “fY Republic of Macedonia”. In this sense, the 1995 Interim Accord,
while serving well the gradual development of mutually beneficial economic relations, left open the major parameter of the dispute.

In this environment of improved bilateral relations, the “fY Republic of Macedonia” actively and successfully pursued its recognition and reference with its constitutional name, both in international diplomatic fora and the media. A significant number of countries gradually shifted away from the “fYROM” to the clearer and more straightforward “Republic of Macedonia” with the result that the Greek position was gradually and de facto eroded. By September 2007, 118 states were officially using the latterlike denomination. Greek objections were thus restricted to multilateral fora of the EU or NATO, where Greece was still able to insist on the use of “fYROM”, and at the bilateral level. In result the plain reference “Macedonia” (as the political qualifier “Republic” was almost absolutely omitted) as the worldwide accepted reference was gradually established. This development made

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94 The admission of the “fY Republic of Macedonia” to the UN and the conclusion of the Interim Accord led gradually to a normalisation of the bilateral relations, with Greece evolving to the major financial partner of the “fY Republic of Macedonia” both in terms of trade and foreign direct investment, Kondonis, see note 93, 57.

95 See Kofos, see note 80, 153.

96 Among them four out of the five permanent members of the UN Security Council, namely China, the Russian Federation, the United Kingdom and the United States of America. France uses the appellation “fYROM”, as almost half of the other EU members.

97 Wood, see note 35, para. 30; Kofos, see note 80, 154.

98 In accordance with the Memorandum of Understanding for the Implementation of the Practical Measures Related to the Interim Accord, stickers were fixed to vehicles coming from the “fY Republic of Macedonia” as to indicate objections to the use of the car plate code “MK”, Zaikos, see note 80, 47. Extremely detailed regulations were also provided for the inscriptions used at the facilities of the Liaison Office in Athens. For example “In the case the Liaison Office is established in an apartment: At the building’s entrance, there will be placed an inscription bearing the provisional designation by which the Party of the Second Part is referred to in UN Security Council Resolution 817/93. At the bottom corner of the inscription there will be an indication that it was placed by another party. [...] On the front side of the main door [...] there will be an inscription bearing a name which the Party of the First Part does not recognize.”, Section 1, Part (a) of the Memorandum on the Mutual Establishment of Liaison Offices. Memorandum on the Mutual Establishment of Liaison Offices, <http://www.hri.org/docs/fyrom/liaison.html>.
Greece trying to insist on the use of the UN provisional reference and the “fY Republic of Macedonia” unwilling to offer concessions in negotiations that seemed to be overtaken by the de facto international developments.

By that time, the positions of the parties had been crystallised as follows: Greece suggested that only a composite name with a geographic or even temporal qualification could be acceptable (as North, Upper or New Macedonia) and that the agreed solution should serve all the international purposes of state representation (erga omnes). The “fY Republic of Macedonia” insisted on nothing less than the international use of the word “Macedonia” as such without any kind of qualification.

e. Further Developments – Admission to NATO and the European Union

Taking into account these unfavourable developments, Greece regarded the aspirations of the “fY Republic of Macedonia” to enter NATO and the EU as its last chance to prevent the de facto and definite solution of the dispute to its disfavour. And this despite the fact that the Greek right to object to membership applications submitted on behalf of “fY-ROM” was circumscribed by the obligations that it had accepted under the Interim Accord.100

As the republic applied for NATO accession, Greece made clear that it would object to its membership despite the fact that the designation used was that of “fYROM”.101 Although the prospect of a Greek veto motivated all interested actors102 to engage in more active negotiations,103 no agreement was reached and at the Bucharest Summit in April 2008 Greece succeeded to prevent the “fY Republic of Macedonias Name: Breaking the Deadlock, Europe Briefing No. 52, 2009, 6.

99 Rather than insisting on the former hard line of supporting non-recognition pending the settlement of the dispute, Kofos, see note 80, 154.
100 See above III. 1. d.
102 Among them the United States of America and other members of the NATO, International Crisis Group, Macedonia’s Name: Breaking the Deadlock, Europe Briefing No. 52, 2009, 6.
103 In the process of which the possible names of “New Macedonia”, “Republic of Upper Macedonia”, and “Republic of Macedonia-Skopje” were considered.
donia” from receiving an invitation to join NATO.\textsuperscript{104} Greek objections did not have to take the form of a veto since the decision not to address such an invitation to the “fY Republic of Macedonia” was included in the mutually agreed Summit Decision, stating furthermore the decision that “an invitation to the former Yugoslav Republic of Macedonia will be extended as soon as a mutually acceptable solution to the name issue has been reached.”\textsuperscript{105}

The NATO Bucharest Summit was the first occasion where Greece blocked the accession of the “fY Republic of Macedonia” despite the fact that the latter agreed to the reference “fYROM” for application purposes. This resulted in the initiation of legal proceedings against Greece before the ICJ\textsuperscript{106} on the basis of the 1995 Interim Accord, which stated as an obligation of Greece “not to object to the application by or the membership of the first Party [fYROM] in international, multilateral and regional organizations and institutions of which the second party [Greece] is a member.” As the Interim Accord explicitly excluded the resort to the ICJ for the name dispute as such,\textsuperscript{107} the case currently pending before the Court will not extend to the main question of the controversy and will thus not be further analysed here.\textsuperscript{108}

\textsuperscript{104} Kofos, see note 80, 2.


\textsuperscript{106} Application of the Republic to the International Court of Justice, see note 101, para. 23.

\textsuperscript{107} Article 21 (2) of the Interim Accord, see note 79.

\textsuperscript{108} It should however be mentioned that Greece responded to this application claiming that there has been in fact no NATO decision to invite the “fY Republic of Macedonia” which had to be vetoed by Greece. It was rather the sharing of Greek concerns by the other members of the Alliance that led to this result. This position was supported by many NATO members and NATO officials, who referred to the non-invitation as a common position of NATO. On the other hand, the Interim Accord does not only forbid the exercise of a veto by Greece but more generally refers to those objections based on the name dispute. Furthermore, Greece has made it clear, by its actions and statements, that the sole reason for its objection to the applicant’s membership of NATO was the difference between the parties as to the applicant’s name. On this topic see also the comments of M. Karavia\'s A. Tzanakopoulos, “Legality of Veto to NATO Accession: Former Yugoslav Republic of Macedonia Sues Greece before the ICJ”, \textit{ASIL Insights} 12 (2008), <http://www.asil.org/insight081229.cfm>; Kofos, see
Most important were the repercussions of this renewed tension at the level of the “FY Republic of Macedonia’s” EU membership bid. The “FY Republic of Macedonia” was granted candidate country status in 2005 and during all the relevant stages of the process the provisional appellation “FYROM” was used, without Greece raising any objections. Athens succeeded, however, in 2008 in establishing the “[maintenance of] good neighbourly relations, including coming to a mutually acceptable solution to the name issue”\(^\text{109}\) as a separate benchmark upon which the progress of the “FY Republic of Macedonia” is to be assessed. Against this background, the European Council decided in December 2009 not to act on the recommendation of the Commission, which suggested the opening of accession negotiations,\(^\text{110}\) and postponed such an opening, repeating that “maintaining good neighbourly relations, including a negotiated and mutually acceptable solution on the name issue, under the auspices of the UN, remains essential.”\(^\text{111}\) Greek objections, stemming from the name issue, were among the primary, if not the only, considerations on deferring the decision of the EU on opening

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membership negotiations. This question remains unresolved until today.

2. Other Cases Involving Disputed Symbols of Statehood

As unprecedented as the names dispute between the “fY Republic of Macedonia” and Greece may sound, it is not. Albeit not reaching the extent of the latter, there do exist comparable cases.

a. The Case of Ireland

One of the disputes that have for a long time involved issues of symbolic representation is that between Ireland and the United Kingdom of Great Britain and Northern Ireland (United Kingdom). Characteristic of this controversy, which is of course a facet of the complicated relations between the two countries, is its nature as a two-way contestation: both Ireland and the United Kingdom raised objections against the denomination used by the other party in several periods of their common history.

Regarding the appellation of the first of them, and according to article 4 of the 1937 Irish constitution, “the name of the state is Éire, or in the English language, Ireland”. The contestable choice was here that of an appellation that coincided with the geographical area of the island of Ireland as a whole, extending thus to the UK-administered part of Northern Ireland. This preference should be read together with the constitutional clauses rejecting the partition of the island and calling for a politically unified Ireland. Article 2 of the Constitution declared thus that “the national territory consists of the whole island of Ireland, its islands and the territorial seas”, raising in this way a territorial claim

112 Italics in the original. With this clause, the name “Ireland” was introduced as the denominator of the state officially referred to since its independence in 1922 as “Irish Free State”. The symbols of sovereignty (among them the oath of allegiance owned by the members of the Irish Parliament to the King) proved to be among the issues on which the United Kingdom was least prepared to compromise, see “The Implications of Eire’s Relationship with the British Commonwealth of Nations”, International Affairs 24 (1948), 1 et seq. (2).

113 Article 2 of the 1937 Constitution of Ireland, emphasis added. According to article 3 “Pending the re-integration of the national territory, and without prejudice to the right of the Parliament and Government established by
over the geographic entirety of the island of Ireland. The strong connection of the name of the country with the partition of Ireland is also stressed by the fact that the 1937 constitution was not proclaimed on behalf of the Irish people as a whole, but it is rather introduced with the phrase “We, the people of Éire [...].” Éire understood in this sense to better describe “the part of [Ireland] which [the sovereign Irish state] can effectively control.”

For these reasons, the denomination “Ireland” was among the Irish constitutional arrangements that soon caused London’s objections. The British response took the form of using Éire (or Eire) instead of “Ireland”, despite the constitutional preference of the latter state to be termed Ireland in English language contexts. According thus to the British instrument implementing the 1938 Anglo-Irish Agreements and for the purposes of English law, the country “which was [...] known as Irish Free State shall be styled as [...] Eire (sic).”

In 1949 with the adoption of the Republic of Ireland Act, a further complication was introduced. This statute, albeit not amending the constitutional name of the country, introduced the appellation “Republic
of Ireland” as “the description of the State”\textsuperscript{120} in order to signify the severance of the links between Ireland and the Commonwealth\textsuperscript{121} and to assert its status as a republic.\textsuperscript{122} An additional reason for the distancing from the denomination “Éire” seems to be exactly the fact that the latter was “identified […] with the Twenty-Six Counties [an informal description of the sovereign state on Ireland] and not with the State that was set up under this Constitution of 1937.”\textsuperscript{123} Although the reference “Republic of Ireland” was used for internal purposes, the Irish government campaigned for the international reference to its statehood under the unqualified appellation “Ireland”\textsuperscript{124} and this was the name under which the country joined the United Nations and the European Economic Community.\textsuperscript{125} The reason for this insistence seems to be mainly connected with the international campaign against the partition of Ireland: the unqualified term “Ireland” was thought to reinforce the cause of a politically unified Ireland by having “a definite psychological effect in favour of the unity of this country on both Irish and foreign minds.”\textsuperscript{126}

Britain responded to the introduction of the term “Republic of Ireland” with its official endorsement\textsuperscript{127} backed up with reservations regarding its practical use.\textsuperscript{128} What was in any case to be avoided by the

\begin{enumerate}
\item Article 2, Republic of Ireland Act, 1948, No. 22/1948.
\item In the sense that the Republic of Ireland Act, 1948 awarded the President the external affairs’ powers, article 3.
\item Vis-à-vis a kingdom, as the United Kingdom, J. Furlong, “Ireland – the name of the State”, Legal Information Management 6 (2006), 297 et seq. (298). The introduction of the political qualifier “republic” goes however back to the political objectives and terminology of the Irish struggle for independence.”
\item Coakley, see note 114, 54.
\item Morgan, see note 114, 99.
\item “[T]hat part of Ireland heretofore known as Eire […] may [be referred to] as the Republic of Ireland”, Section 1 (3) Ireland Act 1949.
\item The views of the British Prime Minister of the time in the British cabinet meeting are enlightening in this respect: “Suggested therefore we shd.[should] use “Republic of Ireland”. N.I. [Northern Ireland Ministers] prefer “Irish Republic”. But let us not speak of “Ireland”. Can we put Re-
British side was the constitutional name “Ireland”. The issues of nomenclature that arose when the two states concluded bilateral treaties were addressed by their adoption in “duplicate” rather than “in two originals” as the usual practice; each of these duplicates used the designations accepted by each of the parties. Moreover, e.g. the arrival of the Australian ambassador in Dublin was delayed until 1965, as the Australian insistence on an accreditation to the “President of the Republic of Ireland” instead “of Ireland” was unacceptable to the Irish government. Further efforts of the United Kingdom to discourage the international usage of Ireland as the reference to the Irish state seem to have failed (as in the case of the UN and the EU), but interestingly resulted in the more persistent use of the full title on its behalf (“United Kingdom of Great Britain and Northern Ireland”). This was in order to downplay confusion regarding the status of the part of the island under British administration.

The use of “Republic of Ireland” instead of “Ireland” by British authorities was also judicially condemned by the Irish Supreme Court. The latter, examining British extradition warrants referring to the “Republic of Ireland”, stated that “[the courts of the United Kingdom] are not at liberty to attribute to this State [Ireland] a name which is not its correct name” and went on to clarify that, by virtue of the duty of

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130 Following the British styling views and presenting as the reason for this insistence that accreditation to the “President of Ireland” would imply sovereignty over the whole island, J. Casey, Constitutional Law in Ireland, 2000, 3rd edition, 32.

131 Id.

132 Interestingly however, the Statute of the Council of Europe, signed in London in 1949, mentions the “Irish Republic” among its original signatories, although “Ireland” is the appellation used for the country for all Council of Europe purposes.

133 Morgan, see note 114, 101.

the courts and of the *Garda Síochánaí* to uphold the Constitution, “such warrants should be returned […] until they are rectified.”\(^{135}\)

The Anglo-Irish dispute was however not restricted to the symbols employed by the Irish state, but included the appearance of the word “Ireland” within the full title of the United Kingdom. Irish objections were firstly raised against the use of the royal designation “King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas.”\(^{136}\) This title remained so despite the creation of the independent “Irish Free State” in 1922, exercising authority over five-sixths of the island. Upon insistence of the Irish government, this title was amended in 1926 as to refer to “the United Kingdom of Great Britain, Ireland, and the British Dominions beyond the Seas.”\(^{137}\) The insertion of the so-called “O’Higgins comma”\(^{138}\) was a change of the British symbols that was meant to reflect the change of authority over the island and the fact that a “United Kingdom of Great Britain and Ireland” did not exist anymore.\(^{139}\) It took however until 1953 for Queen Elizabeth II to bear the title “of the United Kingdom of Great Britain and Northern Ireland”. Even the subsequent designation of the Kingdom as of “Great Britain and Northern Ireland” continued to attract however significant criticism from the Irish side as running contrary to its official territorial claim to Northern Ireland.\(^{140}\)

Settlement of the disagreement seems to have been reached, after more than 60 years of dispute, with the Good Friday Agreement of 1998. This was the first formal agreement signed between “the Government of the United Kingdom of Great Britain and Northern Ireland” and the “Government of Ireland.”\(^{141}\) Although there has been no

\(^{135}\) Id. See also Casey, see note 130.

\(^{136}\) The full title of the British sovereign from 1901 to 1927 being “By the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India”.

\(^{137}\) Coakley, see note 114, 53. For details see R.F. Shinn, “The King’s Title, 1926: A Note on a Critical Document”, *The English Historical Review* 98 (1983), 349 et seq. (351).

\(^{138}\) From the name of the, at the time, Minister for External Affairs Kevin O’ Higgins, id., M.O. Hudson, “The style and titles of his Britannic Majesty”, *AJIL* 22 (1928), 146 et seq.

\(^{139}\) Although the King himself still had authority over Ireland.

\(^{140}\) See above the reference of the Irish “duplicate” of bilateral treaties to “United Kingdom”.

\(^{141}\) Coakley, see note 114, 54.
particular provision for the name issue in the Agreement and there are still commentators arguing that difficulties remain; subsequent practice\textsuperscript{142} seems to imply that the dispute is now settled.

**General Considerations**

Drawing some general lessons as well as parallels with the main case study of this article, the dispute over the use of the term “Macedonia”, is of course not easy. The case of Ireland needs to be approached within the particular context created by the 1920-1922 partition settlement and the long-existing dispute over the political unification of the island. Geographical realities should be considered as well as ethnological dimensions. In this direction, it would be helpful to refer to the three intertwined dimensions adjacent to the use of a state symbol in general: the political, the geographical and the national/identity one.

The unqualified use of “Ireland” (or even that of the “Republic of Ireland”) has to be firstly read as a reflection of the constitutionally sanctioned claim to political unity for the geographic area of Ireland. Although the state reference “Ireland” never coincided with the territorial reach of the sovereign country, this was the constitutionally proclaimed aim of the latter: the national territory of the state of Ireland was according to article 2 not only the southern part of the island but extended to “the whole island of Ireland, its islands and the territorial seas”\textsuperscript{144} In this aspect also, the name did reflect an existent political aspiration of the entity bearing it and was utilised to reinforce an understanding of political unity of the said geographical area. The changes brought to this claim in 1998 with the Good Friday Agreement\textsuperscript{145} were

\textsuperscript{142} Morgan, see note 114, 92.

\textsuperscript{143} See for example the reference to “Government of Ireland” and “Ireland” in: The Disqualifications Act 2000, Ch. 42.

\textsuperscript{144} See above the reference to articles 2 and 3 of the Irish Constitution.

\textsuperscript{145} The Belfast (or Good Friday) Agreement substantially modified, but not completely removed the claim of the republic to the northern part of the island. Articles 2 and 3 of the Irish Constitution were replaced as follows: “2. It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage” and “3.1. It is the firm will of the Irish nation, in harmony and friendship, to unite all the people who share the terri-
not enough to affect the consolidated name of the republic. In any case the Irish state always occupied by far the largest part of the geographic area of Ireland, almost five sixths of it.

Nevertheless, much more important than the relationship between the political and geographical dimensions of the term Ireland seems to be the one connected with its national symbolism. The relationship between the cultural-historical content of the term “Irish” and its state use is not fundamentally contested. No group claims to be “Irish” in a way profoundly different from that of Irish citizens.

In short, even if the term Ireland as state name does not coincide with the geographical area bearing the same name, it does not create significant tension with the historical/cultural meaning it has. That is to say that the attribute “Irish”, as derived by the state name, corresponds to a very significant extent to the attribute “Irish” in its “pre-state”, cultural-historical dimension as used to signify personal identities. This is not to exclude however, that the use of a particular terminology does not play itself a role in the evolution of the said meanings. On the contrary it is commented that “persistent use of “Ireland” to refer to twenty-six counties not only reflects existing political realities […], it also reinforces them.”

b. The Case of German Austria

If the name of Ireland was employed to express and reinforce the claim of political union of the Irish geographic/ethnic area, the use of the short-lived term “German Austria (Deutschösterreich)” was an allu-

[146] This is not to exclude however, that the use of a particular terminology does not play itself a role in the evolution of the said meanings. On the contrary it is commented that “persistent use of “Ireland” to refer to twenty-six counties not only reflects existing political realities […], it also reinforces them”; Coakley, see 114, 57.

[147] Sometimes transcribed “Deutsch-Österreich”. 

sion to post-World War I Germanic unity. Instead of asserting an Austrian territorial claim (as was the case with Ireland), however, this name was primarily utilised to express a belonging of the country to the broader German linguistic and ethnical area and the desire for the subsequent joining of the German Weimar Republic.

With the impending collapse of the Austro-Hungarian Empire, after the defeat of the Central Powers in World War I, the representatives of the German-speaking areas of the Empire gathered as the provisional “National Assembly of the German Representatives”148 and assumed constitutive authority. The Assembly proclaimed on 12 November 1918 the “Law for the Form of the State and Government”,149 which declared in article 1 that “German Austria [Deutschösterreich] is a democratic republic.”150 On the same day the National Assembly issued a declaration to the “German Austrian people”151 calling for national solidarity and unity within the new republic.152

The choice of the name “German Austria” was based on the unofficial appellation used to describe the German-speaking part of the Austro-Hungarian Empire before its disintegration. Beyond that, however, the appellation chosen was connected with two of the main characteristics of the new republic: its claim to include in its boundaries the former Austro-Hungarian territories with German-speaking major-

148 “Nationalversammlung der deutschen Abgeordneten” according to the title of the respective stenographic protocol, Stenographische Protokolle, Erste Republik, Session 1, <http://alex.onb.ac.at/cgi-content/anno-plus?apm=0&aid=spe&datum=00010003&seite=00000001&zoom=2>. Sometimes referred to as “Provisional Assembly for German Austria (Provisorische Nationalversammlung für Deutschösterreich)”.

149 Gesetz vom 12 November 1918 über die Staats- und Regierungsform von Deutschösterreich, StGBl. Nr 5/1918.

150 The designation of the country as “German Austria” was restated by the Beschluß der Provisorischen Nationalversammlung für Deutschösterreich of 30 October 1918, StGBl. 1/1918 and the 1919 “Provisional Constitution”, Gesetz vom 14 März 1919 über die Volksvertretung, StGBl. 179/1919 and Gesetz vom 14 März 1919 über die Staatsregierung, StGBl. 180/1919.

151 “An das deutschösterreichische Volk”.

152 W. Goldinger, Geschichte der Republik Österreich, 1962, 19-21. The same term, “German Austria”, was also used in the Declaration of 11 November 1918, which brought the end of the Habsburg dynasty and recognised “in beforehand the decision of German Austria regarding its future state form”, Wiener Zeitung, Nr. 261, Extra-Ausgabe, 11. November 1918.
ties\textsuperscript{153} and the aim to ultimately be itself united with Germany in a future Austro-German union. As in the case of Ireland, these aims were constitutionally sanctioned. According to article 2 of the above mentioned Law for the Form of the State and Government, "German Austria is an integral part of the German Republic." This clause, although not creating by itself a unified Austro-Germany, was a clear expression of the will of the National Assembly to ultimately form a political unity with the German Republic.\textsuperscript{154} Both these elements were themselves intertwined with the need to express a break with the Austro-Hungarian Imperial past\textsuperscript{155} and to make clear that "German Austria" was a different entity to the defeated Empire, having no stronger connections with the Dual Monarchy than the other states emerging from its collapse.\textsuperscript{156} The qualification "German" was thought to be both adequate and necessary for this differentiation, as the sole term "Austria (Österreich)" (itself not easily defined\textsuperscript{157}) was decisively connected with the defeated, multinational Empire.\textsuperscript{158}


\textsuperscript{154} An aim that was to be achieved through negotiations between the two countries.

\textsuperscript{155} Haider, see note 153, 168; O. Bauer, \textit{Die österreichische Revolution}, 1923, 159.

\textsuperscript{156} Stressing in particular that it was in no aspect the successor of the Austrian-Hungarian Monarchy in terms of international law or regarding the issue of liabilities, Telegramm Nr. 69, Staatskanzler Renner an Staatsamt für Äußeres, Saint Germain 30 Mai 1919, in: K. Koch/ A. Suppan/ W. Rauscher, \textit{Außenpolitishe Dokumente der Republik Österreich 1918-1938}: Band 2, \textit{Im Schatten von Saint Germain}, 1994, 194; Haider, see note 153, 165.

\textsuperscript{157} Haider, see note 153, 156 et seq.

\textsuperscript{158} Used until 1867 primarily to identify the entire empire and from that point to 1918 the west part of it, Haider, see note 153, 157.
Although clearly preferred for these reasons by the new state,\textsuperscript{159} the appellation “Deutschösterreich” faced the opposition of the victorious Allies. They announced, in the process of concluding the treaty of St. Germain,\textsuperscript{160} that they would only recognise “Austria” as their negotiating partner. The mandates submitted by the Austrian delegation were thus accepted by the Committee for Verification with the notice, that “the allied and associated powers have decided to recognize the new republic under the appellation Republic of Austria (République d’Autriche); for this reason they declare that they approve the mandates received on the 19th of May as to authorize the delegates holding them to negotiate in the name of the Republic of Austria.”\textsuperscript{161}

The reasons for this insistence of the Allies on the name “Austria” seem to include their intent to imply a sense of continuity of the new state with the old Monarchy.\textsuperscript{162} Very important for this decision, reached on 29 May 1919 at Woodrow Wilson’s residence, were however the concerns of the Czech and Yugoslav delegations that the designation “German-Austria” would be an ongoing inherent claim of the new state to the German-inhabited territories of the old Monarchy, now under their jurisdiction.\textsuperscript{163} Moreover, the consideration was expressed that

\textsuperscript{159} Furthermore, the choice of this appellation was perceived as deriving from the nature of the new state entity itself, as it “included the German territories of Austria and was established through constitutive act of all the German members of the Austrian Imperial Council” as well as an allusion to the right of the non-German peoples of the former Empire to self-determination. See the Response of the Minister of Foreign Affairs Bauer to Chancellor Renner (translation by the author), Telegramm Nr. 86, Staatssekretär für Äußeres Bauer an deutsch-österreichische Friedensdelegation (Saint Germain), in: Koch/ Suppan/ Rauscher, see note 156, 195.

\textsuperscript{160} Treaty of Peace between the Allied and Associated Powers and Austria, (St. Germain-en-Laye, 10 September 1919).

\textsuperscript{161} As quoted by the Austrian Chancellor K. Renner in his telegraph to the Ministry of Foreign Affairs, dated 30 May 1919 (translation by the author), Telegramm Nr. 69, Staatskanzler Renner an Staatsamt für Äußeres, see note 156, 194.

\textsuperscript{162} Speech of the Reporting Member of the Assembly Weiskirchner, Österreichische Parlamentsschriften, Stenographische Protokolle, Erste Republik, Session 2, Sitzungsprotokolle, 872, <http://alex.onb.ac.at/sten_pro_er_fs.htm>.

\textsuperscript{163} A.D. Low, The Anschluss Movement 1918-1919, 1974, 327.
the latter name could reinforce the tendencies for a future “Anschluss” and the creation of an Austro-German union.\textsuperscript{164}

The immediate Austrian response to this position of the Allied Powers was to inform them that “the Republic established in the territories of Austria inhabited by Germans is named, according to its fundamental constitutional laws, German Austria”\textsuperscript{165} and that there could be no change of this appellation without a respective constitutional amendment.\textsuperscript{166} Taking into account the stance of the Allied Powers, and especially France’s, on the issue,\textsuperscript{167} Chancellor Karl Renner went on to suggest the constitutional change of the name.\textsuperscript{168} The response from Vienna to these developments was to reassert its preference for the current constitutional name, stressing that it bears no connection to the issue of a future Austro-German union, and to confine itself to “taking notice” that the allied and associated countries identify the republic with another name than the one that it chose for itself.\textsuperscript{169}

Such appeals for freedom of the new republic to choose its own symbols of sovereignty were however not adopted by the Allies, which insisted on the change of the name. Although there is no special provi-

\begin{flushleft}
\textsuperscript{164} Id.
\textsuperscript{165} Telegramm Nr. 69, Staatskanzler Renner an Staatsamt für Äu ßeres, see note 156, 194.
\textsuperscript{166} Id. International recognition could not suffice, according to the Austrian delegation, for such a change, but with the parliamentary ratification of the Peace treaty this would occur automatically. See also the response of the Minister of Foreign Affairs Bauer to the Chancellor Renner, Telegramm Nr. 86, Staatssekretär für Äußeres Bauer an deutsch-österreichische Friedensdelegation (Saint Germain), in: Koch/ Suppan/ Rauscher, see note 156, 195.
\textsuperscript{167} The French Prime Minister, Georges Clemenceau was reported to reject with a fierce gesture the mistaken reference of a French translator to “L’Autriche Allemande”, speech of the Member of the Assembly Wäber, Österreichische Parlamentschriften, Stenographische Protokolle, Erste Republik, Session 2, Sitzungsprotokolle, 867, see under <http://alex.onb.ac.at/sten_pro_er_fs.htm>.
\textsuperscript{168} Telegramm Nr. 69, Staatskanzler Renner an Staatsamt für Äußeres, see note 156. Renner has also previously suggested the name “Südostdeutschland”, G. Schmitz, Karl Renners Briefe aus Saint Germain und ihre rechtspoli-
\textsuperscript{169} Telegramm Nr. 86, Staatssekretär für Äußeres Bauer an deutsch-österreichische Friedensdelegation (Saint Germain), in: Koch/ Suppan/ Rauscher, see note 156.
\end{flushleft}
sion in the Treaty of St. Germain prohibiting the use of the name “Deutschösterreich”, the preamble of the Treaty states that “[f]rom that moment, and subject to the provisions of the present Treaty, official relation will exist between the Allied and Associated Powers and the Republic of Austria.” The treaty itself bore furthermore the title “Treaty of Peace with Austria” and no reference whatsoever was made to “German Austria.” An explicit prohibition of the union of “Austria” with Germany without the consent of the Council of the League of Nations was also included, regarding the constitutional aspirations to a future “Anschluss”.

Although the new name was understood from some major figures of Austrian politics as an overwhelming dictate of the Peace Treaty or even a hostile appellation, other political powers appeared more open to its use. Ultimately the view prevailed that the peace agreement was establishing a duty to abandon the later appellation and adopt instead the term “Austria”. Regardless of the existence of an international

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170 Article 88 of the Treaty.
171 According to the Minister of Foreign Affairs Otto Bauer, “[d]er Friedensvertrag raubte der Republik selbst ihren Namen. [...] Der Friedensvertrag zwang uns, der Republik den alten Namen Österreich wiederzugeben; der Imperialismus zwang uns den verhaßten Namen auf” (The Peace Treaty robbed the Republic even of its name. [...] The Treaty compelled us to give back the Republic the old name Austria; Imperialism imposed us the hateful name), Bauer, see note 155, 159. Members of this fraction brought moreover the argument that the Treaty of St. Germain did not amount to an international obligation to change the name of the country to “Austria” suggesting that “Autriche” was “only a French translation of Deutschösterreich”, Speech of the Member of the Assembly Waber, see note 167, 867.
172 According to the Member of the Assembly Austerlitz “One is now forced to abandon the name we have chosen for ourselves and to interchange with a name that is alien to us, or even hostile”, Österreichische Parlamentschriften, Stenographische Protokolle, Erste Republik, Session 2, Sitzungsprotokolle, 867, <http://alex.onb.ac.at/sten_pro_er_fs.htm>.
173 Like the Chancellor Renner, see note 153, 767.
174 Speech of the Member of the Assembly Austerlitz, see note 172, 867.
175 Speech of the Member of the Assembly Austerlitz, see note 172, 870. According to the Parliamentary Reporter to the name issue, there was a clear obligation for change in the wording of the preamble of the Treaty and “Austria” was the name that the country should use in the future, Speech of the Reporting Member of the Assembly Weiskirchner, see note 162, 872.
obligation however, and considering the results of the St. German treaty in general, the view was expressed that the name “German Austria” was no longer an accurate identification for the republic.\footnote{176}

For the implementation of the Treaty the “Law for the Form of the State” was enacted,\footnote{177} with article 1 declaring, that “German Austria [Deutschösterreich], in its borders defined by the Treaty of St. Germain, is a democratic Republic under the name “Republic of Austria” [“Republik Österreich”],” and article 2 providing for the change of the appellation “Republik Deutschösterreich” (German Austria) with that of “Republik Österreich” (Republic of Austria) in all the laws referring to the first term.\footnote{178} According to article 3, and to the implementation of the union-prohibition, the provision “German Austria is an integral part of the German Empire” was set out of force.\footnote{179} The only symbol of the period of “Deutschösterreich” that survived this change as a relic was interestingly the song used as the unofficial national anthem of Austria from 1920 to 1929: it continued to praise “German Austria”\footnote{180} in words written by Chancellor Renner himself.

**General Considerations**

The case of Austria offers an example of regulation of the name of a state by means of international law. The appellation of the country was one of the elements of the Austrian constitutional order that needed to be modified in the aftermath of the peace treaty of St. Germain.

The denomination initially employed by Austria had the clear purpose of expressing a connection with the German character of the coun-

\footnote{176} And since “the Germans of Sudetenland were separated by those of the Alps” even a total change to the name “Deutsche Alpenlande” was suggested, Haider, see note 153, 320 at fn. 80.

\footnote{177} Gesetz vom 21 Oktober 1919 über die Staatsform, StGBl. 484/1919, 250, amending the above mentioned 1918 “Law for the Form of the State and Government”.

\footnote{178} Id.

\footnote{179} Id.

try and a disconnection with the formation of the defeated multinational Dual Monarchy. Together with the clauses referring to a future Austro-German union, the name “Deutschösterreich” formed a constitutional framework intended to promote a collective identity where the German element would be critical, if not predominant.\textsuperscript{181} It would be a symbol describing a prevailing understanding regarding the character of the new state. The objections to that symbol were thus not referring to the danger of its monopolisation and were not raised by entities claiming its use. Such contestation was rather directed to the incorporation of both the German connotations that the word was called to employ: the claim of the territories of the former Empire with German majorities, ultimately included in the Slavic states of the region, and the desire for an Austro-German union. As these symbolic meanings were unwanted by the victorious Allies, they insisted on a denomination that would not include the Germanic connotations. The abandonment of the latter was considered to be a necessary safety for the post World War I arrangements in Central Europe, a view that stresses the importance of state symbols in a context much broader than that of protocol and nomenclature. From an internal perspective, the actual results of this change to the evolution of the Austrian identity are an issue that cannot be investigated here.

\section{IV. International Regulation of State Symbols}

\subsection{1. International Law Principles and Concepts}

As it has been clear from the cases discussed above, there are neither special rules regarding state symbols nor a single body dealing with claims or objections on the issue. Nevertheless, general international

law concepts and international institutions may play an important role in the settlement of the relevant disputes.

The absence of international rules on state symbols is more interesting if compared with the status of symbols representing an economic value. Trademark law regulates the use of symbolisms at the domestic and international level in significant detail. Misappropriations of symbols and misnomers regarding the source of a product are thus extensively addressed by means of law and there are also rules governing the use of geographical symbols in trade contexts (geographical indications).\(^{182}\) When it comes to the symbolic representation of states, however, no similar regulation exists.\(^{183}\) Aspects of a naming dispute could, however, be connected to some general concepts of international law.

### a. Statehood and Recognition

While a potential change of denomination does not affect the statehood of an entity or its international rights and obligations,\(^{184}\) considerations over appellations have come to play an important role at the stage of international recognition. This was true for the recognition of Austria as a party to the peace negotiations after World War I but gained a wholly new dimension in the case of the “fY Republic of Macedonia”.

Regarding the connection of statehood to recognition, there is here no need to go into detail regarding the classical distinction between the nature of state recognition as declaratory or constitutive for the international legal personality of a state.\(^{185}\) In any case, in the example of the “fY Republic of Macedonia” the state denomination was widely utilised as a relevant criterion.

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\(^{182}\) See for example article 22 (1) and (2) of the TRIPS Agreement, providing for the duty of the WTO Members to provide interested parties with the legal means necessary to prevent “the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good”.

\(^{183}\) Froomkin, see note 38, 845.


International recognition by the European Communities and a great part of the international community was thus withheld for a period of at least fifteen months\textsuperscript{186} although the new republic clearly fulfilled\textsuperscript{187} the so-called effectiveness criteria for statehood,\textsuperscript{188} namely permanent population, defined territory, effective government and independence.\textsuperscript{189} Moreover, even if it is accepted that the conditions of recognition are not confined to those referring to the effectiveness of an entity but also include the respect of core elements of international law,\textsuperscript{190} there was no infringement of those norms that are usually elevated by practice and theory of criteria of international personality.\textsuperscript{191} Nevertheless, the recognition by the EC of the “FY Republic of Macedonia”, together with that of all other former Yugoslav states, was subjected to a rather unique coordinated mechanism\textsuperscript{192} based on a broad spectrum of substantive conditions beyond those described above.\textsuperscript{193} The assessment of the fulfilment of these requirements, ranging from minority to democracy questions, was referred to an Arbitration Commission. To these general conditions, an additional criterion was subsequently added, namely “the adoption of constitutional and political guarantees ensuring that it has no territorial claims towards a neighbouring Community State and that [the applicant] will conduct no

\textsuperscript{186} From January 1992, when the country withdrew its members from the Yugoslav parliament and the agreement for the withdrawal of the Yugoslav National Army in April 1993, when it was admitted to the UN.

\textsuperscript{187} That was also the opinion No. 11 of the Badinter EC Arbitration Commission.

\textsuperscript{188} Crawford, see note 185, 45.

\textsuperscript{189} M.C.R Craven, “What’s in a Name? The Former Yugoslav Republic of Macedonia and Issues of Statehood”, Australian Yearbook of International Law 16 (1993), 199 et seq. (212). For the requirements of statehood connected with effectiveness see article 1 of the Convention on the Rights and Duties of States, Montevideo, 26 December 1933, 165 LNTS 19; Crawford, see note 185, 45 et seq.

\textsuperscript{190} See Crawford, note 185, 97 et seq.

\textsuperscript{191} As for example the creation of the entity in violation of the prohibition of the non-use of force or the principle of self-determination, Craven, see note 189, 211.

\textsuperscript{192} See T. Grant, The Recognition of States, 1999, 156 et seq.

\textsuperscript{193} Referring to minority, democracy and non-proliferation standards, Declaration on the ‘Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union’ (16 December 1991), reproduced in Türk, see note 50, 72.
hostile propaganda activities versus a neighbouring Community State, including the use of a denomination which implies territorial claims.\footnote{194} By that, a state appellation, connected with potential territorial implications, was effectively raised to a consideration relevant to the recognition of statehood. These concerns were moreover not allayed by the introduction by the applicant of substantial constitutional amendments renouncing all territorial claims.

The effective infusion of considerations relevant for the representation of an entity in the concept of recognition has been a rather new development. It is nevertheless in line with the general approach to infuse to the concept of state recognition substantive assessments beyond effectiveness. The effect that such an approach may have for the functionality of the international law concept of recognition is rather unclear.\footnote{195} Although the statehood of "Y Republic of Macedonia" was not in doubt,\footnote{196} its admission to international intercourse on many occasions took into account the appellation it used,\footnote{197} as a constitutional arrangement of broader interest for the international community. The now prevailing usage of the constitutional name reassures that the initial withholding of recognition was not based on any kind of statehood considerations, but policy assessments that connected the issue with peace and security questions.

\footnote{194}{Declaration on Yugoslavia (Extraordinary EPC Ministerial Meeting, Brussels, 16 December 1991), reproduced in Türk, see note 50, 73.}

\footnote{195}{Critical, Craven, see note 189, 216, 218. The introduction of such requirement may have effects on the statehood of an entity depending on the choice between the declaratory or constitutive theory of recognition. It should be mentioned, however, that the requirement of a constitutional amendment as to allay concerns related to territorial claims, did not amount to derogation from the "Y Republic of Macedonia's" formal independence, as a requirement for its statehood, Crawford, see note 185, 68.}

\footnote{196}{Crawford, see note 185, 95.}

\footnote{197}{Un Certain in the particular case is also the importance of expression by the UN Security Council of the hope “that […] all others concerned, will avoid taking steps that would render a solution more difficult” regarding the subsequent recognition of the “Y Republic of Macedonia” under its constitutional name, pending the settlement of the dispute. See the Statement by the President of the Security Council, Doc. S/25545 of 7 April 1993; Zaikos, “Onomatodosia and FYROM”, in: I. Stefanides/ V. Vlassides/ E. Kofos (eds.), Macedonian Identities in Time [in Greek], 516 et seq. (533).}
b. Self-Determination

Self-determination is a concept of international law mainly concerned with the claim of a people to self-governance.\(^{198}\) Being an extremely uncertain subject in itself, the right to self-determination is connected with the choice of state symbols in an indirect way: at issue here is not the right of a people “freely to determine, without external interference, [its] political status”\(^{199}\) as such, but the means it chooses for its representation.\(^{200}\) As the examples of Macedonia, Ireland and Austria show, the states opposing the use of the particular symbols did not contest the fact that the respective citizenry constituted a “people” or its right to form an independent state. Under dispute was rather the appellation that the people and its political formation would use.

Nevertheless, the choice of the symbols of representation is closely connected with the right to self-determination, as one of the most fundamental dimensions of the latter is indeed the freedom of self-representation.\(^{201}\) The main issue arises here from the critical problem of defining the legitimate limits of the group (the “self”) entitled to self-determination, which is also apparent in the area of self-representation.

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199 “And to pursue [its] economic, social and cultural development”, according to the 5th Principle of the so-called Friendly Relations Declaration of the UN General Assembly, containing the most authoritative elaboration of the right to self-determination - Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, A/RES/2625 (XXV) of 24 October 1970.

200 Although this seems to be an often made misunderstanding, see for example Craven, see note 189, 200.

Conceptually, the entitlement to self-determination presupposes the definition of an authentic community\textsuperscript{202} that comprises some people and extends over a certain territory. These elements form the limits of the entitlement: if the emerging political formation claims to incorporate people that are “other” (i.e. they form another “self”), it usurps their own, distinctive right to self-determination. In the same way that it would be an abuse of the right to self-determination to include in the new formation people not belonging to the community, it seems unjustified to occupy a symbol that extends beyond the said community. Both could be described as cases of misappropriation, of a territory or a symbol respectively. The inclusion of a part of an alien ethnical group in a state emerging on the basis of self-determination would infringe the right of this “other” group of its own self-determination. Likewise, the state use of a symbol that has already a meaning and value for an “other” group could evolve its meaning or de facto monopolise it – and thus affect the representation of this “other” group.

The problem of identifying what constitutes a “self-determination unit”\textsuperscript{203} for the purposes of international law has been indeed a notorious one. To determine who is the holder of the respective right, has to face the difficulty of setting the boundaries of a particular “self” against an “other”.\textsuperscript{204} Regardless of how insuperable these difficulties might seem, however, if the resort to the concept of self-determination is to have any meaning, the ascription of some intersubjective dimension to the “self” is inevitable. This conceptual necessity was addressed for the purposes of state delimitation in the recourse to linguistic, historical and other criteria as well as referenda. What are exactly the proper conditions for the purposes of self-representation, is apparently equally problematic.\textsuperscript{205} In any case, what is important is to stress that if a right to self-representation might be derived from the concept of self-determination, they both share the same limits. One is entitled to represent himself in the way he chooses but to the extent he does not interfere with the legitimate interests of others.

The general principle behind this assertion is easily discernible in other fields of law. At the most basic level, the right to self-representation, as an expression of the right to self-determination, in-

\textsuperscript{202} Koskenniemi, see note 198, 564.
\textsuperscript{203} Id., 260.
\textsuperscript{204} Id., 264.
\textsuperscript{205} Historical analysis and the views of different groups would also here be the most obvious candidates.
cludes the right of oneself to choose (or change) one’s name or other means of personal representation. This does not amount, however, to a right to present oneself as another person with the intent (or the effect) to create confusion about one’s actual identity. Rules exist to protect against the usurpation of symbolic meanings or falsified forms of “self”-representation. Beyond general public policy considerations, the right of other persons to represent themselves without the danger of confusion is thus hereby protected. In short the right to self-representation, as a correlate of the right to self-determination, meets its limits where the chosen means amount to misnomer, one type of which is the *pars pro toto* fallacy. All these considerations, however, are not sufficient to answer why the choice of a particular denomination can be of such an importance as to significantly affect the right to self-representation of other groups. This will be investigated in the following.

c. Naming a State as Exercise of Power

The recourse to state symbols as a means of promoting political unity, loyalty and solidarity beyond consensus is a practice as long as the creation of political communities itself. As indicated by the practical examples offered above, particular symbols have been employed for a variety of purposes, ranging from the promotion of ethnical cohesion and political influence to the expression of territorial claims. The importance of such decisions in the international framework cannot be overestimated. To restrict the significance of state denomination to a rudimentary.

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206 As the security of transactions.

207 In the same token, the manufacturer of a product is free to choose the label of his product. This right is circumscribed, however, by rules protecting trademarks and geographical indications. For an approach of the question of state names through the trade mark analogy and the concept of historic title, see I. Bantekas, “The Authority of States to use Names in International Law and the Macedonian Affair: Unilateral Entitlements, Historic Title, and Trademark Analogies”, *LIIL* 22 (2009), 563 et seq.

208 Where a part of an object or concept is used as to represent the entire object or concept. In this context for example the state of Ireland, bears the name of the whole of the island although it is a part of it.


210 See the example of the use of the colours red and white in Poland, S. Harrison, “Ritual as Intellectual Property”, *Man* 27 (1991), 225 et seq. (236).
mentary aspect of self-representation does not do justice to its function in the international scene. Far from being only a question of self-ascription, the choice of a state name can have effects extending beyond its own boundaries.

Much more difficult to conceptualise than other potential threats to international peace and justice, the exercise of this form of “symbolic power” can be approached, however, using insights from research in other social contexts.\(^{211}\) In the words of Pierre Bourdieu, one of the most influential theorists on the issue, “[b]y structuring the perception which social agents have of the social world, the act of naming helps to establish the structure of the world, and does so all the more significantly, the more widely it is recognized, i.e. authorized.”\(^{212}\) If this is true for social agents in general, it is even more so for states, which endow their name and its derivatives with the highest authority possible in an international community primarily organized along state lines.

Given this understanding, the choice of a state denomination should be regarded as an authoritative decision, not only from an internal perspective, but also \emph{vis-à-vis} other international actors. In an international order organised on the basis of the state paradigm, the authority to name its constituent parts can have an effect on the understanding of the structure itself. Turning to the conflict potential of the exercise of such power, international disputes over state symbols in particular names are in parallel with the fights of social groups over the right to control the naming process in social contexts. The latter offer again a good example of the importance of symbolic conflicts.\(^ {213}\) Important as the choice of such an appellation might be, it is usually unproblematic. Controversies usually arise when other international actors claim some interest in the symbolic content of the term before its use as state symbol. It is true that states generally resort to symbols that are already in use and bear a particular symbolic meaning, rather than inventing totally new ones.\(^ {214}\) Geographical or ethnological symbols, like “Mace-
“Ireland” or “Deutsch”, have been thus employed as to convey their symbolic meaning to the political formation choosing them.

Problems arise when the attachment of this pre-existing symbolism to a particular political formation is contestable. In such cases, actors that claim an affiliation to this symbolism (in its pre-state use), but do not intend to be included in the new political formation may contest its use. This contestation takes the form of a claim of misappropriation of the old symbolism and misnomer regarding its new use. The parties thus engage in a “proprietary contest”215 over the use of symbols in which both recognise some value.216 The essence of this dispute usually lies in the fact that the several meanings of a word used as state name stand in a relationship pars pro toto, i.e. there is a divergence between the meanings a symbol has before its use as state name and what it is called to represent after this use. The greater this divergence is, the more interests it can potentially affect and the more likely international tension is. In short, the existence of a relationship pars pro toto between the meaning of a term as state name and the meanings beyond this use, is understood by the parties that have an interest in this “over-state meaning” but are excluded from the “state symbolism” as misnomer. The resort to such a potential misnomer, however, is usually not accidental or indifferent: by implying through their name an attachment to some broader symbolical content (be it a geographic region or of historical-identity nature), states may establish an indirect but effective claim to it.

In the case of Macedonia for example, the term used as a state name seems to drastically diverge from both the pre-state symbolic meanings of the term, namely its geographical and historical dimensions. For the actors that have an interest in these latter meanings, like states sharing that geographic region or having an identity affiliation with the historical connotation, this state denomination qualifies as misappropriation and misnomer. Aspects of the Irish dispute can also be understood in the same way, as the state appellation “Ireland” diverged from the geographical meaning of the term; however, no such a divergence seems to be significant here regarding the historical-identity connotations. Tension was also created by the pars pro toto use of the unqualified term “Ireland” in the title of the United Kingdom even after the creation of two countries which formed in 1964 the new state of the “United Republic of Tanzania”.

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216 Id.
an Irish state. In the Austrian example, peace and security consideration seem to have prevailed, rather than arguments over competing claims on the meaning of the term. The exercise of symbolic power was contested here because it was understood as undermining the post World War I security arrangements.

2. International Fora and the Regulation of State Symbols

In the case of state symbols something similar to an “international registry” does not exist. Sometimes, however, respective issues are manifested as questions of participation in international organisations, and more prominently the United Nations. Other facets include the regulation of internet domain names (the well known two last letters of an internet address) and the role of non-governmental organisations dealing with international standardisation (ISO).

a. United Nations

Although there is nothing like an official universal list of state names,217 the first place for somebody to look for the international use of a state denomination is the United Nations. The name of the state might become of relevance mainly at two stages, during the admission of a state as new member of the United Nations and later on for terminological purposes of the UN administration.

As the example of the “fY Republic of Macedonia” vividly displays, the admission to the United Nations can be a crucial point for raising objections against a state appellation. In this case, as described above, the Security Council connected the issue with the interest of maintaining peace and good neighbourly relations in the region,218 suggested the admission with a “provisional reference” and urged the parties to continue negotiations. An issue that arose regarding this suggestion (and the subsequent decision of the General Assembly) is whether the acceptance of the provisional reference and the call for negotiations amount

217 Froomkin, see note 38, 846.
218 S/RES/817, see note 59.
to additional admission requirements beyond those exhaustively²¹⁹ laid down in Article 4 (1) of the UN Charter.²²⁰

Although it is not clear whether or not the acceptance of a provisional reference amounts to the imposition of an additional requirement,²²¹ the fact that the “fY Republic of Macedonia” indeed fully acquiesced to the use of the provisional reference, is not by itself enough to disqualify the nature of the provisional reference as such:²²² the characteristic of a prerequisite is not its fulfilment against consent, but rather its indispensability for the advent of another, distinct event which is the ultimate aim of the actor. The practical importance of this discussion lies in the fact that, according to the ICJ, the enumeration of criteria for admission in the UN Charter is exhaustive:²²³ That would make the imposition of an additional membership requirement a violation of the UN Charter.

According to the Security Council and the General Assembly, which ultimately endorsed the membership application, the existence of the naming dispute did not affect the admission criterion of the “willingness or ability of the applicant to carry out the obligations of the Charter.”²²⁴ The explicit connection drawn by the Security Council between the name dispute and the interest of maintaining peace²²⁵ was rather referring to the use of the contested, unqualified term “Macedonia” for

²¹⁹ Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), ICJ Reports 1948, 57 et seq. (62).

²²⁰ According to which “Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations”.


²²² Wood seems to be of this opinion, see note 35, para. 32.

²²³ Conditions of Admission of a State to Membership in the United Nations, see note 219, 62.

²²⁴ Since, as suggested by the Security Council, the applicant did fulfil “the criteria for membership in the United Nations laid down in Article 4 of the Charter”, S/RES/817, see note 59.

²²⁵ “Noting however that a difference has arisen over the name of the State, which needs to be resolved in the interest of the maintenance of peaceful and good-neighbourly relations in the region”, id.
UN purposes. The acceptance of the provisional reference seems thus to have been understood as adjacent to the duty of the UN Member States to maintain peaceful relations with each other. In this sense, the use of the reference “the former Yugoslav Republic of Macedonia” until the settlement of the dispute, was and still is regarded by the Security Council as a particular aspect of the general duty of all members to abide by the Charter obligations in the interest of maintaining international peace.\textsuperscript{226} Given this understanding, the acceptance of the provisional reference is indeed a condition for the admission of the new republic, but not an additional one: it could be rather subsumed under the general requirements of “peace-lovingness” and the “willingness to carry out the obligations of the Charter”. The same can be said regarding the obligation to continue negotiations over the name issue – with the difference that the text of the General Assembly Resolution, unlike the Security Council suggestion, is not drafted as to imply a self-standing obligation,\textsuperscript{227} but rather a temporal qualification: as long as no agreed solution is to be found, the provisional reference “fYROM” will be used for UN purposes.

In any case, what the result of the UN admission process revealed is that the choice of a state symbol, and in particular the name of a state, can be regarded as having an importance beyond the party choosing it. This significance can moreover affect the decision of the Security Council in respect of its admission to the United Nations. A similar vein could be recognised in the assessments leading to the name reference of Austria in the conclusion of the Treaty of St. Germain. Also in this case, peace considerations affected the decision of the proper denomination of one of the concluding parties. Both can be regarded as examples where the freedom of a state to choose its own symbols of representation was circumscribed by the need to secure international peace and security.

Furthermore, and beyond the stage of admission, a state denomination can be of importance for the purposes of UN nomenclature. This

\textsuperscript{226} For this reason it cannot be said that “fYROM's status” within the UN “is obviously different from that of other Member states”, I. Janev, “Some Remarks on Macedonia’s Legal Status in the United Nations”, \textit{Review of International Affairs} 1108 (2002), 33 et seq. (34).

\textsuperscript{227} Also Janev, \textit{AJIL}, see note 221, 155.
mainly concerns instances of name change, a practice that is not as rare as it might sound.\textsuperscript{228}

In this context, it should be briefly noticed that the current “authority” in respect of country names in the official languages of the United Nations is the UN Terminology Section.\textsuperscript{229} It maintains UNTERM,\textsuperscript{230} a multilingual terminology database which provides UN nomenclature technical or specialised terms and common phrases in all official UN languages and is the successor to UN Terminology Bulletin No. 347/Rev. 1.\textsuperscript{231} The UN Conferences on the Standardization of Geographical Names have also established an expert working group on country names under the UN Group of Experts on Geographical Names which in 2007 submitted a full list of official country names, as used both for domestic and UN purposes.\textsuperscript{232} The UN Statistics Division is lastly a common reference for state names, which itself still refers, however, to the Terminology Bulletin No. 347/Rev.1, now probably the work of UNTERM.\textsuperscript{233}

Interestingly however, the authoritative list of country names used by UNTERM\textsuperscript{234} is connected to the work of the International Organization for Standardization (ISO), a non-governmental organisation being briefly presented below.

\textsuperscript{228} See for example the changes of the name of Venezuela to “the Bolivarian Republic of Venezuela” and Bolivia to “the Plurinational State of Bolivia”, <http://www.iso.org/iso/country_codes/updates_on_iso_3166.htm>.
\textsuperscript{230} The full title of which is: Terminology Team of the Terminology and Reference Section, Documentation Division of the Department for General Assembly and Conference Management.
\textsuperscript{231} United Nations Multilingual Terminology Database.
\textsuperscript{234} <http://unstats.un.org/unsd/methods/m49/m49.htm>.
\textsuperscript{235} To the same catalogue refers also the United Nations Statistics Division, <http://unstats.un.org/unsd/methods/m49/m49.htm>.
b. ISO

ISO is a Geneva-based international organisation that has proved extremely successful in promulgating technical standards. One of these standards is ISO-3166, establishing codes for the representation of names of countries, territories or areas of geographical interest, and their subdivisions. ISO-3166 is divided in three parts, the most important one being ISO-3166-1, referring to codes for the representation of names of countries and their subdivisions. The latter standard has become globally accepted as the point of reference regarding the well-known two- and three-letter country codes but also the official appellation of countries. International organizations like WIPO or IAEA and a great number of private entities resort to ISO-3166 for practical purposes of state reference. The relevant standards are maintained by the ISO 3166 Maintenance Agency, an ISO body composed of ten members with voting rights, serving in their capacity as experts. Half of them come from the national standard organisations of five countries (France, United States, United Kingdom, Germany and Sweden) and the other five are representatives of major UN or other international organisations.

ISO is in close cooperation with the UN in defining the codes it promulgates and refers to the UN Statistics Division and the United Nations Economic Commission for Europe (UNECE).

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236 According to the ISO itself, ISO has developed over 18000 International Standards on a variety of subjects and some 1100 new ISO standards are published every year, see <http://www.iso.org/iso/iso_catalogue.htm>.


239 These are respectively, the Association française de normalization (AFNOR), the American National Standards Institute (ANSI), the British Standards Institution (BSI), the Deutsches Institut für Normung (DIN) and the Swedish Standards Institute (SIS), <http://www.iso.org/iso/country_codes/background_on_iso_3166/members_of_iso_3166_ma.htm>.

240 Namely IAEA, International Telecommunication Union (ITU), Internet Corporation for Assigned Names and Numbers (ICANN), UPU, United Nations Economic Commission for Europe (UNECE), id.
V. Conclusions

The naming process carries great potential. By using a term to identify something for the first time, the symbolic meanings that this term already has are decisively connected with the named object. The attributes that came to be connected with this word through its use, are now linked to the new name bearer. Naming can thus have a major impact on the understanding of the characteristics of the named entity itself; a same or similar name effectively implies identity or similarity of characteristics between the objects with the same or similar name.

This article has tried to show the importance of this process at the state level. Conscious of this importance and the potential of the naming process, states have traditionally resorted to symbols already connected with attributes they valued and wanted to be linked with. Naming played, in this sense, the role of a linkage to some pre-existing meaning. This could be a geographical meaning, a national one or sometimes both; by the respective choice, a state connects itself with a geographical area or a national identity. This connection is hardly a random one. The name chosen by a state very often reflects political aspirations, which sometimes are constitutionally embedded, and in any case are an indispensable element of nation building.

In connection with these considerations, international friction can be caused by a name that gives grounds to allegations of misappropriation. What can be misappropriated with the use of the name becomes clearer, if its potential is looked into: misappropriated can be the connection with the attributes and qualities that a word has come to express through its use. If the characteristics of a state (like its territorial reach) significantly diverge from this “pre-state” meaning of the word, other parties that have an interest in the latter symbolism might contest its use as state denomination. This contestation can sometimes be very

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241 Meaning probably the UN Terminology Bulletin No. 347/Rev. 1, and its current successor, the UNTERM list, see above under IV. 2. a.
persistent, because in a world organised along territorial lines the possibility exists that other meanings are subsumed under the state use. The latter can absorb other facets of a term and reintroduce them under a new perspective. For example the adjective “Macedonian”, although bearing an immense variety of pre-state meanings (geographical, historical and ethnical, as shown above), becomes gradually and de facto monopolised by the state using it as its denomination. Geographical areas that were previously identified by the sole word “Macedonia” (like the broad geographical region in the Balkans), are now connected with the homogenous state. Similarly, cultural identities, influenced to a very great extent by historical references, can hardly be represented as “Macedonian” without being associated with the ethnical characteristics of the same state.

The potential of naming and its actual employment by states has not attracted a set of special rules or a central instance dealing with the relevant controversies. Nevertheless, the historic examples offered above show that, in cases where the conflict potential of the naming process materialised, symbolic representation was elevated to an international issue. It went beyond the realm of domestic interest and was addressed as something beyond the sole disposal of the named entity.

Although no special rules or a “central register” for state names exist, an international law approach of the issue can offer invaluable insights and inform normative arguments. The introduction of assessments of symbolic representation in the question of recognition reinforces old uncertainties and poses new questions about its proper function in this context. The concept of self-determination on the other hand, provides a solid basis for the right of each state to choose its own symbols of representation. At the same time, however, it also offers an understanding of its limits. The conceptual boundaries of self-representation seem clearer here: the utilisation of symbols with a pre-existing content must take into account this content and the interests af-

244 It could be accepted that “Macedonian” is currently used as a derivative of the word Macedonia with a meaning broader than an identifier of a national identity. If the term “Macedonian” had already evolved to an attribute of nationality, no further ethnic qualifiers would be necessary for such a use. Nevertheless, current discourse in international context refers to ethnicities in the geographical area of Macedonia using ethnic prefixes: even texts representing the views of the “FY Republic of Macedonia” refer to “Greek-Macedonians” in order to describe persons of Greek ethnicity but living in broader Macedonia, see e.g. Institute for Democracy “Societas Civilis”, Flawed Arguments and Omitted Truths, 2009, 6.
filiated to it. The use of a name in order to assert the qualities of this pre-existing content can have repercussions beyond self-representation.

Symbols do not exist in a vacuum. Their value is their connection with some attribute. Even the word symbol itself, referring to the production of two halves of a token used as a shared mark of identification, reveals its role as identifier of a link. The distortion of this correspondence through a new use of a symbol by an actor with a great factual capacity to occupy its use, as is the case with states, might have international repercussions which cannot be ignored.

245 “Conversely, this token served to differentiate them from other people who had no such proof”, R. Firth, Symbols, Public and Private, 1973, 47. The word symbol comes from the Greek σύμβολον.
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Chairs of the project are Prof. Rüdiger Wolfrum and Prof. María Teresa Infante Caffi.
Application of the Precautionary Principle in the SPS Agreement

University of Heidelberg, Max Planck Institute for Comparative Public Law and International Law and the University of Chile, March 2009

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Introduction

The application of the precautionary principle is a controversial issue in the field of international trade law. The principle has a significant role in striking a balance between international trade liberalisation and public health protection. In the past, the application of the principle was addressed in a comprehensive manner. There was no instrument which specifically endorsed the precautionary principle in the area of public health protection, until the concept was embraced into the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) as a result of the Uruguay Round Negotiations. The role of the principle is thus more apparent in the context of international trade, but even this configuration is still left unclear.

This thesis aims at addressing this problem. In doing so, it begins to characterise the precautionary principle in Part I., as basic notions of the precautionary principle are controversial. Without beginning with this, it would be difficult to advance on other problematic issues. Part II. will provide an analytical approach of the precautionary principle, which is the main topic for discussion amongst stakeholders. A restrictive version of the principle is supported by the Appellate Body. Its extensive version is not disregarded, as it is also considered thoughtful and deserves to be evaluated accordingly. For this thesis, the problem of how far the precautionary principle could be applicable is to be assessed along with the question of what is the yardstick which could feasibly provide the scope of the precautionary principle.

Application of the precautionary principle in the WTO context is subject to the methodology of public international law. It would not make sense to interpret the principle in technical isolation, rather than as an integral part of public international law, as once addressed by the

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4 Prévost, see note 3, 1 et seq.

Appellate Body in the *US-Gasoline* case.\(^6\) Therefore Part III. will demonstrate the relationship between the precautionary principle and relevant rules of public international law. Afterwards Part IV. will discuss significant procedural issues. Part V. will focus on issues concerning developing countries, as legal specialities appear to exist here.

I. Preliminary Issues

1. Historical Background

Although there a number of international instruments, which already existed in the early 1900s and would also accommodate the precautionary principle due to their language, for instance, the International Convention for the Abolition of Import and Export Prohibitions and Restrictions from 1927, surprisingly the precautionary principle was not invoked to justify trade restrictive measures authorised by relevant provisions thereof. Abstinence from imposing precautionary measures may result from the level of biological technology, which was not as developed as nowadays. Since imposition of precautionary measures deals directly with scientific matters, undoubtedly science has played a significant role in this area, as evidenced in legal texts in both domestic and international legal systems which have recognised this concept.

The concept of precaution did not, *per se*, originate in the international platform, but was pioneered in German national environmental law during the 1970s and 1980s, known as “Principle of Precautionary Action” or “Vorsorgeprinzip”. In the international legal context, it was partly included into the Preamble of the 1984 Bremen Ministerial Declaration of the International Conference on the Protection of the North Sea which provided that states “must not wait for proof of harmful effects before taking action”. The language, as written in the context of this Declaration, did not adequately emphasise the concept, until the release of the 1987 London Ministerial Declaration which clearly embraced the principle of precautionary action, thanks to the insistency by the Federal Republic of Germany. This explicit inclusion has made the principle obtain a clear standing in international law.

Afterwards, the concept became clearly prominent due to the UN Conference on Environment and Development in Rio de Janeiro in

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1992. The precautionary principle was embodied in Principle 15 of the Rio Declaration, in the following terms:

“In order to protect the environment, the precautionary approach should be widely applied by States according to their capabilities. Where there are threats of serious and irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

Since the Rio Declaration, the precautionary principle has been developed in several international conventions on the protection of the environment. For instance, the Preamble of the Convention on Biological Diversity, article 3 of the Framework Convention on Climate Change, article 2 (2)(a) of the Convention for the Protection of the Marine Environment of the North-East Atlantic. At this point, the principle was widespread in specific areas of environmental law. However the principle still lacked formulation in the area of public health especially in relation to international trade. Article XX (b) of GATT 1947 was insufficient to fulfil urgent needs of health protection when trade became trans-boundary.\(^7\) In the Uruguay Round of Ministerial Trade Negotiations, the topic was intensively discussed, resulting in the conclusion of the SPS Agreement.

Generally speaking, the precautionary principle was reflected in article 5.7 of the SPS Agreement,\(^8\) which allows Member States to provisionally impose precautionary measures in case of scientific uncertainty. Within the language of the SPS Agreement, the precautionary principle is considered merely as a part of the risk management and only allows

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\(^7\) Article XX (b) does not accommodate the precautionary principle, as clarified by the Appellate Body in the EC-Asbestos case. This case states that the particular exception contained in Article XX (b) of GATT demands sufficient evidence for the existence of a risk, thus excluding the application of the precautionary principle, which only applied in cases where there is scientific uncertainty. Furthermore, the examination of whether the measure in question is “necessary” to protect human health under this particular exception is essentially influenced by the principle of proportionality, Appellate Body Report, EC-Asbestos case, Doc. WT/DS135/AB/R, para. 167; P. Stoll/ L. Strack, “Article XX lit. b”, in: R. Wolfrum, WTO-Technical Barriers and SPS Measures, 2007, 106 et seq.; H. Priess, “Protection of Public Health and the Role of the Precautionary Principle under WTO Law: A Trojan Horse before Geneva’s Walls?”, Fordham Int’l L. J. 24 (2000), 519 et seq. (552).

precautionary measures for a temporary period. In the *EC-Hormones* case, the EC contended that the principle shall not be constrained as such, but rather be broadly applied also in risk assessment and thus can justify the adoption of non-provisional measures. Such non-compliance of the EC is significant in the development process of the SPS regime, since it does not represent a challenge of discipline, but rather insistency of thoughtful interpretation of the precautionary principle in the SPS context.

2. Definition of the Precautionary Principle

Despite the impressive number of both hortatory and binding international documents endorsing the precautionary principle, a precise definition of the precautionary principle does not exist therein. However, a definition has been proposed by Bohannes which reads:

“Generally speaking, the principle is advanced to help public authorities to make decisions in situations where claims of hazard are uncertain and decision-makers face the dilemma either to take immediate protective action or delay such action until scientific uncertainty concerning these hazards is eliminated or reduced. In these situations widespread public concerns about potential hazards often add to the pressure decision-makers face.”

The essence of the precautionary principle is that positive action, for example, a ban on certain activities in order to protect the environment or public health, may be required before the existence of a risk is scientifically established. The principle therefore accommodates the public authorities to legitimately impose precautionary measures in response to the situation.

However, it is stated that, with regard to SPS matters, there are a number of things that make us cautious. Routinely consumed food and beverages may contain substances which are significant factors for various kinds of diseases. Some kinds of seafood, especially scallops and squids, contain high proportions of cholesterol which could cause high blood pressure. French Fries, when fried at a very high temperature, generate acryl amide resulting in cancer. It is accepted that alcohol

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9 Ibid., para. 16.
10 Bohannes, see note 5, 331.
11 Available at <http://www.doctor.or.th/node/1926>.
causes various effects on brain, liver, etc. Does the precautionary principle has to deal with these problems?

This thesis finds that these problems are irrelevant to the application of the precautionary principle with regard to the SPS Agreement. Undeniably what we consume everyday may contain hazardous substances but anxiety caused by this is the result of consumer behaviour and decisions, rather than substances in the foods and beverages or their manufacturing process. People have studied at school that these food stuffs, if consumed too much, can cause illness. Scallops and squid cannot cause adverse effect if we eat them in moderation. Likewise with alcohol consumption. This thesis observes that anxiety about these circumstances is significantly provoked by behaviours and decisions of consumers, rather than substances of foodstuffs or their manufacturing processes.

In other words, the precautionary principle, in the SPS context, is to be considered as concerned with characteristics of organisms contained in beverages and foodstuffs, as the subject of the SPS Agreement according to Annex A.1. Risk assessment and risk management are determined under this Agreement to cope with these issues. Genetically modified food is definitely the object of the SPS Agreement. At this point, this thesis characterises the precautionary principle under the SPS Agreement as the principle dealing with circumstances where anxiety exclusively falls upon organisms or substances contained in/attached to an object at hand or its manufacturing process. Behaviours of consumers are outside the application of the SPS precautionary principle. Before making further analysis of the precautionary principle in the next part, it is important to recognise differences between the precautionary principle and the prevention principle. Differences between both doctrines have been observed by Jonas which reads:

"On sait que le principe de précaution se distingue de la prévention en ce qu’il tend à anticiper des risques simplement soupçonnés comme les risques résiduels ou reportés; ou totalement inconnus, comme les risques de développement, alors que le principe de prévention vise à empêcher les conséquences dommageables de risques connus, dont la survenance peut faire l’objet d’un calcul de probabilités et qui tombent pour cette raison dans le champ de l’assurance."

His remark clarifies that the prevention principle contributes to protect damageable consequences of “known risks”, whereas the precautionary principle deals with “suspected risks, which could be totally unknown. The prevention principle is also reflected in the SPS Agreement, even more than the precautionary principle. However this thesis will focus on the precautionary principle, not the prevention principle.

3. Status of the Precautionary Principle

The status of the precautionary principle is a controversial issue as evidenced in the EC-Hormones case. The precautionary principle, in the view of the EC, has become a “general customary rule of international law” or at least a “general principle of law” and thus shall apply not only in risk management, but also in risk assessment. The argument was rebutted by the United States and Canada which share the common perspectives that the precautionary principle is not even a legal principle, but rather the so-called “precautionary approach”, which is reflected in article 5.7. However, the Appellate Body has made an important statement on this issue which reads:

“The precautionary principle is regarded by some as having crystallised into a general principle of customary international environmental law. Whether it has been widely accepted by Members as a principle of general or customary international law appears less than clear. ... We note that the Panel itself did not make any definitive finding with regard to the status of the precautionary principle in international law and that the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation.”

Argumentation on the precautionary principle of each side reflects that the discussion was taken merely on the status of the precautionary principle under general international environmental law, without considering that the objects of protection under the SPS Agreement consist of three main things, namely human beings, animals and plants, each of

13 The case of melamine in China is an example of the application of the prevention principle in the area of public health, since risk of melamine contamination is evidently known.
14 EC-Hormones case, see note 8.
15 Ibid., paras 43 and 60.
which deserves a different level of protection. Definitely the priority shall go to the protection of human health and life. The main problem in this case is relevant to the issue of public (human) health. Surprisingly, the arguments of both sides were mixed in the topic of “general international environmental law”. If the status of the precautionary principle would be distinctly analysed with regard to the nature of public (human) health, a profound consideration would have been taken.

The precautionary principle in relation to the protection of health and life of human beings shall be carefully distinguished from “the protection of health and life of animals and plants”. When the precautionary principle is discussed in the context of general international environmental law, it appears that the controversy has not been settled, even though the precautionary principle is considered supplementary to the environmental legal context and is regularly advocated. Specifically, in the area of public health, the precautionary principle is not just a supplementary, but also a vital and inevitable tool which helps to prevent human beings from possible hazards. Due to the endless advancement of biotechnology, scientific outcomes are continuously generated and thus their risks sometimes are unpredictable. Genetically modified foods are evidence which affirms the anxiety resulting from advancement of biotechnology. When human beings get closer to the possible risk of science because of the food they consume, a sufficient legal framework shall be immediately established to protect human beings.

Rules of public international law normally take time to be crystallised.16 Their retardedness discourages efficiency to deal with “accelerated biotechnological advancement”17 as well as open-ended biological problems. The existence of conventional rules requires the expression of consent to be bound by the Member States. Customary international law needs constitution of physical (state practice) and mental (opinio juris sive necessitatis) elements.18 In this case, it is difficult to invoke the precautionary principle by referring to both sources, given that the SPS Agreement, as interpreted by the Appellate Body, only accommodates the precautionary principle in limited extent and its status as customary.

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17 Genetically modified products or any other outcomes of technology.
international law is widely argued. However, there remains a hopeful source of international law, a general principle of law, which does not require such stringent criteria as the others and is expected to be applicable law at the time when non-liquet is almost envisioned.

If the object of argumentation, of whether the precautionary principle is applicable, were narrowed down into the matter of public (human) health, the Appellate Body should have deferred to the fact that non-liquet is almost envisioned and thus shall have recourse to the application of the general principle of law. Considering the SPS regime, the precautionary principle has not only been developed within the SPS Agreement, but also in other international hortatory and binding instruments.

The principle was pioneered in the German legal system and then was induced to be applied internationally in the field of general international environmental law. Manifestly the concept of precaution has already transferred to the field of public (human) health protection, as evidenced in the International Health Regulations (IHR) of the WHO and in the Cartagena Protocol on Biosafety. The precautionary principle as a general principle of law subsists in the IHR of the WHO and in the Cartagena protocol and could be applicable law within the WTO system, at least, referred to as a general principle of law recognised in response to the status of non-liquet.

Taking the experience of international space law, which was a new area of international law, states have solved the problems of gap-in-law by referring to general principles of law as applicable law. A number

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20 Brownlie, see note 16, 16-17; J. Thirawat, Public International Law, 85 et seq. (written in Thai).
21 A. Cassese, International Law, 2005, 189 et seq.
22 Article 43 of the International Health Regulations (IHR).
23 Para. 4 of the Preamble and article 16 of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity.
24 Actually the precautionary principle could be applied as conventional rule of different configuration, imported from other international agreements. This notion will be discussed in Part III.
25 As explained above.
of general principles of law have been applied in this field, regardless of the lack of conventional rules or customary international law. If the answer for international space law is yes, why is it not so for the international SPS regime?

4. Notion of Risk: Introductory Remarks prior to Analysing Coverage of the Precautionary Principle

When discussing the precautionary principle, it is important to refer to “risk assessment and risk management”. The notion of risk is closely related to the precautionary principle. Before continuing the analytical approach of the scope of the precautionary principle, the distinction between risk assessment and risk management is to be made and the “relationship between the principle and the notion of risk” is to be identified.

The SPS Agreement only provides a definition of risk assessment in Annex A4 thereof, but not for risk management. However, risk assessment is an employment of a scientific methodology to establish the probability of hazardous effects of a substance or an activity.27 Risk assessment entails laboratory testing procedures as well as other scientific methods necessary to provide configuration and probability of the risk of a substance and activity at hand,28 whereas risk management29 is concerned with activities rendered by the relevant authority to deal with potential hazards; it includes the process of identifying and evaluating a risk upon a decision to select and implement appropriate measures to

27 Bohannes, see note 5, 335.
28 The Panel elaborates risk assessment as a two-step process that “should (i) identify the adverse effect on human health (if any) arising from the presence of the hormones at issue when used as growth promoters in meat…, and (ii) if any such adverse effects exist, evaluate the potential or probability of occurrence of such effects”, EC-Hormones case, see note 8, para. 183.
29 The SPS Agreement recognises at least three types of actions that a member may take to manage risks, and sets certain minimal requirements for each. These three types of actions are: (i) selecting the level of protection deemed appropriate by the member; (ii) establishing sanitary measures to achieve that level of protection; and (iii) accepting measures established by other members as being equivalent to its own.; V. Walker, “Keeping the WTO from Becoming the ‘World Trans-Science Organization’: Scientific Uncertainty, Science Policy, and Fact Finding in the Growth Hormones Dispute”, Cornell Int’l L. J. 31 (1998), 251 et seq. (268).
reduce such risks. In a risk management, the relevant authority is normally entitled to set forth what level of risk is acceptable in a particular society.

Risk assessment and risk management are related to the application of the precautionary principle. It is widely accepted that application of the precautionary principle is a part of risk management, as evidenced, at least, in article 5.7 of the SPS Agreement. (Further elaboration on the application of the principle in the process of risk management will be discussed in Part II.) The problem of applicability of the precautionary principle in risk assessment, is rather a controversial issue especially after the interpretation of the Appellate Body in the EC-Hormones case. The argument of the EC, that states are entitled to take precaution in risk assessment, is also supported by academics in this field.

This thesis considers that the argument of the EC is thoughtful and should be taken into consideration, but also makes some observations. It also affirms that, by methodology of treaty interpretation, the precautionary principle, actually, is also a part of the risk assessment. Even if the jurisprudence of the WTO, in which science obtains a pertinent role, is pursued in this context, there remains a gateway to application of the precautionary principle since the scientific methodology also provides the concept of precaution in itself. Discussion will be made in Part II. However, in analysing the scope of the precautionary principle, relevant provisions of the SPS Agreement will be regarded and the notion of risk assessment and/or risk management, if necessary, will be additionally raised.

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30 Bohannes, see note 5, 335.
31 Ibid.
32 Ibid., 336; however, some argue that it is more appropriate to use the word “precautionary approach” instead of “precautionary principle”. See arguments of the United States and Canada in the EC-Hormones case, see note 8, paras 43 et seq.
33 The EC argued that the precautionary principle also overrides arts 5.1 and 5.2 and thus a state is entitled to take precaution in risk assessment. In other words, regardless of the conclusion that there is no risk, states can take precaution on the scientific experiment. This topic will be discussed in detail in Part II.
34 Walker, see note 29, 266 et seq.
35 Ibid.
II. Analytical Approach of the Scope of the Precautionary Principle

It is recognised that the scope of the precautionary principle is not exhausted in article 5.7, as asserted by the Appellate Body in the EC-Hormones case, which reads:

“... We agree, at the same time, with the European Communities, that there is no need to assume that Article 5.7 exhausts the relevance of a precautionary principle. It is reflected also in the sixth paragraph of the preamble and in Article 3.3 ...”

This finding has offered a significant interpretation for this topic, but has not provided, in detail, the configuration of the precautionary principle in the sixth paragraph of the preamble and in article 3.3. Also, for its reflection in article 5.7, the configuration of the precautionary principle has not been completely illustrated.36 In response to these ambiguities, this thesis will try to describe configurations of the precautionary principle within the scope of such provisions. Moreover it will analyse and evaluate the possibility of applying the precautionary principle outside the scope of the said provisions.37

1. Within the Scope of Article 5.7

The precautionary principle is reflected in article 5.738 but in a restrictive manner: precautionary measures must be provisional and must fulfil four requirements given under article 5.7. That is to say, during/after

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36 Some issues were left unanswered; Prévost, see note 3, 37 et seq.
37 As mentioned in Part I, the precautionary principle is also related to the notion of risk, including risk assessment and risk management. The relationship between the precautionary principle and the notion of risk will also be demonstrated in this part. When discussing the notion of risk, it is unavoidable to take into consideration the role of science, given that in the context of the SPS Agreement, the precautionary principle is not purely a legal or policy matter. Science is considerably recognised in this Agreement in comparison with other fields of international law, which also endorse the precautionary principle, but do not accept the role of science as much as in this field.
precautionary measures are applied, measures must: (i) be imposed in respect of a situation where “relevant scientific information is insufficient”; (ii) be adopted “on the basis of available pertinent information”; (iii) not be maintained unless the member seeks to “obtain the additional information necessary for a more objective assessment of risk”; and (iv) be reviewed accordingly “within a reasonable period of time”. Its configuration as reflected in article 5.7 will be analysed as followed.

a. Insufficient Relevant Scientific Evidence

Clarification of this requirement had not been addressed until the Appellate Body, in Japan - Measures Affecting the Importation of Apples case, interpreted the phrase. It clarified that article 5.7 is not applied “in situation of scientific uncertainty”, as in other fields of international law, but rather in a situation where “scientific evidence is insufficient.” In other words, the SPS Agreement provides a more restrictive situation which entails application of the precautionary measures. Insufficiency of scientific evidence is referred to as a situation where scientific evidence has been, at least once, sought for, but eventually is considered insufficient, whereas scientific uncertainty loosely represents a wide range of doubtfulness.\(^\text{39}\) In this sense, the Appellate Body affirmed that these two phrases are not interchangeable.\(^\text{40}\) This reflects a character of the precautionary measures in the context of article 5.7.

So, under which circumstances is scientific evidence insufficient? In answering this question, the Appellate Body clarified that insufficiency should not exclude a “case where the available evidence is more than minimal in quantity, but has not led to reliable or conclusive results.”\(^\text{41}\) With regard to this clarification, reliability and conclusiveness are yardsticks to point out in which situation the scientific evidence, at issue, is considered insufficient. Assessment of reliability and conclusiveness should not be scientifically characterised in isolation, but rather in relation with the values of a particular community in a particular context.\(^\text{42}\) At this point, room is left for Member States to take into consideration non-scientific factors.

\(^{39}\) Oxford Advanced Learner’s Dictionary.

\(^{40}\) Appellate Body Report, Japan - Measures Affecting the Importation of Apples, Doc. WT/DS245/AB/R, paras 181 et seq.

\(^{41}\) Ibid.

\(^{42}\) Winickoff et al., see note 38, 113.
b. Based on Available Pertinent Information

The phrase “available pertinent information” has not been clarified in any WTO case. In order to interpret this requirement, we should employ methodology of treaty interpretation from article 31 (1) of the Vienna Convention on the Law of Treaties, which provides 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.”

“Pertinent”, according to the Oxford English Dictionary, means “pertaining or relating to the matter at hand; relevant; to the point; apposite” and, according to the American Heritage Dictionary of the English Language, it means “having logical precise relevance to the matter at hand.” According to both dictionaries, in reliance with the object and the purpose of the SPS Agreement, the available information, referred to by Member States, shall obtain a logical linkage to the potential hazards alleged to occur.

In addition, according to article 31 (1) of the Vienna Convention, contextual language of article 5.7 should also be considered to further clarify the phrase “available pertinent information”. At this point, observation was made by Winickoff, which reads:

“The first sentence of Article 5.7 clearly differentiates pertinent information from relevant scientific information, implying that the former is a broader category than the latter. The term should be interpreted to include substantive inputs from officially recognized public deliberations, experiential data not available from the published scientific literature, and other information concerning public values such as consumer data on public attitudes.”

This thesis also finds it appropriate to interpret in this way, since the context actually confers the different meaning of the two phrases. The phrase “available pertinent information” is something not based on science anymore, but rather on “public values.” The question of what “public values” are will vary with each case and particularity in each Member State, given that Member States are only entitled to impose

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43 See note 39.
44 The American Heritage College Dictionary (Electronic Source).
45 Winickoff et al., see note 38, 114.
46 Ibid.; P. Stoll/ L. Strack, “Article 5 SPS”, in: Wolfrum, see note 7, 459 et seq.
SPS measures within their own jurisdictions. Such public values could thus vary thereupon.

For example, people in state A eat food X regularly. But food X is highly objected in state B, where people are afraid of possible risks resulting from consumption of food X. Even though the scientific experiment proves that no risk takes place, food X is still objected by people in state B. Objection to food X is considered as public value of state B. Thus, when referring to this element, state B could invoke that its people highly object food X. But, vice versa, if food X, is exported from state C to state A, state A cannot refer to the public value, since the same public value does not exist in state A. As mentioned above, the public value of state A does not object to consumption of food X.

c. Obligation to Obtain Necessary Additional Information

After a Member State has imposed precautionary measures on the basis of available pertinent information, it is required to seek for necessary additional information which “must be germane to the conduct of a more objective risk assessment.” Such information, as clearly characterised as additional, must be additional to the old information at hand. It is therefore not necessarily a new information in the sense of a new discovery. In addition Member States are not required to conduct their own research, but rather they have discretion to decide which means they may employ to obtain such additional information, i.e. consultation of scientific research, database, internal and external experts, since the phrase “seek to obtain” implies various means which could be employed to obtain such additional information.

Moreover Member States are not obliged to achieve actual results. After Member States have made “plausible efforts to obtain the additional information”, it should be assumed that they have complied

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48 Stoll/Strack, see note 46, 461.
49 Ibid.
50 Ibid.
51 At this point, Stoll and Strack have made a reasonable statement, which reads: “This, however, does not mean that half-hearted efforts in this regard will not have legal consequences. If they result in a lack of additional information, the duty to review will at some point require the Member to admit that efforts to produce sufficient scientific evidence and a more ob-
with article 5.7 accordingly. Member States are also required to perform the obligation pursuant to the principle of good faith in order that this provision is not abused. Non-compliance with this requirement results in an obligation to repeal the precautionary measures, as clarified by the Appellate Body that Member States could not maintain the precautionary measures at hand, unless this requirement is fulfilled.

d. Review within a Reasonable Period of Time

In addition to the previous obligation, after applying the precautionary measures, Member States are also required to review the measure at hand within a reasonable period of time. This requirement implies that Member States shall conduct their own “self-evaluation on such precautionary measures”, which may result in a decision to repeal or to sustain the measures. Regarding the reasonable period of time, the Appellate Body, in the Japan-Varietals case, clarified that such period had to be established on a case-by-case basis and depends on the specific circumstances of each case, including the difficulty to obtain additional information necessary for the review and the characteristics of the provisional SPS measures. The Appellate Body further clarified that the reasonable period of time starts only after the entry into force of the SPS Agreement.

2. Paragraph 6 of the Preamble

Paragraph 6 of the preamble reflects technical aspects of the SPS regime since application of the SPS measures can involve a conflict (or clash) between scientific and legal technicalities. The SPS Agreement, therefore, also provides significant roles upon relevant specialised organisations to establish international standards, guidelines and recommenda-

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\text{Ibid.}
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\text{Ibid.}
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\text{Ibid., Japan-Varietals case, see note 47, para. 93.}
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\text{They are sometimes called “three sisters organisations”, which are namely Codex Alimentarius Commission (CAC or Codex), International Office of Epizootics (OIE, Office International des Epizooties) and the Secretariat of the International Plant Protection Convention (IPPC).}
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tions in order that such technical matters be harmonised, which eventually favour international trade regimes.

With regard to international standard setting for precautionary measures, Charnovitz has remarked that “Normally when an international standard exists, it was written because there was scientific information available.” In his view, precautionary measures could not be harmonised with international standards, as international standards are set when available scientific information exists. According to him, application of the precautionary principle is not in the sphere of international standard setting.

However, this thesis envisions that the concept of precaution could also be inserted into international standards, as no substantive obstacle prohibits us from doing so. International standards, for instance, on genetically modified products, could be established by a specialised organisation. Harmonisation of precautionary measures, if rendered, could be a merit because, in doing so, we could decrease tension amongst Member States. It is known that the precautionary principle grants states a range of discretion, which tends to result in abusive application of the precautionary principle, but once Member States are encouraged to take precaution according to existing international standards, which are widely accepted, they are thus more likely to conform to such international standards, since presumption of compliance is to be granted in accordance with article 3.2.

Making reference to international standards is not obligatory and is flexible. Member States are entitled to select any works of relevant specialised organisations or of international organisations as identified by the SPS Committee in accordance with Annex A.3(d). However, it

56 S. Charnovitz, “Preamble SPS”, in: Wolfrum, see note 7, 373 et seq.
58 However, the question under which circumstances precautionary measures should be instructed by international standards should depend on the single situation.
59 International standards are not obligatory, but SPS measures in conformity with international standards result in the presumption of compliance with the SPS Agreement pursuant to article 3.2 of the SPS Agreement.
60 These specialised organisations are three sister organisations, as mentioned in note 55.
61 As yet, the SPS Committee has not identified international organisations under this provision.
is restrictive that international standards are established when “international concerns” are met. Sometimes circumstances are involved merely with “domestic concerns”, which will hardly provoke establishment of an international standard. Thus, Member States, in case of domestic concerns, have to employ the mechanism of article 5.7. and this is a weak point of international standard setting.

In addition to the notion of international standards, the precautionary principle is also reflected in the last part of the sixth paragraph of the preamble, which recognises the right of Member States to establish “their own appropriate level of SPS protection.”62 It should be noted that, in the sixth paragraph of the preamble, the level of SPS protection is not deemed appropriate not just in the opinion of Member States, but also in the spirit of the SPS Agreement. Without this regard, the relevant SPS measures may be repugnant to relevant SPS provisions. Concerning this issue, article 3.3 sets forth requirements as will be analysed later in this part.

However, the preamble itself does not provide obligations for Member States, but rather establishes general ideas of application of the SPS Agreement. According to the Vienna Convention on the Law of Treaties, the preamble could be regarded as to help interpret provisions. It does not principally oblige Member States, whereas provisions of the treaty actually do. When precautionary measures are applied in the context of the SPS Agreement, provisions in the SPS Agreement shall prevail and the sixth paragraph of the preamble could be employed to help interpret the relevant provisions of the SPS Agreement.

In conclusion, even though the precautionary principle is actually reflected in the sixth paragraph of the preamble, it does not play an indispensable role in respect of the application of the principle, as the preamble of the SPS Agreement is employed to interpret the relevant provisions according to article 31 of the Vienna Convention on the Law of Treaties.

3. The Scope of Article 3.3

The scope of the precautionary principle in article 3.3 is a controversial topic. The question of whether this article reflects the precautionary

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62 Article 3.3 provides the similar context which will be discussed later.
principle has not been settled.\(^\text{63}\) In analysing the applicability of the precautionary principle, this thesis will firstly draw attention to the unclear text of article 3.3 and then to the interpretation of the Appellate Body in the *EC-Hormones* case.

Article 3.3 reads:

“Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5. Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement.”

According to the text, this article loosens the obligations of Member States under arts 3.1 and 3.2, which require Member States to base or to conform their SPS measures on or with international standards respectively. Article 3.3, instead, leaves room for Member States to decide not to use international standards, but to introduce or to maintain their SPS measures which result in a higher level of protection than would be achieved by measures based on the relevant international standards. The Appellate Body, in the *EC-Hormones* case, affirmed that “the right of a Member to establish its own level of sanitary protection under Article 3.3 of the SPS Agreement is an autonomous right and not an exception from a general obligation under Article 3.1.”\(^\text{64}\) It also asserted that this article reflects the precautionary principle, in the sense that Member States may take precaution on potential hazards by elevating the level of SPS protection.\(^\text{65}\)

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\(^{63}\) Despite the finding of the Appellate Body in the *EC-Hormones* case that this article reflects the precautionary principle, interpretation by the Appellate Body, in the same case, shows that it seems impossible to apply the precautionary principle in the context of this provision. It seems strange that the same Appellate Body Report was written differently.

\(^{64}\) *EC-Hormones* case, see note 8, para. 172.

\(^{65}\) A number of commentators, including the author of this thesis expose their position against this finding of the Appellate Body. Bohannes, see note 5, 335 et seq.; Charnovitz, see note 56, 373 et seq.
Article 3.3 sets forth two situations either of which Member States could invoke to impose measures resulting in a higher level of protection: (i) if there is a scientific justification; or (ii) the measures are consequences of a level of protection that the Member State determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5. By reading only these two conditions, we may imagine that the configuration of the precautionary principle subsists in the requirement of scientific justification, but the case is not that easy. The second sentence and footnote of this article have generated confusion amongst scholars and practitioners in this field around the world including the Appellate Body.66

The second sentence of this provision additionally requires that all SPS measures in both situations shall not be inconsistent with any other provision of this Agreement. Due to this additional requirement, scientific justification could not play an independent role that would embrace applicability of the precautionary principle. Instead, the scientific justification is required not to be inconsistent with any other provisions of the SPS Agreement. In addition, the footnote to this article makes this requirement redundant as it clearly obliges Member States, which refer to the scientific justification, to conduct “an examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement.”

At this point, the article is reluctant to say that, on the basis of scientific justification, Member States have to rely again on risk assessment.69 In other words, with the text and the WTO jurisprudence, we have to understand that relying on a scientific justification would not be considered different from conducting a risk assessment according to article 5.1, as asserted by the Appellate Body in the EC-Hormones case.70 It considered that risk assessment plays a countervailing factor with respect to the application of article 3.3, which reads as follows:

“Consideration of the object and purpose of Article 3 and of the SPS Agreement as a whole reinforces our belief that compliance with Article 5.1 was intended as a countervailing factor in respect of the right of Members to set their appropriate level of protection. ... The ultimate goal of the harmonization of SPS measures is to prevent the

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66 Charnovitz, see note 56, 423 et seq.
67 EC-Hormones case, see note 8, para. 175.
68 Scientific justification is broader than risk assessment.
69 EC-Hormones case, see note 8, paras 172 et seq.
70 EC-Hormones case, see note 8, para. 177.
use of such measures for arbitrary or unjustifiable discrimination between Members or as a disguised restriction on international trade, without preventing Members from adopting or enforcing measures which are both ‘necessary to protect’ human life or health and ‘based on scientific principles’, and without requiring them to change their appropriate level of protection.”

At this point, we can see the contradiction between the two findings of the Appellate Body in the same case. On the one hand, it established that article 3.3 reflects the precautionary principle, but on the other hand, it emphasised that the application of the precautionary principle is subject to the “scientific justification” which, as it holds, is not different from the “process of risk assessment.” Thus, from its view, in elevating the level of SPS protection, Member States are called upon to rely on the relevant provisions of risk assessment in order to justify the higher level of SPS protection. In this regard, article 3.3 does not configure with the precautionary principle, as long as the provisions concerning risk assessment, *per se*, do not accommodate the precautionary principle,71 as will be discussed below.

4. Outside the Scope of Article 5.7, Paragraph 6 of the Preamble and Article 3.3

a. Possibility to Apply the Precautionary Principle in the Context of Arts 5.1 and 5.2

Even though the Appellate Body, in the *EC-Hormones* case, has already addressed that arts 5.1 and 5.2 do not accommodate the application of the precautionary principle, there have been consistent efforts, by academics, to make the precautionary principle applicable in the context of these articles. This thesis does not consider the notion merely academically, but rather logically thoughtful and complementary. In considering the coverage of the precautionary principle in the context of both articles, the provisions and their jurisprudence will be analysed and some proposals will also be made.

Article 5.1 requires Member States to ensure that their SPS measures are based on a risk assessment. In complying with article 5.1 Member States are required to examine risk factors as listed in article 5.2: “avail-

71 The possibility to apply the precautionary principle in the provisions concerning risk assessment will be analysed later in this part.
able scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.” However the Appellate Body, in the EC-Hormones case, affirmed that the list of risk factors in article 5.2 is not intended to be a closed list and has made a statement significant for a possible gateway to the precautionary principle which reads:

“It is essential to bear in mind that the risk that is to be evaluated in a risk assessment under Article 5.1 is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die.”

According to this interpretation, risk assessment, as required by arts 5.1 and 5.2, has been clearly in reliance with something outside the scope of pure science. The phrase “risk in human societies” indicates that “societal factors” could be included as well in the context of article 5.2. In the light of this interpretation, the precautionary principle accordingly finds its role within the context of risk assessment under the open list of article 5.2. However, consideration of societal risks within the context of article 5.2 is not unconditional, since the Appellate Body, in the Australia-Salmon case, has demarcated the role of societal factors, which reads: “the risk evaluated in a risk assessment must be an ascertainable risk;72 theoretical uncertainty is not the kind of risk which, under Article 5.1, is to be assessed.”73

At this point, “risk in human societies”, as a part of risk assessment, must be an “ascertainable risk”. Risk in human societies, as merely a “theoretical uncertainty”, is not included in the context of arts 5.1 and 5.2.

“Ascertainable risk”, the second element, was not explicitly explained by the Appellate Body in the EC-Hormones case. The phrase “ascertainable risk” was used by the Appellate Body, in substitution of the phrase “scientifically identified risk” used by the Panel in the same

72 The Appellate Body, in the EC-Hormones case, preferred the word ascertainable risk instead of “identifiable risk”, as used by the Panel; EC-Hormones case, see note 8, para. 186.

case. In seeking for its characterisation, the excerpt of the relevant text is to be considered as follows:

“It is not clear in what sense the Panel uses the term ‘scientifically identified risk’. The Panel also frequently uses the term ‘identifiable risk’, and does not define this term either. The Panel might arguably have used the terms ‘scientifically identified risk’ and ‘identifiable risk’ simply to refer to an ascertainable risk: if a risk is not ascertainable, how does a Member ever know or demonstrate that it exists?...

In another part of its Reports, however, the Panel appeared to be using the term “scientifically identified risk” to prescribe implicitly that a certain magnitude or threshold level of risk be demonstrated in a risk assessment if an SPS measure based thereon is to be regarded as consistent with article 5.1. To the extent that the Panel purported to require a risk assessment to establish a minimum magnitude of risk, we must note that imposition of such a quantitative requirement finds no basis in the SPS Agreement. A Panel is authorized only to determine whether a given SPS measure is “based on” a risk assessment.

If the finding of the Panel in this case had been adopted by the Appellate Body, science would have played a highly intense role and no room would have been left for assessment of “risk in human societies”, subsequently making the WTO a “purely scientific organisation”! In making alignment with other previous findings, the Appellate Body has neutralised the element of risk assessment, by substituting the phrase “scientifically identified risk” with the phrase “ascertainable risk” and disregarded the qualitative requirement, magnitude or threshold, as proposed by the Panel. This could make Member States feel more comfortable, in the sense that they are entitled to make decisions on the basis of “risk in human societies”, taking into account “societal risk factors.” Therefore, when Member States would like to impose precautionary measures in the context of arts 5.1 and 5.2, they have to rely on this approach as well.

At this point, it is conclusive that the jurisprudence allows the precautionary principle to be applied as long as a relevant unlisted risk fac-

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74 According to the American Heritage English Dictionary (electronic source), “ascertain” means: (i) to discover with certainty, as through examination or experimentation.; (ii) (Archaic) to make certain, definite, and precise.

75 Walker, see note 29, 252.
tor has been embraced into article 5.2 with regard to the fulfilment of two requirements, as mentioned, ascertainability and exclusion of theoretical uncertainty.\textsuperscript{76}

However, this approach does not leave room for argumentation of the EC to prevail. As the EC argued in the Hormones case, that the precautionary principle overrides arts 5.1 and 5.2 and thus precaution could be taken as the result of the risk assessment, \textit{per se}. This thesis considers that this argument, even though it finds some logical basis,\textsuperscript{77} is not practical as an argument, since it is easy to be attacked and significantly offends WTO jurisprudence.

Instead of stating that the precautionary principle overrides\textsuperscript{78} arts 5.1 and 5.2, the argument may have been that the precautionary principle overlaps with such provisions and is applicable in conjunction with article 5.1 because a relevant unlisted risk factor definitely provides a gateway to its application. The ruling of the Appellate Body does not imply inapplicability of precautionary measures in risk assessment un-

\textsuperscript{76} Moreover the fulfilment of these two requirements is the gateway to the application of the precautionary principle in article 3.3, as the author of this thesis has analysed in the previous part.

\textsuperscript{77} In this regard, it is worth remembering a well-known statement of Socrates which is relevant to this discussion: “so when I went away, I thought to myself, ‘I am wiser than this man: neither of us knows anything that is really worth knowing, but he thinks that he has knowledge when he has not, while I, having no knowledge, do not think that I have. I seem, at any rate, to be a little wiser than he is on this point: I do not think that I know what I do not know.’” Plato Euthyphro, \textit{Apology}, \textit{Crito} 26 (F.J. Church trans., 2nd edition 1956) cited in: Walker, see note 29, 267. This statement reflects the reality of scientific knowledge which cannot perfectly provide absolute certainty. In response to this problem, Walker has suggested that scientists should have a role in making a decision on the issue. He says: “Science policies should be formally adopted and risk assessment scientists should be required to disclose and explain inherent scientific uncertainties. In this way, those who make decisions based on a particular risk assessment will understand the limits of the underlying scientific knowledge. Absent such disclosure and explanation, decision-makers will not be able to distinguish guesswork from well-supported findings”, ibid.

\textsuperscript{78} It was foreseeable that adjudicatory organs of the WTO did not agree on the argument of the EC, given that WTO jurisprudence significantly gives importance to its institutional framework. The written texts of its covered agreements normally prevail over an unwritten notion, such as the precautionary principle.
der article 5.1, but only rejects the argument of the EC that significantly promoted the role of precaution over article 5.1.

b. Possibility to Apply the Precautionary Principle as an Unwritten Norm

As proposed by academics in numerous publications that the precautionary principle is also a part of the risk assessment and thus Member States may take precaution as result of a risk assessment, taking into account that the precautionary principle overrides arts 5.1 and 5.2, as also invoked by the EC, this thesis does not oppose to this notion but will support that the concept of precaution should also be developed outside the framework of the SPS Agreement. As experienced in many cases, when the precautionary principle or precautionary approach is applied in the context of the WTO, it is unable to exercise its role naturally, but rather subjugates itself to the overarching rules of the SPS regime,\(^79\) which always prioritises the object and purpose of trade.

States obtain their jurisdiction within their own territory to impose SPS precautionary measures in order to protect human, animal and plant’s life and health. The precautionary principle, when considered outside the SPS context, also plays its role independently in the area of international environmental law. The principle deserves to be highly regarded when its configuration in environmental law is overlapping with that of international health law, resulting in the configuration of the precautionary principle aimed at international (human) health protection, which is quite new, but indispensable. Biological development is always unforeseeable. Keeping with the mode of the SPS Agreement would not be able to deal with potential hazards resulting from such development.\(^80\)

The precautionary principle may find some difficulties in being considered as customary international law as the principle seems to con-

\(^{79}\) EC-Hormones case, see note 8; Australia-Salmon case, see note 73.

\(^{80}\) Concerning this point, Walker has made a statement: “On the one hand, Members obtain jurisdiction to introduce and maintain measures to protect health and life within their territories; on the other hand, they may do so only if such measures are not inconsistent with the provisions of the SPS Agreement, and in particular, are not arbitrarily or unjustifiably discriminatory and do not constitute disguised restrictions on international trade”, Walker, see note 29, 253.
front persistent objection from at least the United States, Canada\textsuperscript{81} and especially developing countries, the economies of which significantly depend on agricultural products.\textsuperscript{82} Another choice left to us, as mentioned in Part I., is that the principle could be applied as a general principle of law recognised by developed countries. The precautionary principle in international (human) health protection deserves to be regarded as a general principle of law to prevent a legal vacuum or non-liquet within the field. This thesis finds that we are approaching non-liquet in this field, as a consequence of the subjugation process, by the trade regime, which has promoted the role of science and does not leave room for appropriate formulation of the principle. Even though the precautionary principle, according to the Appellate Body, subsists in some provisions, it has already been eviscerated by their own texts.

The principle, therefore, should also be developed outside the SPS regime of the WTO, but in circumstances where the subject matter is overlapping with trade context, Member States shall ensure that the measures neither result from arbitrary or unjustifiable discrimination, nor are characterised as disguised restrictions to international trade. Strictly speaking, all requirements, as set forth in the SPS Agreement, are intended to prevent Member States from imposing arbitrarily or unjustifiably discriminatory measures and disguised restriction to international trade. If precautionary measures, when applied outside the scope of the SPS Agreement, are double checked as such, both regimes, trade and health protection, could reach consistency resulting there from.\textsuperscript{83}

III. Relation between the Precautionary Principle and Relevant Rules of International Law

It is important to note that when Member States apply the precautionary principle, they shall rely on other relevant rules of international law.

\textsuperscript{81} EC-Hormones case, see note 8, paras 43 and 60.

\textsuperscript{82} D. Prévost/ M. Matthee, “The SPS Agreement as a Bottleneck in Agricultural Trade between the European Union and Developing Countries: How to Solve the Conflict”, \textit{Legal Issues of Economic Integration} 29 (2002), 43 et seq. (43-45); Perspectives of developing countries on the precautionary principle will be discussed in Part V.

\textsuperscript{83} This thesis also takes into consideration overlapping areas concerning the precautionary principle between the SPS Agreement and relevant international agreements, as mentioned in Part III.
On the one hand, rules of international law help to clarify the configuration of the precautionary principle in the context of the SPS Agreement so that the concept of precaution will no longer be abstract, but rather practical and tangible. On the other hand, rules of international law could prevent Member States from arbitrarily exercising their jurisdiction resulting in a disguised violation. A pure application of the precautionary principle is also dangerous, not less than potential hazards of biotechnological food, as the precautionary principle provides states with discretion and thus states can easily evade international obligations. Rules of international law therefore are important in this regard.

1. Rules of International Trade Protection

a. Principle of Good Faith

The Principle of Good Faith is, at least, a general principle of law as recognised by developed nations and has crystallised to be customary international law. The Vienna Convention reflects the role of the principle of good faith in arts 31(1) and 26. Article 31(1) requires that treaty interpretation shall be “interpreted in good faith”, whereas article 26 emphasises “the performance of obligation under a treaty, by Member States, in good faith.” Both provisions must be considered in the application of the precautionary principle in order to prevent Member States from avoiding compliance with obligations by arbitrarily relying on the precautionary principle. The principle of good faith therefore not only regulates Member States to interpret relevant provisions, but also requires them to perform their obligations in good faith.

The role of the principle, therefore, is not independent, but rather attached to other obligations of Member States. Concerning this point, the ICJ has addressed that the principle is applied to regulate an existing substantive obligation at hand, as affirmed in the following text:

“The principle of good faith is one of the basic principles governing the creation and performance of legal obligations, ... it is not in itself a source of obligation where none would otherwise exist ... Good faith does not exist as an abstract notion that could be determined

without looking at the same time at the substantive obligation to which it refers."\textsuperscript{85}

Not only the ICJ, but also the Appellate Body has recognised the application of the good faith principle in its jurisprudence. The principle of good faith, in its view, is considered as "an organic and pervasive general principle ... that underlines all treaties."\textsuperscript{86} It is employed in conjunction with the application of the WTO Agreements, including the SPS Agreement. This principle shall also be regarded when relevant provisions of the precautionary principle are applied. In this regard, Member States are accordingly required to apply SPS precautionary measures in good faith, although good faith is not written down in the Agreement.

In the SPS Agreement, it is also necessary to analyse article 2.3, as the provision partially reflects the principle of good faith. It provides a general obligation that SPS measures shall not arbitrarily or unjustifiably discriminate between Member States and shall not be applied in a manner which would constitute a disguised restriction on international trade. Definitely Member States, when applying precautionary measures, have to perform the obligation under this article. But this article, alone, could not provide a sufficient mechanism which enhances Member States to comply with their obligations. The article could not be a substitute for the principle of good faith and thus Member States shall eventually comply with the principle of good faith as well.

b. Transparency Requirement

The Transparency requirement is considered as an essential mechanism to enhance "fair trade". Lack of transparency could unavoidably result in trade barriers.\textsuperscript{87} The SPS Agreement embraces this recognition in article 7 and Annex B which set forth obligations for Member States to fulfil the notion of transparency. For example, Member States are required to publish their SPS measures for a reasonable period before the measures enter into force in order that producers in exporting countries adapt their products and methods of production to the requirements of

\textsuperscript{85} Nuclear Tests case (Australia v. France), Judgment, ICJ Reports 1974, 253 et seq. (268).
\textsuperscript{86} Appellate Body Report, United States-Tax Treatment for Foreign Sales Corporations, Doc. WT/DS108/AB/R, para. 166.
\textsuperscript{87} M. Böckenförde, “Article 7 and Annex B SPS”, in: Wolfrum, see note 7, 478 et seq.
the importing country. In case that SPS measures are different from international standards, guidelines or recommendations, Member States are required to allow a reasonable time for other members to make written comments, discuss these comments upon request, and take the comments and the results of the discussion into account.\footnote{Available at <http://www.wto.org/english/tratop_e/sps_e/sps_handbook_cbt_e/intro1_e.htm>}

However, article 7 and Annex B reflect the international character of the notion of transparency, whereas domestic participation is also needed to render appropriate SPS measures.\footnote{C. Foster, “Public Opinion and the Interpretation of the World Trade Organisation’s Agreement on Sanitary and Phytosanitary Measures”, \textit{JIEL} 11 (2008), 427 et seq. (453-454).} Domestic stakeholders are directly affected by the imported products so that they, also, should have a role in making decisions. Participation of domestic stakeholders could be observed in two referenda made in Austria in 1997\footnote{Available at <http://www.netlink.de/gen/Zeitung/970414a.htm>.} and in Switzerland in 1998,\footnote{Available at <http://www.gmo-free-europe.org/de/node/126>.} in both of which the majority of the voters voted against importation of genetically modified organisms into their territories. It is necessary that “domestic participation” is a part of the SPS Agreement, even in the case of domestic issues, that Member States could manage within their own territories, because domestic stakeholders are a group of people who are directly affected by importation of such products.\footnote{The notion of domestic participation, as proposed, will be elaborated when discussing the principle of self-determination.}

This thesis considers that the “result of domestic participation should entail effect at international level and thus could render precautionary measures legitimate.” Practically speaking, if the importation of a kind product provokes great public concern in a country, it makes no sense to continue introducing such product into the country. This regard should be recognised in the name of domestic transparency, which grants participatory role upon domestic stakeholders.\footnote{The notion responds to the principle of self-determination as will be discussed later in this part.} However, we may be confronted with difficulties to introduce this concept into the SPS Agreement, since SPS measures are required to be based on risk assessment. This thesis suggests that we should step back to view article
5.2 and include public concern as one factor in the open list of the article.

At this point, Bohannes suggested that the transparency mechanism should also embrace a participatory role of “non-domestic economic actors” apart from Member States which have obtained their role pursuant to the relevant provisions. He explains that “the rationale is to counterbalance with any bias of the scientific findings or of the opinions of the domestic stakeholders”.94 This thesis supports this suggestion, taking into account that, in adopting precautionary measures, Member States should gather relevant information and comments as much as possible in order to make precautionary measures an objective which could favour stakeholders in the context of international trade and international health protection.

c. Necessity Test

When SPS measures are applied, a necessity test is normally required, otherwise relevant SPS measures are not legitimate under the SPS Agreement. The application of the precautionary principle is not exempted from this requirement. Even though provisions which accommodate the application of the precautionary principle do not explicitly link to the requirement of the necessity test, Member States are obliged to perform a necessity test as well. Such performance of the obligation could ensure that the application of the precautionary principle is objective in the sense that the precautionary principle is not invoked to abusively generate disguised restriction in international trade. In analysing the necessity test in the scope of the SPS precautionary principle, arts 5.6 and 2.2 will be observed as follows.

According to article 5.6, Member States are obliged to reduce negative effects to international trade. SPS measures, or precautionary measures in this regard, shall “not be more trade-restrictive than required to achieve” a Member’s appropriate level of SPS protection. It should be noted that article 5.6 requires necessity tests in a manner different from Article XX (b) of GATT 1994, which sets forth a “least trade restrictive requirement,”95 that makes necessity tests more stringent.

94 Bohannes, see note 5, 368.
95 Thailand–Cigarettes case, BISD 37S/200, para. 74.; Stoll/Strack, see note 7, 108 et seq. In this regard, Desmedt has remarked: “WTO Agreements and corresponding case law are indeed sprinkled with substantive rules and concepts that are close to a full-fledged proportionality principle known in
In the *Australia-Salmon* case, the Appellate Body has illustrated the proper configuration of the necessity test under article 5.6, in a negative proof as an SPS measure is more trade restrictive than necessary if there is another SPS measure that (1) is reasonably available, taking into account technical and economic feasibility; (2) achieves the member’s appropriate level of sanitary or phytosanitary protection; and (3) is significantly less restrictive to trade than the SPS measures contested. These three elements of this negative test are cumulative so that, if one of these elements is not fulfilled, the SPS measure is consistent with article 5.6.\(^97\)

Moreover, a relationship between the arts 5.6 and 2.2 should be made, as both articles appear to similarly require a necessity test. In the *Japan-Varietals* case, the Panel clarified that article 2.2 does not swallow article 5.6 at all, even though article 2.2 also requires a necessity test. The Panel remarked that article 5.6 further requires a necessity test, even after an SPS measure is already consistent with article 2.2, as it stated that: “findings under Article 5.6 would stand even if the measures in dispute were not in violation of Article 2.2.” This clarification of the Panel not only shows that a necessity test under article 5.6 is performed when article 2.2 is applied, but also that the necessity test shall be regarded when a precautionary measure is applied under article 5.7.\(^98\)

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\(^96\) For example, an absolute ban on genetically modified products is considered more trade restrictive than necessary, since there are other available means.

\(^97\) Stoll/Strack, see note 46, 456 et seq.

\(^98\) Knowingly article 5.7 is the exception of article 2.2.
2. Countervailing Rules against International Trade Protection

a. Principle of Self-Determination of Peoples in Economic Context

As mentioned in the second part, application of precautionary measures also deals with public values, but results from a decision of the incumbent authority of the Member State. The authority of the Member State, in performing its role, has to enhance domestic values of its society, which is a difficult task, since such determination of public values in conjunction with an assessment of societal risk factors may not be internationally recognised and thus would be an subject of dispute before WTO adjudicatory organs. Is it possible that public values prevail on the international platform?

This thesis proposes to employ the principle of self-determination to promote recognition of public values on international platforms. Self-determination has been recognised not only as customary international law, but also as *ius cogens* which prevails here over rules of international trade protection. Here, it is named “Principle of Self-Determination in Economic Context”. The principle of self-determination is often applied in cases of genetically modified organisms. As aforementioned, referenda in Austria and Switzerland are not only examples of domestic participation, but also of exercising self-determination. Once public values have been expressed via referendum or other substantive means, the action shall result in preponderance of public values over international trade law and thus be internationally recognised in pursuance with the principle of self-determination.

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99 The principle has been recognised in legal instruments, i.e., the UN Charter, the 1966 International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the Declaration on the Granting of Independence to Colonial Countries and Peoples (A/RES/1514 (XV) of 14 December 1960), and the Friendly Relations Declaration (A/RES/2625 (XXV) of 24 October 1970), which have precipitated the formation of the first element, state practice. *Opinio iuris*, the mental element, was also affirmed in judicial decisions, i.e., the Namibia case, the Western Sahara case, the East Timor case, etc.


101 Brownlie, see note 16, 582 et seq.
However, expression of public values should be relevant to the determination of measures for health protection, since public values are not always absolute, that is, people in a single society may think differently. If the result of a referendum is quite definite, for example 80-90 per cent of voters vote against genetically modified organisms, this should entail a total ban of those products. If the result of the referendum is not so clear cut, a total ban is not reasonable and could be deemed illegitimate under the relevant provisions of the SPS Agreement.

b. Rules Established by the World Health Organisation

The World Health Organisation (WHO) has objectives to promote and protect health internationally. Since its foundation in 1946, the WHO has significantly contributed to global health protection, as evidenced in its numerous active works in formats of regulations, recommendations, resolutions, etc. However, protection of international health is not an isolated field, but correlates with others; the WHO has acknowledged this trait. The WTO collaborates with other relevant institutions, for instance, ILO, UNESCO, FAO, etc., in search of achieving common goals. Although international health protection, by nature, has a close relationship with international trade, the collaboration with the WTO is surprisingly not as explicit as with other institutions.

Despite the lack of explicit collaboration between the two regimes, relevant provisions of International Health Regulations (IHR) give insights about several subjects in which consistency between both regimes can be found. It appears that, even though the WHO enjoys a primary competence to elaborate rules and standards on human health, “its regulations were surprisingly made subordinate to relevant provisions of international trade.” In this context, arts 43 and 57 of the

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104 Available at <http://www.who.int/crs/ihr/en>.
105 Von Tigerstrom, see note 103, 55 et seq. These include, for example, the WTO agreements on air and marine pollution, nuclear safety conventions, human rights agreements and the law on diplomatic relations.
IHR have echoed some significant notions of the precautionary principle, which are quite similar to the concept set forth in the SPS Agreement, for instance, the role of science and the necessity test. Therefore conflict between the WHO and IHR concerning the SPS precautionary principle does indeed look weak.

Article 43.1 of the IHR sets forth a necessity test, which resembles article 5.6 of the SPS Agreement, by requiring that additional measures106 “shall not be more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives that would achieve the appropriate level of health protection.” Thus, when a precautionary measure is inconsistent with article 5.6 of the SPS Agreement, it appears to be inconsistent also with article 43.1 of the IHR. Even though, configuration of the necessity test under article 43.1 of the IHR has not been identified, it is expected not to be different from that of article 5.6 of the SPS Agreement, since the former is designed107 and called upon to be compatible with the latter, in accordance with article 57.1 which reads:

“States Parties recognize that the IHR and other relevant international agreements should be interpreted so as to be compatible. The provisions of the IHR shall not affect the rights and obligations of any State Party deriving from other international agreements.”

It is important to note that the word “should” is used in the first sentence, calling upon compatible interpretation between the IHR and relevant agreements applicable to analogous subjects. But, in the second sentence, the word “shall” is used instead to require that rights and obligations of States Parties not be affected by the IHR provisions. What can we deduce from this article?

Since there are two sentences in the provision which are separable, this thesis suggests to firstly read both sentences separately, but, in the end, link them together. The first sentence contains a recommendatory condition. The word “should” indicates that States Parties are merely encouraged to interpret relevant agreements to be compatible with the IHR. On the other hand, it could be interpreted as the possibility that states could adopt incompatible views with regard to two or three agreements, under consideration, as long as the incompatibility does not result in significant alteration of the rights and obligations of the

106 Member States are obliged to implement health measures as required by the IHR. Nevertheless, they are also entitled to apply additional health measures in accordance with article 43.

107 Von Tigerstrom, see note 103, 55 et seq.
concerning States Parties. Even though the compatibility between the IHR and other international agreements is something expected, the WHO shall have an appropriate standing to elaborate its own regime, when necessary, regardless of emerging conflicts with other conventions. For the WHO, health protection is characterised as a prudent framework,\textsuperscript{108} as Gostin has remarked:

“Certainly, international commerce is a social good, and overreaction without scientific evidence can cause economic harm by diminishing trade, travel, and tourism. However, the international community cannot have it both ways — unimpeded travel and trade, with full public health protection ... The WHO’s mission should unequivocally be expressed as global health protection and promotion ... That is the vision of the WHO Constitution. Neither the preamble nor Article 21 mention commerce protection, let alone minimization of barriers to commercial intercourse.”\textsuperscript{109}

This thesis considers that this opinion could serve as a counterbalance to the pretension that the IHR is subordinated to other relevant agreements. Article 1 of the WHO Constitution sets forth the WHO’s objective as “the attainment by all peoples of the highest possible level of health.” The WHO, therefore, shall perform its actions to achieve and make possible this objective. Compatibility with other relevant agreements could be enhanced as long as such compatibility does not pertinently deprive the WHO from its objective.\textsuperscript{110} This notion is quite helpful in analysing IHR relevant provisions concerning the precautionary principle, namely arts 43.1(a) and 43.1(b) of the IHR, which go with arts 3.3 and 5.7 of the SPS Agreement respectively.

The SPS precautionary principle, as asserted by the Appellate Body, is reflected in article 3.3 of the SPS Agreement, but its scope is restricted by the phrasing of the provision and the related footnote, as mentioned in the previous Part. Article 43.1(a) of the IHR also recognises application of the precautionary principle in similar circumstances by allowing States Parties to adopt “the greater level of health protection than WHO recommendations ... in response to specific public health risks or health emergencies of international concern”, without putting onerous


\textsuperscript{109} Ibid.

\textsuperscript{110} Ibid.
requirements like article 3.3 of the SPS Agreement. An SPS precautionary measure of higher level of health protection which is legitimate under article 43.1(a) of the IHR could be held to contradict article 3.3 of the SPS Agreement, as a result of its inconsistency with the additional text and the footnote.

Article 3.3 of the SPS Agreement is deemed to contain a definition of the precautionary principle, as asserted by the Appellate Body in the EC-Hormones case, but the preoccupation that it might lead to an abusive application results in the insertion of the additional text, which renders article 3.3 confusing, as mentioned in Part II., and leaves little room for application of the precautionary principle. Article 43.1(a) of the IHR seems to accommodate the applicability of the SPS precautionary principle more than article 3.3 of the SPS Agreement as it does not add other requirements in its text. At this point, we acknowledge a degree of conflict between the two configurations of the precautionary principle. Is the concept of the precautionary principle under article 43.1(a) of the IHR to be interpreted or applied in a subordinated position in relation to the SPS Agreement?

As mentioned earlier, in accordance with article 57.1, WHO States Parties are allowed to interpret article 43.1(a) of the IHR in a different way as compared to article 3.3 of the SPS Agreement, as long as the rights and obligations of the concerned states are not affected. The configuration of article 43.1(a) of the IHR is therefore legitimate in the context of the IHR and the WHO Constitution. Nevertheless, with regard to the WTO jurisprudence, this configuration is hardly to be introduced when it is exposed to the WTO legal system, given that the law which is applicable under it is rather limited and that article 3.3 seems restrictive, as the footnote seems to clarify. Unfortunately, the WTO legal system does not leave room for reconciling article 3.3 of the SPS Agreement with article 43.1(1) of the IHR.

Article 43.2(b) of the IHR is a provision which also reflects the precautionary principle by reiterating some elements of article 5.7 of the SPS Agreement. However, it does not set forth more stringent requirements than the latter. According to the provision of article 43.2(b) of the IHR, where scientific evidence is insufficient, article 43.1(a) of the IHR, where scientific evidence is insufficient, “States Parties shall base their determinations upon ... ... the available information.” Like-

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111 “Sufficiency of scientific evidence”, the requirement under article 43.1 (a), is the same element for application of the precautionary principle as article 5.7 of the SPS Agreement. The drafters of the IHR rejected to use the word “scientific uncertainty”.

wise, if the precautionary principle is invoked before the WTO, the
configuration of provisions of less stringent character under article
43.2(b) will not affect the SPS regime of the WTO.

In the elaboration of this thesis, the author has reached the conclu-
sion that the SPS Agreement provides elements which are possibly con-
necteda to the WHO regime, as can be seen in article 3.2 and Annex
A.3(d). According to article 3.2, precautionary measures that conform
to international standards, guidelines or recommendations are pre-
sumed to be consistent with the Agreement. This presumption only ap-
plies to “relevant international organisations as identified by the SPS
Committee” as Annex A.3(d) points out.

Until now, the WHO has not been included in the list of such rele-
vant international organisations of the SPS Committee.112 In the future,
if it is included in the list, the channel will be open to its recommenda-
tions and guidelines concerning the SPS precautionary principle, in the
sense they have been exposed, amongst others, by arts 43.1(a) and
43.2(b).

c. Biosafety Protocol

The relationship between the SPS Agreement and the Biosafety Proto-
col is a controversial topic in the SPS context. Relevant provisions of
both instruments are indicative of the existence of overlapping areas re-
garding the applicability of the SPS precautionary principle. The Bio-
safety Protocol was designed to cope with problems of possible hazards
resulting from cross-border transfer of the so-called Living Modified
Organisms (LMOs), by establishing rights and obligations upon States
Parties, with the aim of reducing possible hazards. This concern is con-
sidered important in the SPS Agreement which allows Member States to
introduce and maintain SPS measures, as long as the measures do not
imply trade restrictions inconsistent with the relevant provisions of the
Agreement.

After the conclusion of the Protocol, rights and obligations of the
WTO Member States need to be clarified, since a considerable number
of the WTO Member States are also States Parties to the Biosafety Pro-
ocol.113 Whether or not their rights and obligations under both in-

112 Scott, see note 3, 53 et seq.
113 T. Stewart/ D. Johanson, “A Nexus of Trade and the Environment: The
Relationship between the Cartagena Protocol on Biosafety and the SPS
struments are complementary to each other is being debated. Some scholars consider that the Protocol was intended to be complementary to the SPS Agreement. 114 A number of scholars argue that both accords are rather contradictory. 115 This thesis will not analyse the Protocol as a whole, but will select relevant provisions concerning the precautionary principle separately, as we find that some provisions are actually complementary to the SPS Agreement, but not all of them. 116

The Biosafety Protocol sets forth different mechanisms, establishing rights and obligations upon Member States. Requirements under the Protocol do not always imply a rejection of the SPS Agreement. Whether or not this reaction takes place depends on relevant provisions of the Biosafety Protocol. For example, requirements of notification according to article 8 of the Protocol do not challenge the SPS Agreement, as it is the consequence of a duty imposed on importing countries to acknowledge the transfer of LMOs. But when a decision under article 10 of the Protocol has been taken, a challenge to the SPS Agreement may arise, especially concerning the level of protection of human health. There is also the question of risk assessment pursuant to article 15, which is less stringent than in the relevant provisions of the SPS Agreement.

Many examples may be exposed to demonstrate contradictions between both treaties although this thesis will not analyse all of them. It prefers to focus on general resolutions to overcome contradictions between both instruments.

The first possibility, proposed by this thesis, to resolve the conflict between both instruments, is the principle of effective treaty interpretation (ut res magis valeat quam pereat) which is also recognised in WTO jurisprudence, as evidenced by the US-Gasoline case.117 This principle

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115 Stewart/ Johanson, see note 113, 21 et seq.
116 It is possible that some provisions are not complementary to the SPS Agreement because the Biosafety Protocol prioritises protection of public (human) health, rather than protection of international trade.
provides that a treaty shall be interpreted in the light of applicability and enforceability of rights and obligations of States Parties. Concerning provisions on risk assessment, it is clear that requirements applicable to it under the SPS Agreement are more stringent by nature. Consistency between both systems could be attained if States Parties, when performing risk assessment under article 15 of the Protocol, also perform their obligations under relevant provisions of the SPS Agreement.

By doing so, the purpose of the Protocol is still maintained. That means obligations of States Parties, including the duty to notify, reception of notification and the decision making procedure, etc., are still required under relevant provisions. But enforcement of these requirements is a difficult issue in the light of WTO mechanism, since these rules are not considered as applicable law according to the DSU and its jurisprudence. They could be just “interpretative supplements” employed by adjudicatory organs to interpret particular WTO provisions under consideration. Actually this is clearly reflected in article 3.2 which provides that applicable law of the WTO is composed of “covered agreements” and “customary rules of interpretation of public international law.”

Notwithstanding article 3.2 of the DSU, Customary International Law (CIL) and General Principles of Law (GPL) are recognised as applicable law within the context of the WTO as well. Some provisions under the Protocol could be invoked as applicable law before Panels or the Appellate Body, if such provisions are considered as CIL or GPL.

Potential conflicts between the Protocol and the SPS Agreement could be solved by recourse to some other rules of treaty interpretation, especially arts 30 and 31 of the Vienna Convention on the Law of Treaties. Article 30 is related to the application of successive treaties relating to the same subject matter, that is, the Biosafety Protocol is considered as a successive treaty to the SPS precautionary principle of the same subject matter. But, in similar circumstances as the Biotech case, the Panel did not apply article 30, but instead article 31, which establishes general rules of treaty interpretation. It should be noted that article 30 of the Vienna Convention deals with application of successive treaties, while article 31 thereof merely refers to the general rule of interpretation. Both situations are significantly different.

118 US-Gasoline case, see note 6, para. 16.
119 Stewart et al., see note 113, 35.
The application of article 30 of the Vienna Convention, by the Panel, in the Biotech case, demonstrates that applicable law in the WTO context is restricted in the light of article 3.2 of the DSU. The application of article 30 of the Vienna Convention could entail importation of rules outside the WTO, resulting in the modification of its institutional legal framework, whereas article 31 is applicable, since it does not imply modification as such, but rather suggests that certain provisions of the Protocol, as in this case, be employed as supplementary interpretive tools. For this thesis, article 31 (3)(c) is to be taken into account, as it employs “any relevant rules of international law applicable in the relations between the parties.” Thus, when provisions of the SPS Agreement are applied, relevant rules of the precautionary principle under the Biosafety Protocol shall be employed as just “supplementary interpretative tools”, even though both parties ratified the Protocol.

However, as mentioned above, article 3.2 of the DSU does not make the WTO deny the concept of public international law, as CIL and GPL are also applicable law that adjudicatory organs could apply in cases as well. The rules in the successive treaty could thus be applied if they are CIL or GPL.\textsuperscript{120}

IV. Dispute Settlement Concerning the Precautionary Principle

Dispute settlement concerning the application of the precautionary principle is a significant topic, apart from the substantive issues. As mentioned in previous Parts, substantive issues are quite complicated and have not yet been sufficiently addressed. We could say, in other words, that the precautionary principle, at this moment, is in a legal vacuum. Substantive issues are problematic as such, so the dispute settlement dimension is not less problematic. Procedural issues or dispute settlement concerning the precautionary principle should therefore be approached in this thesis.

1. Choice of Forum

Application of the precautionary principle is not only available in the SPS Agreement, but also in other international instruments, namely the

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\textsuperscript{120} US-Gasoline case, see note 6, para. 16.
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Free Trade Agreements (FTA), the IHR of the WHO, and the Biosafety Protocol. These instruments also provide mechanisms for dispute settlement. Member States of the SPS Agreement, which are also parties to these instruments, can select one of them for dispute settlement. Applicable provisions regarding the precautionary principle, as mentioned in previous Parts, may differ from those embodied in the SPS Agreement, and that could lead to inconsistencies of the findings of adjudicatory organs according to each institution. The precautionary principle may be subject to variations according to the forum activated in a specific case.

It should be noted that conflicts of procedural dimension are rarely found between mechanisms of WTO and FTA. Most of the FTA are influenced by the SPS Agreement of the WTO, as the entirety of the SPS Agreement is directly referred to in those FTA.\(^\text{121}\) In the view of the FTA drafters, rules on SPS matters, as established in the SPS Agreement, are considered perfect, as well, for bilateral relations. Such reference-making could be found in, article 6.1 of the Chile-United States free trade agreement, article 63 of the one between Chile-Japan, article 7.3 of the Australia-United States free trade agreement, article 6.1 of the Bahrain-United States and article 4 of the Peru-Thailand free trade agreement. Differences to the text of the SPS Agreement also exist, but only in a few cases, such as the Association Treaty between Chile and the EC which establishes certain special rules for the SPS Agreement. Since conflicts between a FTA and the SPS Agreement are quite rare as such, due to the same substantive legal basis, conflicts between both systems will rarely happen.

If a dispute arises in relation to the application of the precautionary principle, the claimant may decide to submit the claim to one of the two systems, as the same law (SPS Agreement in most cases) is applicable in both mechanisms. However, the submission of a claim to an adjudicatory function of the FTA may be beneficial for both, in the sense that the procedure could be faster compared with the WTO’s adjudicatory mechanism. But a disadvantage of the FTA is that other states cannot participate in the proceedings. Application of the precautionary principle normally does not affect the interest of only one state, but often of Member States as a whole. In this regard, dispute settlement before FTA mechanisms is not very practical.

Conflicts of dispute settlement mechanisms between the WTO and the Biosafety Protocol, could be found more easily than the previous examples. The WTO mechanism seems to obtain more advantages than those of the Biosafety Protocol. Panels and the Appellate Body of the WTO work with an adjudicatory function. In the Biosafety Protocol, dispute settlement mechanisms work in the format of conferences in which States Parties discuss how to solve non-compliance, according to article 27 of the Protocol. The latter lacks institutional framework and thus faces great difficulties in respect of the enforcement, whereas the former contains significant mechanisms for enforcement, which makes it more advantageous. In this regard, states prefer to invoke and defend their rights concerning SPS measures before the WTO mechanism.

Comparing the dispute settlement mechanisms of WTO and WHO, both organisations have their own adjudicatory organs. Slightly similar to the WTO mechanism, WHO States Parties shall seek in the first instance to settle the dispute through negotiation or any other peaceful means of their own choice, including good offices, mediation or conciliation in accordance with article 56.1 of the IHR. If the dispute could not be settled by any of such means, a State Party may declare in writing to the WHO Director General that it accepts arbitration in accordance with article 56.3 of the IHR. If both States Parties have agreed to accept arbitration, this will be the procedure to be followed.

At this point, we can see that the mechanism of the WHO is parallel to the mechanism of the WTO in the sense that both systems render judicial decisions binding and final. How can we deal with such overlapping jurisdiction? Actually with regard to this issue, the question was

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122 With regard to dispute settlement mechanisms, Stewart has made a remark as follows: “If two parties to the Protocol seek to resolve a dispute involving LMOs under the auspices of the Protocol, they could conceivably do so, but as a practical matter, the dispute settlement process of the Protocol remains undefined.” Stewart et al., see note 113, 33.

123 The implementation process of the WTO is instructed by the principle of prompt compliance. The responding Party is required to implement the adopted report within a reasonable period of time. If the recommendations and rulings of the DSB are not implemented within a reasonable period of time, the complaining party may seek for “compensation or the suspension of concessions or other obligations” with regard to authorisation of the DSB; E. Kessie, The Course on Dispute Settlement in International Trade, Investment and Intellectual Property: World Trade Organisation, 3.4 Implementation and Enforcement, 2003, 3 et seq. and 25 et seq.
already answered in article 56.4 of the IHR and article 11.3 of the SPS Agreement.

Article 56.4 of the IHR sets forth that “nothing in these Regulations shall impair the rights of States Parties under any international agreement to which they may be parties to resort to the dispute settlement mechanisms of other intergovernmental organizations or established under any international agreement.” The phrase “nothing ... shall impair the rights” is significant in this context. Especially, if disputes concerning SPS precautionary principles have been brought before adjudicatory organs of the WTO. The DSU has eventually released a recommendation, with regard to article 56.4 of the IHR according to which States Parties cannot repeatedly bring the claim before the WHO mechanism.

If, vice versa, the States Parties decide to bring a dispute before the WHO arbitration and the arbitral award has already been given, can the losing party bring the claim again before the WTO? To answer this question this thesis suggests to apply article 11.3 of the SPS Agreement which reads: “Nothing in this Agreement shall impair the rights of Members under other international agreements, including the right to resort to the good offices or dispute settlement mechanisms of other international organizations or established under any international agreement.” Likewise article 56.4 of the IHR, article 11.3 of the SPS Agreement provide solutions for possibly overlapping jurisdiction, that is, adjudicatory organs of the WTO shall also recognise the final decision from the other system.124

2. Roles of the SPS Committee

The SPS Committee was established to serve as a regular forum for consultations and to be in charge of performing functions necessary to achieve the objectives of the SPS Agreement.125 The Committee does

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124 Article 56.4 of the IHR and article 11.3 of the SPS Agreement reflect a general principle of procedural law, recognised in various domestic jurisdictions. The concept is that the moment a dispute has been settled by a competent judicial organ, the dispute concerning the same substantive issue cannot be repeatedly adjudicated. F. Schorkopf, “Article 11”, in: Wolfrum, see note 7, 523 et seq.

125 Scott, see note 3, 48 et seq.; V. Röben, “Article 12”, in: Wolfrum, see note 7, 526 et seq.
not only obtain a “role of administration”, but also a “role of norm elaboration”\textsuperscript{126} as it is competent to address concerns relating to SPS issues,\textsuperscript{127} including application of precautionary measures. If SPS issues have been appropriately elaborated by the Committee, Member States will envisage such elaborated norms, which help to reduce a number of disputes brought before WTO adjudicatory organs. However, in order to cope with the SPS precautionary issues, the SPS Committee and states concerned need to do something more.

It appears that the Committee has to carry out plenty of work, but its own structure does not enable it to efficiently pursue its functions. The Committee is a big institution, which consists of representatives of all Member States. It makes decisions on the basis of consensus; that is, all members have to agree upon an issue raised before them. Regularly it organises meetings three times a year, where problematic SPS issues are addressed. Annex A.2.3 of the SPS Agreement helps to reduce the work of the Committee by referring to capacities of the three sister organisations, making international standards, recommendations and guidelines applicable in the context of the SPS Agreement. Member States therefore do not have to submit issues to the Committee, but directly refer to such instruments.

Even though these three similar organisations play a role in the assistance of the Committee, each year there remain pending issues to be addressed by the Committee. Such pending issues are abundant and deal with various topics concerning SPS matters. In responding to those issues Annex 2.3(d) provides that the Committee may invite other international organisations to participate in international standard setting. As yet, no international organisation participated in the process except the so-called three sister organisations. If functions of other relevant international organisations were embraced into the SPS context, SPS issues of international concern could also be addressed by such relevant organisations, leading to the reduction of SPS concerns brought before the Committee. Member States, therefore, do not need to present single issues to the Committee.

\textsuperscript{126} Concerning this point, Scott stated “… the committee not only elaborates norms for its own operation. It serves also to give shape and meaning to Members’ obligations under the agreement. Formally, its powers are constituted in only the vaguest and weakest terms. In practice, it is hardly an exaggeration to conceive the committee as performing something approaching a legislative function”, Scott, see note 3, 49 et seq.

\textsuperscript{127} It can even make a proposal to amend the SPS Agreement; ibid., 48 et seq.
It should be noted that the Committee is sometimes reluctant to do so, since reference to international standards determined by certain specialised international organisations may lead to fragmentation\textsuperscript{128} of SPS regulations, since some international organisations are also responsible for the SPS area, but prioritise their objective differently to the WTO. The WHO, if determined as a specialised organisation under Annex A.3 (d), would be an example of an international organisation, which would be difficult to align with the spirit of the SPS Agreement, since it prioritises health protection rather than trade. Reliance on guidelines or recommendations, as established by the WHO, may constitute inconsistency with the SPS Agreement\textsuperscript{129}.

However, it is not only the SPS Committee that has the role to address SPS issues of international concerns, but also Member States should exercise their role, provided in the SPS Agreement, hand-in-hand seeking for common understanding with other Member States through a process of negotiation, consultation or any other peaceful means, instead of directly bringing cases before adjudicatory organs. Especially, with regard to the application of precautionary measures, affected Member States should actively respond to the problems.

3. Burden of Proof

The configurations of the precautionary principle, as mentioned in Part II., are reflected in three circumstances: (i) Member States perform risk assessment obligations under article 5.1 in reliance with unlisted risk factors under article 5.2, (ii) Member States introduce and maintain provisional measures under article 5.7 and (iii) Member States impose precautionary measures in conformity with international standards. In analysing rules for burden of proof of both configurations, we should take into account the statement of the Appellate Body, in the EC-Hormones case, which reads:

“The initial burden of proof lies on the complaining party, which establishes a prima facie case of inconsistency with a particular provision of the SPS Agreement on the part of the defending party, or more precisely, of its SPS measure or measures complained about.


\textsuperscript{129} Scott, see note 3, 53 et seq.
When that prima facie case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency. This seems straightforward enough and is in conformity with our ruling in United States-Shirts and Blouses,\(^{130}\) which the Panel invokes and which embodies a rule applicable in any adversarial proceedings."

However, rules on the burden of proof are not fully restricted to this fundamental assertion. In some cases, it is impossible, for a complaining Party, to establish a *prima facie* case, while asserting inconsistency with relevant provisions. Proceedings concerning the application of the precautionary principle are one example. The responding Party regularly plays the role of the “affirmative defence” in the proceedings to assert that precautionary measures are justified under the SPS Agreement.\(^{131}\)

In analysing this issue, this thesis will take into consideration elements of each configuration of the precautionary principle.

\(^{130}\) The Appellate Body has remarked “...it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption”, Appellate Body Report, *US-Wool Shirts and Blouses* case, Doc. WT/DS33/AB/R, para. 335.

\(^{131}\) At this point, it is worth a comparison with the burden of proof under the Biosafety Protocol, which sets different tasks on the Parties. Vallely stated: “The precautionary principle contained in Article 10 of the Protocol suggests a great amount of deference to the state imposing restrictions on trade in justifying the restriction. When combined with the detailed notification requirements imposed on exporters, the Protocol appears to impose a burden on the exporting country to demonstrate the safety of a given LMO export. The actual evidentiary burdens imposed on parties in a dispute under the Protocol are not yet known, as the Protocol defers agreement on specific procedural issues to a later date, but the text implied that the burden lies with the exporter. This directly conflicts with the assertion in *Apples* that the burden lies on the trade-restricting country to prove its side of the argument, further complicating reconciliation of the two treaties. Such an allocation of burdens, as a procedural matter, will significantly weaken the protections afforded to trade-restricting states under the Protocol”, P. Vallely/ J. Patrick, “Tension between the Cartagena Protocol”, *Chi. J. Int’l L.* 5 (2004), 369 et seq. (376).
a. Arts 5.1 and 5.2

As mentioned in Part II., the precautionary principle is reflected in risk assessments, taking into account “risk factors” under article 5.2, which must not constitute just a “theoretical uncertainty” but rather an “ascertainable risk”. (In the *EC-Hormones* case, the Appellate Body affirms that a “societal risk” is also recognised in the context of article 5.2)

At the beginning of the case, it may appear impossible for the complaining Party to demonstrate that there is no risk, as the burden of proof is characterised negative *per se*. With regard to this problem, the Appellate Body, in the *Japan Varietals* case has addressed this issue by considering the provision of article 5.8, according to which the complaining Party may have already requested an “explanation of reasons” for the precautionary measures, imposed by the responding Party. It is not required that the complaining Party proves a negative assertion, but merely raises a presumption on the basis of such explanation. The burden of proof, with regard to arts 5.1 and 5.2, still falls upon the responding Party as an affirmative defence.

b. Article 5.7

The burden of proof in case of invoking the precautionary principle under article 5.7 is also characterised as a form of affirmative defence, as the responding Party bears the burden to adduce evidence to demonstrate legitimacy of its provisional measures. However, the establishment of the *prima facie* case for article 5.7 is different to arts 5.1 and 5.2, as clarified by the Panel in the *Japan - Measures Affecting the Importation of Apples* case, which affirmed that the member imposing the provisional measure is to make a *prima facie* case. This finding was not reviewed by the Appellate Body.

This thesis considers that the findings of the Panel were not consistent with the WTO jurisprudence, as asserted by the Appellate Body in the *Japan-Varietals* case, that the complaining party has to rely on article 5.8 and thus to set off the *prima facie* case on the basis of the explanation it had already obtained from the responding Party. If the complaining Party is entitled to request for such an explanation of reasons for SPS measures, it could do so as well for explanations of applications of precautionary measures. However, whether the burden to establish

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132 *EC-Hormones* case, see note 8, paras 181 et seq.
*prima facie* cases falls upon the complaining or the responding Party, the responding Party shall definitely obtain the burden to demonstrate legitimacy of its precautionary measures.

c. Paragraph 6 of the Preamble and Article 3.3

When the responding Party imposes its precautionary measures in conformity with international standards, recommendations or guidelines related to the precautionary principle, it is deemed that its measures have been in compliance with the SPS Agreement. This, however, does not exclude the responding Party from the burden of proof. The presumption of compliance just shifts the burden of proof on the complaining Party to adduce evidence to demonstrate that the measures at hand “are not in conformity with international standards” and then the responding Party has to rebut the argument of the complaining Party.

4. Review of Precautionary Measures

A function of Panels is to perform objective assessment of facts. Specifically, in proceedings concerning the application of precautionary measures, panels have to review precautionary measures, taking into account risk assessment and risk management, as, in the view of this author, the precautionary principle reflects both areas.

When precautionary measures are applied in the context of risk assessment, the Panel has to review the measures in regard to the elements justifying the precautionary measures, taking into account evidence adduced by both Parties, as mentioned in the previous Part. As mentioned in Part II., the precautionary principle is applied in the context of risk assessment when an unlisted risk factor fulfils the criteria: (i) ascertainability and (ii) exclusion of theoretical uncertainty. The Panel is fully entitled to re-examine whether such risk factor fulfils these criteria. In doing so, the Panel has to make an objective assessment of the facts concerned, as obtained by its capacity.

After reviewing the risk assessment of the responding Party, the Panel, then, has to review the risk management decisions of the responding Party. The keyword in this review is “evaluating measures selected by the responding Party.” The Panel has the capacity to examine

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133 As mentioned in Part II., this thesis considers that precautionary measures could be instructed by international standards.
whether the precautionary measures, invoked by the responding Party are legitimate under the SPS Agreement. Basically, it has to check compliance of the measures with the relevant provisions that may be invoked by the responding Party, namely article 5.7 on provisional measures or article 3.2 for precautionary measures based on international standards.

After doing so, the Panel has to assess the legitimacy of the measures at hand, referring to other relevant provisions, for instance, article 5.6, for a necessity test, article 2.3, for evaluating whether the measures are characterised as disguised restrictions to international trade. Moreover, this thesis would like to make further remarks that the Panel shall take into account unwritten rules applicable to the case as those rules also intrude into the SPS precautionary matter. As mentioned in Part III., countervailing rules to international trade protection shall be regarded also in the WTO context. This idea was included in the WTO jurisprudence, as supported by the Appellate Body in the US-Gasoline case, which affirms that the WTO “... is not to be read in clinical isolation from public international law.”

V. Precautionary Principle and Developing Countries

Application of the precautionary principle for developing countries, could be characterised as two sides of a coin. It could discourage as well as benefit developing countries. It depends which side of the coin we take into account. Firstly, this part will focus on developing countries when playing a role as exporting countries and secondly on developing countries when playing a role as importing countries.

134 US-Gasoline case, see note 6, para. 16.
135 There is no definition of the term developing country in the SPS Agreement, nor has such a definition been adopted by the WTO members. Article XVIII:1 GATT 1994 which refers to developing countries as those economies which can only support low standards of living and are in the early stage of development can be used as guidance. In practice classification as a developing country is predominantly a matter of self-determination, Scott, see note 3, 505.
1. Developing Countries as Exporting Countries

Preoccupation of developing countries, as exporting countries, relating to the application of the precautionary principle is quite high, since, speaking in general, their economies rely on agricultural products, which are subject to the SPS Agreement. Applicability of the precautionary principle within the scope of the SPS Agreement is a significant cause for their anxiety since the principle provides that Member States are entitled to exercise a range of discretion to impose precautionary measures. On the one hand, such preoccupation has resulted from the nature of the precautionary principle, which entails “legitimate trade restriction”, and, on the other hand, from the potential that other states may “abusively apply the precautionary principle.”

a. Preoccupation on Configuration of the Precautionary Principle

Preoccupation on configuration of the precautionary principle has stemmed from the text of the relevant provisions in the SPS Agreement. In particular, article 5.7 was criticised by Prévost which reads:

“The allowance made in Article 5.7 for precautionary measures gives developing countries cause for concern. The terms used in Article 5.7 are rather vague and undefined. It is not clear what would constitute ‘pertinent information’ sufficient to justify a provisional measure, how long such a measure may be maintained while keeping its character as ‘provisional’ or what the obligation to ‘seek to obtain ... additional information’ entails. This creates the possibility that insufficiently justified measures could be maintained for long periods of time.”

It actually appears, as asserted by Prévost, that the wording of article 5.7 does not provide, in detail, specific requirements. But, in the view of

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136 At this point, Jensen has remarked: “The difficulties in exporting under increasingly strict SPS measures are manifold and particularly acute for many developing countries. The costs involved included both the production costs of respecting the SPS requirements and the conformity costs of making sure they are respected. When SPS requirements increase production costs do too as new inputs may be required or technologies changed”, M. Jensen, “Reviewing the SPS Agreement: A Developing Country Perspective”, 2002, 3 et seq.

137 Ibid., 1 et seq.; Prévost/ Matthee, see note 82, 43.

138 Prévost/ Matthee, ibid. 49
this thesis, the precautionary principle obtains its proper nature, that is, it deals with scientific loopholes, where even configuration of potential risk itself is difficult to identify, as mentioned in Part III.\textsuperscript{139} Drafters of the SPS Agreement basically seemed to obtain no choice in writing this article. Thus the configuration of the precautionary principle under article 5.7, by its own character, contains loose wording as such, which provides Member States with a wide range of discretion.

Despite the said character of article 5.7, developing countries are less concerned, since application of precautionary measures shall, nevertheless, be subject to substantive rules of international trade protection, including the principle of good faith, the transparency requirements, the necessity test, etc., as mentioned in Part III. Incompliance with these rules certainly renders the precautionary measures illegitimate.

Application of the precautionary principle in arts 5.1 and 5.2 provokes preoccupation also upon developing countries because, as asserted by the Appellate Body, article 5.2 is not intended to be a closed list, which could provide a gateway to applicability of the precautionary principle, as long as risks invoked are ascertainable and not just theoretical ascertainable. It has not provided further explanation regarding “ascertainability”. Thus, in practice, at the beginning, determination of what risk is ascertainable falls upon Member States, which impose the measures\textsuperscript{140} as long as their application of precautionary measures are not counter to rules of international trade protection, as mentioned in the previous paragraph.

Application of the precautionary principle under paragraph 6 of the preamble and article 3.2, in the context of international standards,\textsuperscript{141} could also provoke preoccupation of developing countries, if international standards include instructions for precautionary measures. The problem of international standard setting is not usually about the level of protection itself, but rather the lack of participation of developing countries, even though they are affected by international standards.\textsuperscript{142}

In response to this preoccupation, developing countries should be en-

\begin{footnotesize}
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\item This could be compared with the configuration of the precautionary principle in article 5.1, that the Appellate Body preferred to use the word “ascertainable” instead of “identifiable”.\textsuperscript{\textsuperscript{139}}
\item Nevertheless determination of risk is still governed by relevant rules of international trade protection, as mentioned in the previous paragraph.\textsuperscript{\textsuperscript{140}}
\item As mentioned in Part II., it is possible that precautionary measures are instructed by international standards.\textsuperscript{\textsuperscript{141}}
\item Scott, see note 3, 269 et seq.\textsuperscript{\textsuperscript{142}}
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couraged to participate in international standard setting\textsuperscript{143} in order to express their concerns on precautionary measures harmonised by international standards. Actually developing countries have certain platforms to expose, but do not actively use this opportunity.

The configuration of the precautionary principle, as shaped by its own text in the SPS Agreement and WTO jurisprudence, is not problematic for developing countries, since application of the precautionary principle is countervailed by scientific requirements and relevant rules of international trade protection, including the principle of good faith, transparency requirements and necessity tests, as mentioned in Part III. The first preoccupation, concerning legitimate trade restriction, is nevertheless inevitable, since the precautionary principle has been endorsed to fulfill the spirit of the SPS Agreement. The principle itself does not aim at protectionism, but rather provides opportunity to Member States to protect public health within their own territories via SPS measures.

b. Preoccupation on Abusive Application of the Precautionary Principle

The SPS Agreement actually provides a doctrinal framework to counter abusive application of the precautionary principle. For example, “prohibition of arbitrary or unjustifiable discrimination and of disguised restriction to international trade” is underlined in article 2.3, in parallel to the Chapeau of Article XX of the GATT 1994. Also, as mentioned in the previous Part, relevant rules of international trade law play a significant role in regulating the application of precautionary measures. Despite the existence of these rules, preoccupation of developing countries and least developed countries still prevails. But, it appears that the preoccupation should focus on the question of how to implement these rules in order to effectively counter the abusive application, rather than how to change such rules.

The proposal of this thesis is that developing countries, altogether, should actively deal with the issue, rather than wait for help. In doing so, it is important to obtain enough information which manifests that arbitrary or unjustifiable discrimination and disguised trade restriction take place, since these problems are mostly related to fact findings. Without sufficient evidence, they could not bring claims against countries which impose the measures both before judicial and non-judicial.

\textsuperscript{143} Ibid.
mechanisms. Gathering evidence is not a simple work and is difficult to be done alone. Therefore developing countries, which share the same interests, should begin to actively collaborate.

The collaboration may be achieved by various means, including exchange of information relating to their concerns in common, collective submission of requests for explanation under article 5.8, proceedings of collective consultation under article 11.1.

The first proposal of this thesis, “exchange of information”, may be achieved when developing countries communicate with each other. A developing country should neither feel insignificant, nor hesitate to help, when other developing countries ask for information, which is already available. Exchange of information between developing countries themselves could provide a useful means for each other. Two developing countries, which share the same concern, have investigated facts. The facts at hands of both countries may be complementary to each other, and if exchanged, could make fact finding more profound and then the process of investigation will be a lot faster.

It should be noted that this proposal is different to paragraph 7 of the preamble, since the former requires “self-collaboration amongst developing countries”, whereas the latter calls upon more prosperous countries to recognise the limitations of developing countries. This thesis forecasts that if current framework for developing countries under the SPS Agreement is complemented by this proposal, those rules of international trade law designed to prevent arbitrary or unjustifiable discrimination and disguised trade restriction will be implemented and thus importing countries will be discouraged from abusively applying precautionary measures with the real aim of trade restriction.

The second proposal of this thesis is to “employ Article 5.8 of the SPS Agreement in a collective manner.” According to article 5.8, a developing country could ask for an explanation from importing countries with regard to precautionary measures imposed. This thesis proposes that the submission of request for an explanation under article 5.8 will contribute to the interest of developing countries if developing countries, which share the same interests, make collective submissions of request. In doing so they should make observations on the explanation provided by the importing countries. With this proposal, the application of article 5.8 will not just be an inactive transfer of information, but rather a collaborative investigation of facts. Since no provision prohibits this collective submission, it is therefore possible to do so.
The third proposal of this thesis deals with the process of consultation, as the prerequisite for a dispute settlement proceeding. In the view of this thesis, the consultation process, if done collectively, could reconcile the interests of developing countries, affected by measures of importing countries. That is, developing countries, whose rights have been affected by precautionary measures, proceed together in the consultation process with the importing country. This could, on the one hand, help the importing country to get to know the full consequences of the application of the precautionary measures. On the other hand, developing countries feel more confident about undergoing the process of consultation, especially if the importing country is a big economy, namely the EC or the United States.

2. Developing Countries as Importing Countries

When developing countries exercise the role of importing countries, applying precautionary measures, they have much less preoccupation than they would have when exercising the role of exporting countries. Rights of developing countries with regard to the application of SPS measures, are established quite clearly in the SPS Agreement, namely in paragraph 7 of the preamble and article 10 of the SPS Agreement. In this regard, developing countries are also granted the capacity of imposing precautionary measures to protect public health within their territories.

Before further analysing special rules for developing countries, it is important to draw attention to the question, under what circumstances special rules could be applied for developing countries? The basic notion of special and differential treatment is that rules on special and differential treatment are designed to compensate disadvantages that developing countries may encounter when SPS measures are applied due to their limited capacity. Special and differential treatment shall not be interpreted as to diminish fundamental rules of international trade law.

For example, importation of genetically modified products entails application of precautionary measures which are intended to protect public health. However, the importation also significantly affects developing countries. That is, employment of genetic science accelerates and improves productions by providing herbicide resistance to plants, enlarging the size, making the taste better. Genetically modified prod-

144 A. Seibert-Fohr, “Article 11”, in: Wolfrum, see note 7, 504 et seq.
ucts therefore could quantitatively respond to demands of people a lot more than ordinary production, generally employed by developing countries. Even though this may be disadvantageous to developing countries, it is not a reason for differential treatment. If developing countries maintain their precautionary measures by this motive, it could be deemed that the precautionary principle is being invoked to justify a disguised restriction to international trade, which is not permitted under article 2.3 of the SPS Agreement.

As mentioned in Part II, the application of the precautionary principle under article 5.7 requires four elements, that is, during/after precautionary measures are applied, measures must: (i) be imposed in respect of a situation where relevant scientific information is insufficient; (ii) be adopted on the basis of available pertinent information; (iii) not be maintained unless the member seeks to obtain the additional information necessary for a more objective assessment of risk; and (iv) be reviewed accordingly within a reasonable period of time. With regard to relevant rules of special and differential treatment for developing countries, elements of article 5.7 are to be construed as long as each of them leaves room for special interpretation for developing countries.

The first element of article 5.7 does not entail special interpretation for developing countries, since determination of insufficiency of scientific evidence is based on the same standard for Member States, which deals with determination of “reliance and conclusiveness”, as clarified by the Appellate Body. Equally, the second element does not entail special interpretation because the question of whether the measures concerned are based on available pertinent information depends on “relevant information” and “public values of a single State”, which are not relevant to particular rights of developing countries.

The third and fourth elements entail special interpretation for developing countries. As mentioned in Part II, the third element leaves room for Member States to decide “what means to employ in order to obtain additional information which must be germane to the conduct of a more objective risk assessment.” In searching for information, developing countries may confront difficulties. The means, which they may employ to get information, shall depend on their capacities in the light

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145 However, before article 5.7 is applied, developing countries may enjoy special rights. That is, in seeking for scientific evidence, they obtain rights to get technical assistance. But this technical assistance is not relevant for article 5.7 at all, but rather for relevant provisions on risk assessment.

146 This issue has already been discussed in Part II.
of paragraph 7 of the preamble. Special interpretation is to be made, as well, for the last element of article 5.7, “review (the measures) within a reasonable period of time”. As the capacity of developing countries is generally limited, a reasonable period of time therefore could be construed in a more extensive manner than for developed countries.

Developing countries, when applying precautionary measures under arts 5.1 and 5.2, also find an opportunity to obtain special interpretation in accordance with article 9, which provides for the possibility of developing countries to obtain technical assistance. This thesis considers that article 9 not only provides special treatment for developing countries, but also fosters transparency when precautionary measures are imposed by developing countries. When Member States apply precautionary measures alone, the measures are contingent on discretion thereof, which sometimes may be abused. Whether the risk in question is ascertainable or not is still an abstract issue and is potentially interpreted by virtue of the state which imposes the measures. But when risk assessment is supported by technical assistance, the possibility of abused discretion is reduced, since the result of risk assessment is the output of collaboration between at least two countries.

Special rights of developing countries for application of the precautionary principle also include a “special right to determine relevant measures to reach an appropriate level of protection.” For example, developing countries basically have less capacity than developed countries in terms of equipment and materials necessarily used for checking entrance of suspected goods, as part of precautionary measures. Developed countries may use equipment of highly advanced technology to check significant substances contained in the products, whereas developing countries may not have the capacity to do this. In the light of article 10.1 and paragraph 7 of the preamble, they therefore could employ measures of lower technology or low costs to investigate the imported products.

However, in doing so, developing countries shall ensure that their measures are consistent with basic obligations, as mentioned in previous parts. Low cost measures shall conform to the principle of good faith. In imposing the measures, they have to perform the transparency obligations. The necessity test is also to be regarded to ensure that such low cost measures are not more trade restrictive than absolutely required.
Conclusion

Approaching the precautionary principle is a considerable challenge, since the principle contributes to the so-called suspected risks “des risques soupçonnés.” Once it has been exonerated from being suspected, the precautionary principle does not continue its role. The principle, in the SPS sphere, is definitely intended to protect life and health of living beings, including humans, animals and plants, but there is a fear that it may be abused by a state invoking it, since the principle gives a wide range of discretion to Member States. Despite its character it is required to exist in order to counterbalance rules of international trade protection. In the view of this thesis, the principle is not just a theoretical notion, but rather something we need in practice.

As mentioned in the relevant Parts, the principle obtains its standing in the SPS sphere both as a written provision, underlined in the SPS Agreement, and as unwritten principle, which is also applicable before adjudicatory organs of the WTO. The principle has not yet been crystallised as customary international law, but could be invoked as a general principle of law, when employed to protect human health. The scope of application of the precautionary principle is unclear and highly arguable. However, findings of the WTO provide relevant answers to questions concerning its scope of application in the SPS Agreement, although these findings are themselves contradictory. The configuration of the precautionary principle has not only been exhausted in article 5.7, but also reflected in certain provisions in a restrictive style.

Moreover, the precautionary principle is not isolated, but intermingles with relevant rules of international trade law and other relevant areas. In this regard, application of the principle shall take into account other relevant rules. This thesis has split such relevant rules into two groups, rules of international trade protection and countervailing rules of international trade protection. The precautionary principle shall always be applied in conjunction with these rules, otherwise public health would not be ultimately protected or the application of the principle may result in protectionist tendencies.

After analysing the doctrinal framework of the precautionary principle, this thesis also took into consideration dispute settlement concerning the application of the precautionary principle, since there are significant issues which deserve to be approached. The topic is therefore included in this thesis in order to make the work complete. In the last Part, the thesis narrowed down the scope to relevant issues on developing countries. Generally speaking, developing countries do not appreci-
ate the application of the precautionary principle, since a considerable number of developing countries rely on revenues from agricultural products. Solutions to reduce this preoccupation have been proposed in the same Part. However, when developing countries play a role as importing countries, there are relevant issues to be regarded as well. In exercising this role, they enjoy certain special rights, which were also analysed in this thesis.
Textbooks on international organisations tend to be voluminous, encyclopaedic in their description of individual organisations – sharply in contrast with the scarcity of general principles in that field – and about as stimulating as an organisational chart of the ministry of agriculture. This is probably no coincidence. Rather, such an approach serves to uphold an image of smoothness in the government of international affairs, supporting a functionalist view of international organisations according to which states set them up in order to get something done.

Not so Jan Klabbers’ textbook on international institutions, which appeared in its second edition in 2009. As in the previous edition, Klabbers places the conflicts pervading international institutions at centre stage. And, what is more important, he manages to extract one coherent front line running through all these conflicts: the tug of war between diverging perspectives on international institutions, one of them seeing international institutions as tools of their Member States, the other one as separate entities (p. 3 et seq., 35-37).

As Klabbers excavates this leitmotif throughout the Chapters of the book, he ends up deconstructing, rather than describing the law of international institutions. Along with Klabbers’ usual vivid writing style, this makes his book a fascinating read that frees the field of international institutional law from the dust of functionalism. Klabbers’ excavation of international institutional law is very thorough. Before reaching the ruins of international institutional law, he digs his way through the political theory aspects of international institutions that illuminate the ratio behind the contending perspectives on international institu-
tions (p. 25 et seq.). Numerous references to national and European case law illustrate the contentions throughout the book.

For purists of European law it might come close to heresy that Klabbers puts the European Union largely on a par with international institutions. However, as the same tension between diverging perspectives can be detected in the European Union as well, its inclusion in the book appears largely justified. In some respects, for example in matters of competencies, the European Union is even like a greenhouse where ideas grow faster and can be observed in vivo before implanting them into the law of international institutions. As this review addresses only a second, revised edition, it should suffice to refer to some Chapters which concern issues that have seen, or might see some recent development in practice as well as scholarship. This is the case with regard to the competencies, instruments, and treaty-making capacity of international institutions, as well as the highly contentious issue of their responsibility.

Chapter 4 discusses the powers of international organisations. It is no wonder that it is here, in particular in the debate about implied powers, where the leitmotif is most audible. Klabbers’ scrutiny of the case law reveals that there is presently no convincing legal doctrine guiding the repartition of powers between an organisation and its Member States. The functionalist appeal of the doctrine of implied powers ends up in a question-begging circularity, as the function of international institutions to serve states’ needs is eventually used as an argument against state sovereignty (cf. p. 63). However, Klabbers’ proposal to limit the scope of application of the implied powers doctrine to cases where it complements explicit powers (p. 65) might just shift the contestation to the delimitation of those explicit powers. The hope that the issue might lose its relevance over time seems in vain, too. Even though the European Court of Justice has preferred working with the concept of Gemeinschaftstreue instead of competencies in some cases (p. 71-72), recent case law relating to external competencies, such as the ECOWAS Judgment from 2008 (C-91/05), demonstrates that the issue of power and competencies is still very much alive. Instead, relief might come across if we just accept the eternal contestations in the law laid open by Klabbers’ piercing analysis. This would open up our minds for procedural instead of substantive means for solving the power dilemma. This is exactly where Klabbers’ own analysis points to in the Chapter devoted to decision-making (p. 227-228).

In Chapter 10 on legal instruments, Klabbers reveals that the theories explaining the binding character of legal acts of international or-
ganisations resonate the same leitmotif. Either they are seen as acts of delegation that owe their binding force to state consent, or as acts of an international legislative requiring no further justification (p. 184). The conclusion to be drawn from this would probably be that the binding force of the legal acts of international institutions does not rest on an overly stable fundament. Given this insight, I wonder why Klabbers maintains his rejection of soft law, which he considers as a tool of naked power (p. 183). While the legitimacy of soft law indeed raises questions, soft law is by no means only a tool for powerful states to pursue their interests. Rather, it can also be used by the great majority of less powerful states to voice their opinion and concerns against a legal situation dominated by powerful states’ interests. Thus, the different uses of soft law are just another manifestation of the tensions between sovereign states which see international organisations as tools for increasing their leverage, and an international community which wants to superimpose them over states (on the latter point see p. 207). Applying his own theory more consequently, Klabbers might have come to the point to see soft law not so much as an anomaly, but rather as a structural peculiarity of international institutions, resulting from their genetic code. As with the implied powers doctrine, procedural means might be employed in order to attenuate the legitimacy deficits of soft law instruments.

As the author is a specialist on treaty law, Chapter 13 on treaty-making by international institutions is of particular interest. Again, Klabbers exhibits the tension between international organisations and their Member States by unravelling the history of the treaty-making capacity of international organisations (p. 251). Most of this Chapter, however, relates to the intricacies of the law of the European Union. As Klabbers concedes, the practice of the European Union gains particular significance because of the direct effect of international treaties in the Member States by virtue of EU law (p. 263). At this point, in my opinion, the analogy of the European Union with international institutions reaches its limits. As neither the legal instruments of international organisations, nor the treaties concluded by them have direct effect in their Member States, direct effect seems to be the unique feature of the European Union. It is not to be expected that international organisations develop in the same way.

Finally, Chapter 14 on the responsibility of international organisations embarks on an almost inscrutable field. Klabbers does what lawyers can do best: he categorises the various scenarios that must be distinguished in order to develop a meaningful doctrine of responsibility.
(p. 276 et seq.). Each of the categories thus developed, be it the subject of responsibility, the wrongful act, or the question of Member States' liability for acts of the organisation, reveals the tension between a holistic view of the organisation as such, and a particularistic view that sees the Member States in the first place. This deconstruction shows two things: first of all, the responsibility of international institutions requires taking into account the particularly public nature of international institutions. As Klabbers rightly points out (p. 278), private law analogies such as those that pervade the International Tin Council litigation do not provide a convincing doctrinal fundament for situations where international institutions fulfil public tasks such as peace-keeping.

Second, the issue of responsibility shows that the underlying tension which provides the leitmotif to the book might eventually have three poles instead of only two: states, institutions, and the individual. The more international institutions exercise power over individuals, and not just over states which mediate (and occasionally mitigate) their impact on individuals, the more the individual needs to be taken into account in the law relating to international institutions. While the trend of the era after World War I has been the move to institutions, the trend of the post-war era, and even more so of the era following the cold war could probably be called the move towards the individual.

And indeed, in his concluding remarks, Klabbers performs the move towards the individual by proposing ethical standards for the behaviour of international organisations and their staff as a solution to their legitimacy dilemma (p. 317). Ethical standards presuppose an individualist perspective. However, ethical standards raise just the same questions of application and interpretation as the law on the responsibility of international organisations. Even worse, they give leeway for unfettered subjectivity. A viable alternative for achieving greater accountability of international organisations might be available in the form of public law approaches such as constitutionalism or Global Administrative Law.

Although Klabbers is right in pointing out that each of these approaches features certain deficits (p. 314-317), it is perhaps one of the most important lessons of his book that we need to generally lower our expectations of international law as a means for the attainment of justice – just as Klabbers advises us to reduce our expectations of the capability of international institutions to cure the myriad of ills of the world (p. 317). Law is only capable of providing some relief in some cases, no matter how much we try to make it perfect. In this respect, law could not be more different from the textbook under discussion that success-
fully strives towards perfection with its second edition, and whose readers’ expectations will certainly be exceeded.

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