Max Planck Yearbook of United Nations Law

Volume 11
2007

Editors
Armin von Bogdandy
Rüdiger Wolfrum



Max-Planck-Institut für ausländisches
öffentliches Recht und Völkerrecht

Martinus Nijhoff Publishers

Max Planck Yearbook of United Nations Law

Volume 11
2007

Max Planck Yearbook of United Nations Law

Founding Editors
Jochen A. Frowein
Rüdiger Wolfrum

Max Planck Yearbook of United Nations Law

Volume 11
2007

Editors
Armin von Bogdandy
Rüdiger Wolfrum

Managing Editor
Christiane E. Philipp



Max-Planck-Institut für ausländisches
öffentliches Recht und Völkerrecht

MARTINUS NIJHOFF PUBLISHERS
LEIDEN / BOSTON

A C.I.P. Catalogue record for this book is available from the Library of Congress.

This book should be cited as follows: Max Planck UNYB

Printed on acid-free paper.

ISBN13: 978 90 04 16430 7
ISSN: 1389-4633
© 2007 *Koninklijke Brill NV, Leiden, The Netherlands*

Koninklijke Brill NV incorporates the imprints Brill, Hotei Publishers, IDC, Martinus Nijhoff Publishers and VSP.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, microfilming, recording or otherwise, without written permission from the Publisher.

Authorization to photocopy items for internal or personal use is granted by Brill provided that the appropriate fees are paid directly to The Copyright Clearance Center, 222 Rosewood Drive, Suite 910, Danvers MA 01923, USA.
Fees are subject to change.

Printed and bound in The Netherlands.

Articles from previously published volumes are electronically available under "Top-Links" at: http://www.mpil.de

Contents

List of Contributors IX
Abbreviations XI

Strydom, Hennie,
The Non-Aligned Movement and the Reform of International Relations 1

Wood, Michael C.,
The International Seabed Authority: Fifth to Twelfth Sessions (1999-2006) 47

Zimmermann, Andreas,
The Second Lebanon War: *Jus ad bellum*, *jus in bello* and the Issue of Proportionality 99

Orakhelashvili, Alexander,
The Acts of the Security Council: Meaning and Standards of Review 143

Schmahl, Stefanie,
The United Nations Facing the Challenges of the "Information Society" 197

Kugelmann, Dieter,
The Protection of Minorities and Indigenous Peoples Respecting Cultural Diversity 233

Matz-Lück, Nele,
The Eighth Conference of the Parties to the Convention on Biological Diversity: Summary and Analysis 265

Thompson, Edwina A.,
Misplaced Blame: Islam, Terrorism and the Origins of *Hawala* .. 279

Röder, Tilmann J.,
Little Steps Forward: Some Remarks on the Rome Conference on the Rule of Law in Afghanistan 307

Focus:

How to speed up Implementation of the Right to Adequate Food at the International Level?

Selected Papers from the Expert Seminar held at the Max Planck Institute for Comparative Public Law and International Law, 11-12 September 2006.
Food and Agriculture Organization of the United Nations
Max Planck Institute for Comparative Public Law and International Law
FIAN International (FoodFirst Information and Action Network)

Courtis, Christian,
The Right to Food as a Justiciable Right: Challenges and Strategies 317

Skogly, Sigrun I.,
Right to Adequate Food: National Implementation and Extraterritorial Obligations 339

Coomans, Fons,
Application of the International Covenant on Economic, Social and Cultural Rights in the Framework of International Organisations 359

Söllner, Sven,
The "Breakthrough" of the Right to Food: The Meaning of General Comment No. 12 and the Voluntary Guidelines for the Interpretation of the Human Right to Food 391

LL.M. Thesis:

Letelier Astorga, Ricardo,
The Nationality of Juridical Persons in the ICSID Convention in Light of Its Jurisprudence 417

Book Reviews 473

List of Contributors

Coomans, Fons

Senior Researcher, Centre for Human Rights, University of Maastricht, The Netherlands

Courtis, Christian

International Commission of Jurists, Geneva, Switzerland

Kugelmann, Dieter

Professor of European Law at the University of Applied Sciences Harz, Halberstadt; Associated Professor of Public Law, Public International Law and European Law, University of Mainz

Matz-Lück, Nele

Dr. iur., LL.M. (University of Wales, Aberystwyth), Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law

Orakhelashvili, Alexander

LL.M. (Leiden), Ph.D. (Cantab.), Shaw Foundation Junior Research Fellow in Law, Jesus College, Oxford, United Kingdom

Röder, Tilmann J.

Dr. iur., Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law

Schmahl, Stefanie

Dr. iur., LL.M. (E), Private Lecturer of Public Law, Public International Law and European Law, University of Potsdam; during the summer semester 2007 Visiting Professor, University of Düsseldorf

Skogly, Sigrun I.

Professor of Human Rights Law, Lancaster University Law School, United Kingdom; Coordinator of the International Human Rights Obligations Network (IntHRON)

Söllner, Sven

Dr. iur., Legal Trainee

Strydom, Hennie

Professor of Public International Law, University of Johannesburg, South Africa

Thompson, Edwina A.

Research Scholar, St Cross College, Oxford University, United Kingdom

Wood, Sir Michael C.

Senior Fellow of the Lauterpacht Centre for International Law, University of Cambridge; Barrister at 20 Essex Street Chambers; between 1999 and 2006 Legal Adviser to the Foreign and Commonwealth Office

Zimmermann, Andreas

Dr. iur., LL.M. (Harvard), Professor of Public and Public International Law and Director at the Walther-Schücking-Institute of International Law, University of Kiel

LL.M. Thesis:

Letelier Astorga, Ricardo

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*
Am. U. Int'l L. Rev.	*American University International Law Review*
Am. U. J. Int'l L. & Pol'y	*American University Journal of International Law and Policy*
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*
Austrian J. Publ. Int'l Law	*Austrian Journal of Public International Law*
AVR	*Archiv des Völkerrechts*
BauR	*Baurecht*
BayVBl.	*Bayerische Verwaltungsblätter*
BGBl.	*Bundesgesetzblatt*
Brook. J. Int'l L.	*Brooklyn Journal of International Law*

B. U. Int'l L. J.	*Boston University International Law Journal*
BVerfGE	Entscheidungen des Bundesverfassungsgerichtes (Decisions of the German Federal Constitutional Court)
BYIL	*British Yearbook of International Law*
Cal. L. Rev.	*California Law Review*
Cal. W. Int'l L. J.	*California Western International Law Journal*
Cal. W. L. Rev.	*California Western Law Review*
Case W. Res. J. Int'l L.	*Case Western Reserve Journal of International Law*
Chi. J. Int'l L.	*Chicago Journal of International Law*
CLJ	*Cambridge Law Journal*
CML Rev.	*Common Market Law Review*
Colo. J. Int'l Envtl. L. & Pol'y	*Colorado Journal of International Environmental Law and Policy*
Colum. Hum. Rts L. Rev.	*Columbia Human Rights Law Review*
Colum. J. Transnat'l L.	*Columbia Journal of Transnational Law*
Colum. L. Rev.	*Columbia Law Review*
Comunità Internaz.	*La Comunità Internazionale*
Conn. J. Int'l L.	*Connecticut Journal of International Law*
Cornell Int'l L. J.	*Cornell International Law Journal*
CTS	Consolidated Treaty Series
CYIL	*Canadian Yearbook of International Law*
Den. J. Int'l L. & Pol'y	*Denver Journal of International Law and Policy*
DGVR	Deutsche Gesellschaft für Völkerrecht (German Society of Public International Law)
Dick. J. Int'l L.	*Dickinson Journal of International Law*
DÖV	*Die Öffentliche Verwaltung*

Duke J. Comp. & Int'l L.	*Duke Journal of Comparative and International Law*
Duq. L. Rev.	*Duquesne Law Review*
DVBl.	*Deutsches Verwaltungsblatt*
EA	*Europa-Archiv*
ECOSOC	Economic and Social Council
ed.	editor
eds	editors
e.g.	exempli gratia
EJIL	*European Journal of International Law*
ELJ	*European Law Journal*
Env. Policy & Law	*Environmental Policy and Law*
Envtl L. Rep.	*Environmental Law Reports*
EPIL	*Encyclopedia of Public International Law*
et al.	et alii
et seq.	et sequentes
etc.	et cetera
EuGRZ	*Europäische Grundrechte-Zeitschrift*
EuZW	*Europäische Zeitschrift für Wirtschaftsrecht*
FAO	Food and Agriculture Organization
Fla. J. Int'l L.	*Florida Journal of International Law*
Fordham Int'l L. J.	*Fordham International Law Journal*
Fordham L. Rev.	*Fordham Law Review*
Foreign Aff.	*Foreign Affairs*
Foreign Pol'y	*Foreign Policy*
Ga. J. Int'l & Comp. L.	*Georgia Journal of International and Comparative Law*
Geo. Int'l Envtl L. Rev.	*Georgetown International Environmental Law Review*
Geo. L. J.	*Georgetown Law Journal*
Geo. Wash. J. Int'l L. & Econ.	*George Washington Journal of International Law and Economics*

Geo. Wash. L. Rev.	*George Washington Law Review*
GYIL	*German Yearbook of International Law*
Harv. Int'l L. J.	*Harvard International Law Journal*
Harv. L. Rev.	*Harvard Law Review*
Hastings Int'l & Comp. L. Rev.	*Hastings International and Comparative Law Review*
HRLJ	*Human Rights Law Journal*
HRQ	*Human Rights Quarterly*
HuV-I	*Humanitäres Völkerrecht – Informationsschriften*
IAEA	International Atomic Energy Agency
ibid.	ibidem; in the same place
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICLQ	*International and Comparative Law Quarterly*
ICSID	International Centre for Settlement of Investment Disputes
id.	idem; the same
IDA	International Development Association
i.e.	id est; that is to say
IFAD	International Fund for Agricultural Development
ICC	International Criminal Court
IJIL	*Indian Journal of International Law*
ILA	International Law Association
ILC	International Law Commission
ILCYB	Yearbook of the International Law Commission
ILM	*International Legal Materials*
ILO	International Labour Organization

ILR	*International Law Reports*
ILSA J. Int'l L.	*ILSA Journal of International Law (International Law Students Association)*
IMF	International Monetary Fund
IMO	International Maritime Organization
Ind. Int'l & Comp. L. Rev.	*Indiana International and Comparative Law Review*
Ind. J. Global Legal Stud.	*Indiana Journal of Global Legal Studies*
Int'l Aff.	*International Affairs*
Int'l Law.	*The International Lawyer*
Int'l Rev. of the Red Cross	*International Review of the Red Cross*
Iowa L. Rev.	*Iowa Law Review*
IP	*Die internationale Politik*
Isr. L. R.	*Israel Law Review*
Isr. Y. B. Hum. Rts	*Israel Yearbook on Human Rights*
J. History Int'l L.	*Journal of the History of International Law*
J. Int'l Aff.	*Journal of International Affairs*
JA	*Juristische Arbeitsblätter*
JIEL	*Journal of International Economic Law*
JIR	*Jahrbuch für internationales Recht*
JPR	*Journal of Peace Research*
JuS	*Juristische Schulung*
JWT	*Journal of World Trade*
JWTL	*Journal of World Trade Law*
Law & Contemp. Probs	*Law and Contemporary Problems*
LJIL	*Leiden Journal of International Law*
LNTS	League of Nations Treaty Series
Loy. L. A. Int'l Comp. L. Rev.	*Loyola of Los Angeles International and Comparative Law Review*
McGill L. J.	*McGill Law Journal*
Miami U. Int'l & Comp. L. Rev.	*University of Miami International and Comparative Law Review*

Mich. J. Int'l L.	*Michigan Journal of International Law*
Mich. L. Rev.	*Michigan Law Review*
Mil. L. Rev.	*Military Law Review*
Minn. J. Global Trade	*Minnesota Journal of Global Trade*
N. Y. U. J. Int'l L. & Pol.	*New York University Journal of International Law and Politics*
N. Y. U. L. Rev.	*New York University Law Review*
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
NILR	*Netherlands International Law Review*
NJCL	*National Journal of Constitutional Law*
NJW	*Neue Juristische Wochenschrift*
Nord. J. Int'l L.	*Nordic Journal of International Law*
NQHR	*Netherlands Quarterly of Human Rights*
NuR	*Natur und Recht*
NVwZ	*Neue Zeitschrift für Verwaltungsrecht*
NYIL	*Netherlands Yearbook of International Law*
Ocean & Coastal L. J.	*Ocean and Coastal Law Journal*
ODILA	*Ocean Development and International Law*
OJEC	*Official Journal of the European Communities*
Pace Int'l Law Rev.	*Pace International Law Review*
PCIJ	Permanent Court of International Justice
Pol. Sci.	*Political Science*
RADIC	*Revue Africaine de Droit International et Comparé*
RBDI	*Revue Belge de Droit International*
RdC	*Recueil des Cours de l'Académie de Droit International*
RDI	*Revue de Droit International, de Sciences Diplomatiques et Politiques*

RECIEL	*Review of European Community and International Environmental Law*
REDI	*Revista Española de Derecho Internacional*
Rev. Dr. Mil. Dr. Guerre	*Revue de Droit Militaire et de Droit de la Guerre*
Rev. ICR	*Revue Internationale de la Croix Rouge*
RGDIP	*Revue Générale de Droit International Public*
RIAA	Reports of International Arbitral Awards
Riv. Dir. Int.	*Rivista di Diritto Internazionale*
RTDE	*Revue Trimestrielle de Droit Européen*
RUDH	*Revue Universelle des Droits de L'homme*
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*
Temp. Int'l & Comp. L. J.	*Temple International and Comparative Law Journal*
Tex. Int'l L. J.	*Texas International Law Journal*
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 L. & Pol'y	*University of California Los Angeles Journal of Environmental Law and Policy*
UCLA J. Int'l L. & Foreign Aff.	*University of California Los Angeles Journal of International Law and Foreign Affairs*
UCLA Pac. Basin L. J.	*University of California Los Angeles Pacific Basin Law Journal*
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
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFPA	United Nations Population Fund
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNIDO	United Nations Industrial Development Organization
UNITAR	United Nations Institute for Training and Research
UNJYB	United Nations Juridical Yearbook
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
UNTS	United Nations Treaty Series
UNU	United Nations University
UNYB	Yearbook of the United Nations
UPR	*Umwelt- und Planungsrecht*

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

The Non-Aligned Movement and the Reform of International Relations

Hennie Strydom

I. Introduction
II. Seeking Shelter from the Storm
III. Some Main Concerns of the Non-Aligned Movement
    1. Disarmament and International Security
    2. United Nations Reform
        a. The Relationship Between the Principal Organs of the United Nations
        b. Reform of the Security Council
        c. The Human Rights Council
IV. Economic Development
V. Conclusion

I. Introduction

Formally, the Non-Aligned Movement (NAM) came into existence during the first conference of Heads of State or Government of non-aligned countries that took place in Belgrade in September 1961. Representing newly-independent developing countries, the movement and its policies can be directly linked to the decolonisation process with the initial years of political engagement in world affairs characterised by anti-imperialist slogans and the denunciation of colonialism, apartheid, racism and Zionism. Occasionally, one comes across over-complicated theories for being a member of NAM[1], but in essence membership de-

[1] See for instance P. Willetts, *The Non-Aligned Movement: The Origins of a Third World Alliance*, 1978. For other more "down to earth" contributions see E. Agaev/ S. Krylov, "Non-Aligned Movement: 116 Nations", *Int'l Aff.* 52 (2006) 46 et seq.; A. Orlov, "The Non-Aligned Movement: 40 Years Af-

A. von Bogdandy and R. Wolfrum, (eds.),
Max Planck Yearbook of United Nations Law, Volume 11, 2007, p. 1-46.
© 2007 Koninklijke Brill N.V. Printed in The Netherlands.

pended upon an empathy for national liberation movements and a dislike for being drawn into one of the alliances that characterised the Cold War stand-off. In this sense, non-alignment meant the rejection of control by the superpowers of the time and the adoption of a foreign policy stance that implied resistance against East–West pressures and solidarity with Third World interests relating to strategic world political and economic issues. Non-alignment in this sense should not be taken too literally though: some members at the time had difficulty in hiding their ideological preferences, and development aid – with the normal strings attached – has the unavoidable tendency to effect changes in allegiances.

As a loose and diverse political grouping of countries comprising populations at different levels of desperation, NAM occasionally lost control over internal divisions and changing objectives[2] during its 45 year history. However, from the initial decolonisation issue, through the rough waters of finding a niche after the watershed changes in world politics in the early 1990s, to the current agenda for a North – South dialogue on issues of common interest, NAM has somehow survived many setbacks to remain an important voice in international relations.[3] Often derided as a relic of the past, it has nevertheless redefined itself during the 1990s to play a more significant role in shaping the major debates of the time. In this context the movement has also refocused its attention on UN reform.

In addressing some of the major issues in this article, it is perhaps sensible to first explain the conceptual and theoretical underpinnings of NAM's endeavours to bring about a different state of affairs.

---

ter", *Int'l Aff.* 48 (2002), 49 et seq.; K. Tassin, "Lift Up Your Head My Brother: Nationalism and the Genesis of the Non-Aligned Movement", *Journal of Third World Studies* 23 (2006), 147 et seq.

2 See also J. Graham, "The Non-Aligned Movement after the Havana Summit", *Journal of International Affairs* 34 (1980), 152 et seq.

3 In September 2006, when the 14th Non-Aligned Summit took place in Havana, Cuba, the Russian President, Vladimir Putin, with immoderate aspirations, stated that Russia and NAM were "united in responsibility for the world's destination" and the "desire to counteract confrontations and support cooperation", Statement accessible at <http://www.cubanoal.cu/ingles/index/html>. During the 2006 Havana Summit, UN Secretary-General Kofi Annan also described the movement's collective mission as more relevant than ever in view of the growing divide between rich and poor countries, Doc. SG/SM/10636 of 15 September 2006.

II. Seeking Shelter from the Storm

The Dutch scholar, van Eikema Hommes, once compared the Marxist-Leninist prophecy of the imminent classless communist society where human freedom and self-development secure the happiness of all, to a secularised, eschatological faith in the final liberation of mankind. In this scheme the proletariat assumed the position of the Great Redeemer who will undo man's fall into sin, i.e. the state of alienation brought about by the capitalist exploitation of man.[4] When one reads NAM's 1998 Durban Declaration for the New Millennium, the Redeemer likeness seems to have captured the imagination of NAM too.

Aware of the "dawn of the new millennium" and of the "symbolism of being on a shore where [one could] get the first glimpse of the sun rising over the Indian Ocean", the Heads of State or Government proclaimed the movement's emergence from centuries of oppression and colonialism as the "power of the new millennium" to lead the "invisible people of the world" into "a new age" the "age of the emerging nations, the age of the South, the age of renewal and renaissance, the age of justified hope", despite "vast obstacles deliberately placed" in the movement's way.[5]

To eradicate the evils of the new millennium – aggression, racism, use of force, unfair economic practices, foreign occupation, the twin forces of liberalisation and globalisation, etc. – the challenge is to "fundamentally transform international relations" through a "revolution in waiting" that will bring "delivery to the destitute and deceased, justice to the oppressed, relief to impoverished debtors, equality to women, succour to children, [and] an end to discrimination and foreign occupation."[6]

As in any eschatology worth its salt, the movement's own version internalises the eternal struggle of good versus evil, a simple formula that even the most desperate citizen should understand. On the side of the good there are the "progressive forces of the world", namely the non-aligned countries (naturally), the United Nations, the OAU (now AU), the socialist and the Scandinavian countries, which oppose the

---

4 H.J. van Eikema Hommes, *Major Trends in the History of Legal Philosophy*, 1979, 276.

5 Department of Foreign Affairs South Africa, *Basic Documents of the XII. Summit Conference of Heads of State or Government of the Non-Aligned Movement*, Durban, 1998, 6, 7.

6 Ibid., 7, 8.

forces of colonialism, imperialism, neo-colonialism, expansionism and Zionism that sow division among the members of the non-aligned movement and undermine the salvation of their nations[7] (or lead them into temptation!). Although later summit documents adopted more diplomatically veiled allusions to "certain states" or "some powerful members of the international community", that intervene illegally in the internal affairs of non-aligned countries under various pretexts, or otherwise threaten the political independence, sovereignty and territorial integrity of these countries,[8] the division of the world in a future non-aligned heaven and an unpleasant alternative remains a strong undercurrent in all non-aligned documents, if opposing forces remain unconverted to the "ethical, political and moral strength" of the movement as the "principle forum representing the interests and aspirations of the developing world."[9]

In aggregating political and economic demands[10] – the twin strategy of the movement – for the final salvation of the destitute nations, the Charter principles of sovereignty, territorial integrity, non-interference and multi-lateralism form the Holy Grail on which reforms in international relations are pursued. In all summit documents these principles assume such prominence and are repeated so often in relation to different subject-matters, that the impression is hardly avoidable that there lurks a deeper motivation for their over-reiteration than a deep-seated political and moral conviction about their relevance for international relations. Exemplary of many similar reiterations in past and more recent documents, is the opening paragraph of the final document of the Kuala Lumpur Summit which reads as follows,

> "The Heads of State or Government of the Movement of the Non-Aligned Countries met in Kuala Lumpur … to address the crucial global issues affecting their peoples with the view to agreeing to a set

---

7 Cf. for instance the *Political Declaration adopted during the 6th Conference of Heads of State or Government of Non-Aligned Countries in Havana*, Cuba, 3-9 September 1979, reprinted in: P Willets, *The Non-Aligned in Havana*, 1981, 78-86.

8 See for instance *Basic Documents of the XII. Summit No. 5*, see note 5, 14 (Final Document of the XII. Summit, para. 7); *Final Document of the Ministerial Meeting of the Coordinating Bureau of the Non-Aligned Movement*, Putrajaya, Malaysia, 27-30 May 2006, para. 15.

9 Cf. *Final Document of the XIII. Conference of Heads of State or Government of the Non-Aligned Movement*, Kuala Lumpur, 24-25 February 2003, para. 20.

10 Cf. Willets, see note 7, 4 et seq.

> of actions in the promotion of peace, security, justice, equality, democracy and development, conducive for a multi-lateral system of relations based on the principles of sovereignty, territorial integrity and political independence of States, the rights of peoples to self-determination and non-intervention in matters which are essentially within the jurisdiction of States, in accordance with the Charter of the United Nations and international law."[11]

On the same occasion, the Kuala Lumpur Declaration on the Revitalisation of the Non-Aligned Movement warned against the emergence of unipolarity and the trend towards unilateralism and called for a strengthening of the multi-lateral process as an "indispensable vehicle in safeguarding the interests of member states of the Movement as well as those of the United Nations."[12] A particular defensive position is noticeable in the 2004 final document of the ministerial conference that took place in Durban, South Africa. The ministers,

> "strongly condemned labeling of countries as good or evil and repressive based on unilateral and unjustified criteria …[and] all unilateral military actions without proper authorization from the United Nations Security Council, as well as … threats of military action against the sovereignty, territorial integrity and independence of Member States of the Movement which constitute acts of aggression and blatant violations of the principle of non-intervention and non-interference."

In the same breath the ministers rejected the so-called "right" of humanitarian intervention, which has no basis in the United Nations Charter or in international law and requested the Movement's Coordinating Bureau to study and consider the expression "responsibility to protect"[13] and its implications on the basis of the "principles of non-interference and non-intervention as well as the respect for territorial integrity and national sovereignty of States."[14] In this regard the movement has flatly ignored the right of the African Union (AU) and of its Peace and Security Council to intervene in Member States in the case of

---

11 *Final Document of the Kuala Lumpur Summit*, see note 9, para. 1.

12 Declaration accessible at <http://www.un.int/malaysia/NAM/KLdec.html>.

13 See Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, 2001.

14 *Final Document of the XIV. Ministerial Conference of the Non-Aligned Movement*, Durban, South Africa 17-19 August 2004, paras 6, 8.

war crimes, crimes against humanity and genocide,[15] and in 2006, the Final Document of the 14th Summit merely stated that the movement will remain "seized of further deliberations in the UN on the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity" bearing in mind principles such as "respect for the sovereignty and territorial integrity of States" and "non-interference in their internal affairs."[16]

What then could be the deeper motivation for the movement's anxiety over these matters? One explanation is the vulnerability of the majority of members as heirs to weak state institutions that followed on the demise of colonial rule. The post-colonial abandonment of and stigmatisation of a range of considerations that could co-determine the quality and sustainability of political governance[17] foreclosed the question on the content and substance of political rule that was taking place under the slogan of political self-determination. Ironically this was also the script for the coming into being of states whose sovereignty and political independence were more apparent than real, the beginning of a phase of state-formation that is excellently captured in the following assessment by Clapham,

> "The pretence that formally independent states should be treated 'as if' they possessed the full attributes of sovereignty, even if they evidently did not in fact do so, was used to cover the cracks in the façade, under the assumption that these cracks would eventually be sealed, and that artificial states would solidify into the real thing.

---

15 Constitutive Act of the African Union 2000, article 4 (h) and (j). See also H. Strydom, "Peace and Security under the African Union", *South African Yearbook of International Law* 28 (2003), 59 et seq. (70); High-level Panel Report on Threats, Challenges and Change, 2004, Doc. A/59/565 para. 199-203. In 2005 the Executive Council of the African Union adopted a common African position on UN reform proposals (the *Ezulwini* consensus) in which resort to forceful intervention by the African Union in the case of war crimes, crimes against humanity and genocide was confirmed. See Executive Council, 7th Extraordinary Session, 7-8 March 2005, Doc. Ext/Ex.CL/2 (VII) 6.

16 *Final Document of the 14th Summit Conference of Heads of State or Government of the Non-Aligned Movement*, Havana, Cuba, 11-16 September 2006, Nam 2006/Doc.1/Rev. 3, para. 22.3.

17 Cf. A/RES/1514 (XV) of 14 December 1960, para. 3; D. Rauschning, "Das Ende des Treuhandsystems der Vereinten Nationen durch die Staatwerdung der ihm unterstellten Gebiete", *Jahrbuch für internationals Recht* 12 (1965), 158 et seq. (176 et seq.).

> Both superpowers and former colonial powers helped to maintain the states for whose protection they assumed responsibility, by means of diplomatic support, economic aid and, if need be, direct military intervention. These state-supporting activities were condoned and indeed encouraged by Third World international organizations, despite their general condemnation of 'imperialism', through the adoption of a doctrine of sovereignty that upheld the power of the government of any particular state, and recognized the right of that government to call on external assistance for its own protection. In the process little attention was given to the domestic structures of the state itself or, in the grossest cases, to the levels of repression and corruption that it embodied."[18]

The only way in which the sovereignty and political independence deficits could be remedied was to seek refuge in formal claims to the applicable Charter principles and the formation of regional pacts based on reciprocal formal guarantees of non-intervention and recognition of sovereignty and independent statehood. These are the guarantees the non-aligned members cling to, because they sense that the problems weak states generate for themselves and for other members of the international community vastly increase the likelihood in the post Cold War understanding of peace and security that someone else "will seek to intervene in their affairs against their wishes to forcibly fix the problem."[19] Like all redemptive movements, NAM can only uphold claims to a higher "ethical, political and moral strength", and to respect for the attributes of statehood, by using moral displacement. Thus, aggression by "some powerful states" is repeatedly mentioned, but not the aggression of some non-aligned governments against their own citizens; the rule of law and democratic practices in international organisations are themes of high importance, but exist only in rudimentary form back home; Israeli atrocities in the occupied territories deserve condemnation in the strongest terms, but the atrocities of the Sudanese government in Darfur disappear under the words of praise for the AU's achievements (sic) in reinforcing peace (sic) in that country; lack of financial support for developing countries is bemoaned, but the misman-

---

18 C. Clapham, "The Challenge of the State in a Globalised World," *Development and Change* 5 (2002), 775 et seq. (782). See also R.H. Jackson, *Quasi-States: Sovereignty, International Relations and the Third World*, 1993, 17 et seq. (18).

19 Cf. F. Fukuyama, *State-Building, Governance and World Order in the 21st Century*, 2004, 96.

agement of national resources by some NAM governments do not make the agenda; arms exporting countries are accused of not taking effective measures to restrict the illicit trade in arms,[20] while no concern is expressed about the deadly concoction of corruption and nepotism in weak states with no institutional capacity to wield a monopoly of force which undermines control over contraband economies and the flow of conventional weapons to sub-state groups[21] and so on. It is against this background that NAM's engagement with reform initiatives in international relations must be read.

III. Some Main Concerns of the Non-Aligned Movement

1. Disarmament and International Security

To determine where NAM has positioned itself with regard to the issue of disarmament, some historical precursors must be emphasised first. One notion, based on early twentieth century idealism and moralism in international affairs, is the Wilsonian call on guarantees in 1918 that national armaments should be reduced to the lowest point consistent with domestic safety.[22] Article 8 of the League of Nations Covenant codified this notion by determining in para. 1 that the members of the League "recognise that the maintenance of peace requires the reduction of national armaments to the lowest point consistent with national safety and the enforcement by common action of international obligations." In terms of article 8 para. 5 members also undertook "to interchange full and frank information as to the scale of their armaments … and the condition of such of their industries as are adaptable to warlike purposes."

---

20 See the *Final Document of the 11th Summit of the Heads of State or Government of the Non-Aligned Countries*, Cartagena, Colombia, 18-20 October 1995, 6.

21 See for instance M. Pugh/ N. Cooper, *War Economies in a Regional Context*, 2004, 19. See also A.D. Rotfeld, "Rethinking the Contemporary Security System", *SIPRI Yearbook* 30 (1999), 1 et seq.; A. Karp, "The Arms Trade Revolution: The Major Impact of Small Arms", in: B. Roberts (ed.), *Weapons Proliferation in the 1990's*, 1995, 7.

22 See T.N. Dupuy/ G.M. Hammerman (eds), *A Documentary History of Arms Control and Disarmament*, 1973, 78, 79.

By contrast the UN Charter deals with disarmament in more subtle and non-specific terms. Article 11 para. 1 gives the General Assembly the opportunity to "consider the general principles of cooperation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments ..." and to make "recommendations with regard to such principles." Article 26 makes the Security Council responsible for "plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments." Furthermore, the Military Staff Committee, established in terms of Article 47 para. 1 of the Charter, can advise the Security Council on the regulation of armaments and even disarmament.

As a result of the Charter approach, the disarmament debate in the years that followed came to be determined by deliberations in the General Assembly and Security Council where the horrors of a nuclear war after Hiroshima and the political realities of the Cold War stand-off produced little more than protracted debates, endless divisions and exploratory agreements.[23] With the abandonment of the dream of international ownership, control and management in the early 1950s,[24] the international debate moved from general and complete disarmament, the all or nothing approach, to attainable arms control accomplishments. This new phase in disarmament negotiations also provided the prelude to a preference for bilateral treaty arrangements on arms control,[25] both nuclear and conventional, between the superpowers which succeeded in wrestling the debate from the multi-lateral process in the General Assembly where the enthusiasm for general and complete disarmament was still high.

This piecemeal approach, dominated by superpower agendas, coupled with the United Nation's failure to force the pace on negotiations on complete disarmament, led to the first special session of the General

---

23 See for instance R.F. Gorman, *Great Debates at the United Nations: An Encyclopedia of Fifty Key Issues 1945-2000*, 2001, 39.

24 Dupuy/ Hammerman, see note 22, 294. On international control and management see inter alia A/RES/1 (I) of 24 January 1946 and S/RES/20 (1947) of 10 March 1947.

25 Topics that became the subject-matter for bilateral arrangements included the Hot Line agreement between the United States and the USSR, 1971; preventing accidents on the high seas, 1972; limiting anti-ballistic missiles – ABM Treaty and SALT I, 1971; preventing nuclear war, 1973; a yield threshold on nuclear tests, 1974; and limiting strategic offensive arms – SALT II, 1979.

Assembly on disarmament in 1978 in an attempt to bring the issue of complete disarmament back into the fold of the multi-lateral process of the UN organs amidst an unabated competitive acquisition of nuclear and conventional armaments. In envisaging a more active role for the UN, the Assembly proposed a revitalisation of the existing machinery and the establishment of "forums appropriately constituted for disarmament deliberations and negotiations with a better representative character."[26] The deliberative function was assigned to a Disarmament Commission, comprising all UN members and constituted as a subsidiary organ of the General Assembly with the function to make recommendations on all disarmament issues.[27] For the negotiating function a World Disarmament Conference was to be established to function as a single multi-lateral negotiating forum of the international community.[28] The Conference, established in 1979, with a current membership of 66, was instrumental in the negotiations that led to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (the so called Chemical Weapons Convention) adopted by the Conference in 1992 and the Comprehensive Nuclear Test Ban Treaty which opened for signature in September 1996, but is not in force yet since not all the 44 Annex II states have ratified it. However, over the last decade the Conference has shown a lack of political resolve to bring about meaningful progress. As is usual with every new session, the 2007 Conference has opened with renewed hope that the stalemate and impasse in multi-lateral negotiations will give way for progress while delegates were reminded by the UN Secretary-General, Ban Ki-moon, that world military spending has now risen to over 1.2 trillion US$ which represent 2.5 percent of global GDP.[29]

For NAM the return to a multi-lateral process under international supervision is a precondition for dealing with matters relating to disarmament, arms limitation and control and international security. In questioning deterrent scenarios in the post Cold War era, the movement in 1995 declared unequivocally that,

---

26 A/RES/S-10/2 of 30 June 1978, para. 113.

27 Ibid., paras 113, 118.

28 Ibid., para. 122.

29 See "Conference on Disarmament Opens 2007 Session" and "Secretary-General's Message to the 2007 Session of the Conference on Disarmament" at <http://www.unog.ch/unog website/disarmament.nsf>.

> "general and complete disarmament under effective international control remains the ultimate objective to be achieved for which a comprehensive, non-discriminatory and balanced approach towards international security should be adopted."[30]

In terms of this approach the movement pursues the objective of,

> "general and complete disarmament … to be attained within a specific time frame through the elimination of all nuclear arsenals and all other weapons of mass destruction as well as through gradual and balanced reductions of conventional arms",[31]

and sees the Conference on Disarmament as the "sole multilateral negotiating body on disarmament."[32]

This basic stance has been a recurring theme at all NAM summits, as are a number of related matters. The first is what the movement considered to be a growing restraint placed on members of the movement by nuclear weapon states to gain access to nuclear material, equipment and technology for peaceful uses of nuclear energy in developing countries.[33] Any fear that such technology transfers may lead to even further proliferation is for the movement a matter that could be addressed through multi-lateral undertakings and control mechanisms. A more realistic assessment though is perhaps contained in an observation made by Hedley Bull some forty five years ago,

> "[I]t is not within the competence of a disarmament agreement to restore a world that is innocent of nuclear technology. We must assume that the future, even if it were to include the destruction of existing nuclear explosives, will include the knowledge of how to make them, and the will under the stress of war to do so. The technological environment in which any future war will occur will include nuclear technology as an increasingly commonplace part of it, and many other branches of advanced technology susceptible of military utilization apart."[34]

---

30 *Basic Documents of the 11th Summit of Heads of State or Government*, see note 20, para. 82. 20

31 Ibid., para. 83.

32 *Final Document of the XIII. Ministerial Conference of the Non-Aligned Movement*, Cartagena, 8-9 April 2000, para. 72.

33 *Basic Documents of the 11th Summit*, see note 30, para. 88; *Basic Documents of the XII. Summit*, see note 5, 48 para. 120; *Final Document of the 14th Conference*, see note 16, para. 94.

34 H. Bull, *The Control of the Arms Race*, 1961, 98.

The second recurring theme is the creation of what the movement calls "a greater balance in conventional armaments and restraints in production and acquisition of conventional arms, and where necessary, for their progressive and balanced reduction …"[35]

This is coupled with a call for the lifting of "unilateral and discriminatory measures imposed by some industrialized States to prevent the transfer and acquisition of defence material to Non-Aligned and other countries essential for their self-defence requirements."[36] During the 2006 Havana Summit this dual strategy of calling for a reduction in conventional arms by industrialised states and facilitating the acquisition of such arms by non-aligned countries was reaffirmed, ostensibly in the interests of international peace and security.[37] That this strategy rather aims at bringing about a greater balance in military power between the industrialised countries and the members of NAM, is perhaps closer to the truth. In fact, during the 1998 Durban Summit, states in various regions of the world were urged to negotiate agreements with a view to "promote greater balance in conventional armaments" and to take into account that regional disarmament initiatives must be mindful "of the special characteristics of each region and enhance the security of every State of the region concerned."[38] This also explains NAM's criticism of military alliances, of which it is not part, such as NATO's New Strategic Concept, because, according to NAM, such alliances "not only set out rationales for the use or threat of use of nuclear weapons, but also maintain unjustifiable concepts on international security based on promoting and developing military alliances and nuclear deterrence policies."[39]

It is one thing to aim at restoring imbalances in military power, but quite another to believe that a more equal spread in arms manufacturing and acquisition capacity will somehow be more immune to the dark realities of the arms industry; and downright naïve to think that the restoration of a balance of military power by agreement will reduce consumer-dominated interest in new markets and prevent a rush to new alliance formation for strategic purposes.

---

35 *Basic Documents of the 11th Summit*, see note 30, para. 102; *Basic Documents of the XII. Summit*, see note 5, para. 130.

36 *Basic Documents of the 11th Summit*, see note 30, para. 102.

37 *Final Document of the 14th Conference*, see note 16, para. 107, 108.

38 *Basic Documents of the XII. Summit*, see note 5, para. 142.

39 *Final Document of the 14th Conference*, see note 16, para. 75.

The third theme relates to the growing concern over the illicit transfer, manufacture and circulation of small arms and light weapons (SALW) and their "excessive accumulation and uncontrolled spread in many regions of the world."[40] International attempts at establishing control mechanisms over illicit transfers and illicit brokers have thus far produced meagre results and even in the case of legal transfers and transactions the majority of states seem to still resist transparency in dealings and inventories.[41] In 2006 the Conference attempt to forge agreement amongst states on the implementation of the UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects also ended in disappointment.[42] For NAM the solution lies in ensuring that the supply of SALW be limited to governments or to entities duly authorised by governments and in implementing legal restrictions on illicit transactions.[43]

A first obstacle to this proposal is government involvement in feeding the illicit markets through transfers conducted by governments themselves or by government-sponsored brokers or entities in pursuance of a hidden policy agenda.[44] A second obstacle is the symbiotic relationship between transnational organised crime, internal armed conflicts and weak and corrupt governments of which there is no scarcity in NAM's own ranks. In understanding what difficulty this creates for the arms control agenda two contemporary perspectives are of particular importance. The first has to do with the way in which a mixture of corruption, nepotism and underdevelopment has "created weak states with neither the legitimacy nor the institutional capacity to wield the monopoly of force required to maintain order, territorial integrity, and peace."[45] This obviously creates enforcement problems for the arms control initiative over a wide front. The second has to do with the role of economic agendas and the exploitation of lucrative resources in the inception and continuation of internal armed conflict[46] – a deadly con-

---

40 Ibid., para. 109.

41 Cf. N. Florquin, "The Illicit Trade in Small Arms and Light Weapons", *IIAS Newsletter* 42 (2006), 10.

42 See UN Press Release Doc. SG/SM/10558 of 10 July 2006.

43 *Final Document of the 14th Conference*, see note 16, para. 109.

44 Florquin, see note 41, 10.

45 Pugh/ Cooper, see note 21, 19. See also Rotfeld, see note 21.

46 Pugh/ Cooper, see above. See also P. Collier/ A. Hoeffler, "On Economic Causes of Civil War", in: T. Sandler/ K. Hartley (eds), *The Economics of Conflict,* Volume 1, 2003, 529.

coction when coupled with the first. While noting that conflicts in Africa, for instance, are increasingly regionalised through cross-border interests and actors, the Stockholm International Peace Research Institute (SIPRI) has noted that,

> "A root cause of the conflict developments in Africa is to be found in the weakness of many of its states, which became especially obvious after the cold war. Corruption, the lack of efficient administration, the poor infrastructure and weak national coherence make government both difficult and costly. At the same time several states in sub-Saharan Africa have vast natural resources. The combination of weak states and rich natural resources has resulted in a dangerous structural environment fuelling conflicts throughout the subcontinent. Natural resources have become a cause for war as well as a necessary source of wealth for keeping the conflicts going. … In several parts of sub-Saharan Africa semi-political actors are fighting for the control of natural resources without any wider political ambitions."[47] [48]

These conditions pose serious obstacles for the control of small arms. While traditionally arms control policies were designed on the assumption that recognised governments representing sovereign states could act as enforcement and control agencies through a system of multi-lateral cooperation, the actors in regional conflicts have the opposite in mind, i.e. to sustain black market operations providing both the incentive and ability to sustain conflict economies and alternative forms of control and regulation. Moreover, the networks that are established under conflict conditions are often carried over into the new political and economic arrangement when a post-conflict settlement and recon-

---

47 M. Sollenberg/ P. Wallenstein/ A. Jato, "Major Armed Conflicts", *SIPRI Yearbook* 30 (1999), 15 et seq. (24, 25). See also J.C. Owens, "Government Failure in Sub-Saharan Africa: The International Community's Options", *Va. J. Int'l L. J.* 44 (2003), 1003 et seq. (1027, 1028).

48 See also S. Lodgaard, "Small Arms and Internal Conflicts: Disarmament in the Framework of UN Peace Operations", in: D Bourantonis/ M. Evriviades (eds), *A United Nations for the Twenty-First Century: Peace, Security and Development,* 1996, 259 et seq. (261, 262): "In Southern Africa, Southwest Asia and Central America the relationship between drug trafficking, illicit trade and intra-state violence has become recurrent."

struction of state and society comes about, making it possible for the same activities to be continued under a more "legitimate" façade.[49]

2. United Nations Reform

For NAM the purpose of UN Reform is to make the UN development system more efficient and effective "in its support to developing countries to achieve the internationally agreed development goals." Consequently, reform efforts "should enhance organisational efficiency and achieve concrete development results".[50] With this in mind NAM wants reform efforts to be "comprehensive, transparent, inclusive and balanced" and undertaken with due regard to the inter-governmental and universal nature of the organisation so that the "voice of every member state … be heard and respected … irrespective of the contributions made to the budget of the organization …".[51]

Already in 1998, NAM stressed that "any further efforts regarding United Nations reform should focus on strengthening the role of the Organization in the promotion of development."[52] This occasion was marked by the Secretary-General's 1997 seminal report on renewal of the United Nations, containing what was referred to as the "most extensive and far-reaching reforms in the fifty-two year history of the Organization", with the objective to enable the United Nations to more effectively and efficiently meet the challenges of the new millennium.[53] This was seized upon by the movement during the 1998 summit to stress the need to keep under close inter-governmental oversight and review the implementation of the reform proposals.[54] Although, as indicated, the development issue weighed heavily with the movement, UN institutional reform, whether as a means to an end or an objective in itself, became a standard item on the movement's agenda in the years that followed. Here, only some of the key issues will be addressed.

---

49 See also N. Cooper, "State Collapse as Business: The Role of Conflict Trade and the Emerging Control Agenda", *Development and Change* 33 (2002), 941 et seq. (942).

50 *Final Document of the 14th Conference*, see note 16, para. 38.2

51 Ibid., para. 38.3.

52 *Basic Documents of the XII. Summit*, see note 5, 28.

53 Secretary-General Report *Renewing the United Nations: A Programme for Reform* Doc. A/51/950 of 14 July 1997.

54 *Basic Documents of the XII. Summit*, see note 5, 28.

a. The Relationship Between the Principal Organs of the United Nations

One of NAM's main concerns, reiterated at every summit meeting, is what it sees as the continuing encroachment by the Security Council on the functions and powers of the General Assembly and of ECOSOC. By using Article 24 of the UN Charter, which bestows on the Security Council primary responsibility for international peace and security, the movement believes the Security Council attempts to enter areas of norm-setting, legal definitions and the progressive development of international law, "which clearly fall within the functions and powers of the General Assembly and the Economic and Social Council."[55] To put an end to this encroachment, NAM aims at strengthening the oversight role of the General Assembly with regard to Security Council activities as well as the role and authority of the Assembly as the chief deliberative, policy-making and representative organ of the UN in all matters, including those relating to international peace and security.[56]

Relying on the Chapter IV powers of the General Assembly, while expressing grave concern about the inaction of the Security Council in matters involving genocide, crimes against humanity and war crimes, or when otherwise incapacitated by the veto right, NAM has great hopes that the General Assembly, under a swifter and revitalised Uniting for Peace procedure,[57] could assume a more prominent role in matters concerning international peace and security.[58] This high-falutin role assigned to the General Assembly by NAM does not seem to correspond with the reform proposals of the High-level Panel and the Secretary-General, who, in confirming the role of the Assembly as the chief deliberative, policy-making and norm-creating organ of the UN, is less concerned with the Assembly's role in matters concerning international peace and security, than with its diminishing status and credibility because of internal malfunctioning. In the Secretary-General's, In Larger Freedom Report, the following observation is rather instructive,

> "In recent years, the number of General Assembly resolutions approved by consensus has increased steadily. That would be good if it reflected a genuine unity of purpose among Member States in responding to global challenges. But unfortunately, consensus … has

---

55 *Final Document of the 14th Conference*, see note 16, paras 40, 42.

56 Ibid., paras 43.2, 44.1, 44.2.

57 See A/RES/377 (V) 1950 of 3 November 1950.

58 *Final Document of the 14th Conference*, see note 16, para. 44-45.8.

> become an end in itself. It is sought first within each regional group and then at the level of the whole. This has not proved an effective way of reconciling the interests of Member States. Rather, it prompts the Assembly to retreat into generalities, abandoning any serious effort to take action. Such real debates as there are tend to focus on process rather than substance and many so-called decisions simply reflect the lowest common denominator of widely different opinions."[59]

If this state of affairs forces one to contemplate the effect thereof on the swifter action NAM envisages, there is also the following to consider,

> "Collective action often fails, sometimes dramatically so. Collective instruments are often hampered by a lack of compliance, erratic monitoring and verification, and weak enforcement. Early warning is only effective when it leads to early action for prevention.
>
> Collective security institutions have proved particularly poor at meeting the challenge posed by large-scale, gross human rights abuses and genocide. This is a normative challenge to the United Nations: the concept of State and international responsibility to protect civilians from the effects of war and human rights abuses has yet to truly overcome the tension between the competing claims of sovereign inviolability and the right to intervene. It is also an operational challenge: the challenge of stopping a Government from killing its own civilians requires considerable military deployment capacity."[60]

How the General Assembly will overcome these obstacles with a view to playing a more active and effective role in the maintenance of international peace and security, NAM has failed to explain. Moreover, with delinquent states more widely represented in the General Assembly, there is the added risk of inaction when solidarity voting and support get in the way of attempts at enforcing *erga omnes* obligations. Thus, it is perhaps not accidental that the High-level Panel Report has underplayed the role of the General Assembly in future collective security arrangements and has chosen to rather focus on strengthening the deliberative function of the Assembly and to concentrate for that purpose on the focus and structure of the Assembly. The norm-creating

---

59 Doc. A/59/2005 of 21 March 2005, para. 159.

60 Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, see note 15, paras 35, 36.

capacity of the Assembly, the Report points out, "is often squandered on debates about minutiae or thematic topics outpaced by real-world events;" the Assembly's relevance is undermined by its "inability to reach closure on issues." "An unwieldy and static agenda leads to repetitive debates", and many resolutions are "repetitive, obscure or inapplicable, thus diminishing the credibility of the body."[61] The question remains whether practices such as these are not perhaps highly useful to those states that seek refuge in general debates and dialogue to prevent scrutiny of their repressive internal policies and questionable foreign relations. Moreover, to discuss is always more convenient than taking action, and monitoring and observing are easy replacements for enforcement action. Another aspect lost in the NAM summit and other documents is the High-level Panel's reproach that,

> "... Successful international actions to battle poverty, fight infectious disease, stop transnational crime, rebuild after civil war, reduce terrorism and halt the spread of dangerous materials, all require capable, responsible States as partners," and since states "are still the front-line responders to today's threats" it is their responsibility to enhance their capacity "to exercise their sovereignty responsibly."[62]

b. Reform of the Security Council

Security Council reform has surfaced with regular intervals in the past, especially around the issue of UN membership enlargement.[63] The current debate on this issue originated in 1992 when Germany and Japan voiced their desires to become permanent members of the Security Council and NAM vowed to revitalise the Security Council after the Cold War and to play a leading role in making the Council's membership more representative.[64] This led to the adoption in 1993 of a General Assembly resolution that gave recognition to the "changed international situation and the substantial increase in membership of the United Nations" and the statements made by NAM, followed by a request addressed to the Secretary-General to invite written submissions

---

61 Ibid., para. 241.

62 Ibid., para. 34.

63 For an historical overview see D. Bourantonis, *The History and Politics of UN Security Council Reform*, 2005, 12 et seq. See also in this respect I. Winkelmann, "Bringing the Security Council into a new Area", in: J.A. Frowein/ R. Wolfrum (eds), *Max Planck UNYB* 1 (1997), 35 et seq.

64 Bourantonis, see above, 46.

from Member States "on a possible review of the membership of the Security Council."[65] The effect of this resolution was that the matter was kept out of the Security Council and away from control by the permanent members.

Since NAM – comprising 118 developing countries – represents almost two-thirds of the UN membership, the proposals that came out of this group can certainly not be ignored. Even though the proposals do not have the force of unanimity of mind, the three issues that have emerged have long been on the reform agenda in one way or another and cannot be avoided forever, namely the increase in the number of the permanent as well as the non-permanent members of the Council, limitations in the scope and use of the veto right, and an improvement in the Council's working methods.[66] It should also be noted that the issues underlying the proposals of the movement are not the unique products of Non-Aligned thinking, but feature in the individual or collective propositions of many other states. Moreover, if the coalitions of interests on reform of the Security Council are considered, there can be little doubt that no meaningful reform would be possible without the consensus of the permanent five and the Non-Aligned Movement.

As far as the first of the above issues is concerned, the quick fix solution of the industrial states to grant a permanent seat to Germany and Japan was rejected in favour of a total increase in the non-permanent member category from 15 to 26, coupled with a balanced increase in the permanent member category that would include both developed and developing members. Another controversial aspect with regard to the increase in non-permanent members is the proposal that geographical distribution as opposed to contributions – the larger the contribution the larger the interest[67] – should determine membership.[68] On the face of it this proposal does not seem to be aligned with Article 23 para. 1 of the UN Charter which clearly states that in the election of the Council's non-permanent members, due regard must be "specially paid" to Mem-

---

65 A/RES/47/62 of 11 December 1992, para. 1.

66 Bourantonis, see note 63, 56. For proposals by other states or groups of states, see ibid., 63 et seq.

67 On this debate see also Y.Z. Blum, "Proposals for UN Security Council Reform", *AJIL* 99 (2005), 632 et seq. (634).

68 Bourantonis, see note 63, 56, 57, 61.

ber State contributions to the maintenance of international peace and security, and "also to equitable geographical distribution."[69]

On the reform of the veto right, the somewhat reckless proposal by some states to abolish it altogether[70] was short-lived so that the debate has come to focus on its modification and restriction instead. In summary the proposals have in mind a removal of the veto in the case of admission of new members, the appointment of the Secretary-General, provisional measures under Article 40 of the Charter, and measures under Article 50 with regard to the economic problems of developing countries in complying with UN imposed sanctions. Further, a requirement, that for the veto to be exercised two permanent members must vote in its favour; a majority decision in either the Security Council or General Assembly to overrule a veto; and the adoption of procedural measures, which would not require a Charter amendment, to limit the scope of the veto.[71]

The enlargement proposals with regard to the veto and the changes the sponsoring states have foreseen were placed on the agenda in conjunction with requests that veto power reform should be reviewed in tandem with the working methods of the Council. In this regard the demands were about greater transparency in decision-making and improved cooperation between the Council and the whole UN membership with a view to making the Council more accountable to the general membership of the organisation.[72]

The great irony is that progress on the package of reforms, in which NAM played such a large role, was eventually frustrated by the movement's own obsession with putting up a unified front and avoiding, at

---

69 Blum, see note 67, 636 has observed that the "first criterion, although ostensibly of primary concern, has in fact been discarded, as can readily be ascertained by even a cursory perusal of the list of nonpermanent members elected over the years."

70 This call has been made by Colombia, Cuba, Guatemala, Malaysia, New Zealand, Yugoslavia, Libya, Sudan and Yemen. See B. Fassbender, "All Illusions Shattered? Looking Back on a Decade of Failed Attempts to Reform the UN Security Council", in: A. von Bogdandy/ R. Wolfrum (eds), *Max Planck UNYB 7* (2003), 183 et seq. (211).

71 Bourantonis, see note 63, 62; Fassbender, see note 70, 212, 213. See also M. Darrow, "Directions in Security Council Reform", *Austr. Yb. Int'l L.* 16 (1995), 285 et seq. (304 et seq.).

72 Bourantonis, see note 63, 62.

all costs, division in its ranks on the elevation of some of its members to the position of permanent members of the Security Council.

The slide towards an inconclusive debate started with the 1997 Razali reform plan, named after the then chairperson of the General Assembly, Ambassador Ismael Razali of Malaysia. This plan, aimed at breaking the deadlock on Security Council reform in the Open-ended Working Group – which has developed into a debating club showing no progress – put forward a three-stage reform initiative. The first step would entail a framework resolution increasing the number of permanent and non-permanent Council members. This would be followed by a second, implementing resolution selecting the new permanent members, and a third resolution formally amending the Charter to bring it into line with the new arrangement.[73] The thinking behind this staged process was that, in the form proposed, only the last resolution would need the Article 108 two-thirds majority of the total number of Assembly members, while the first two could be passed in terms of Article 18 para. 2 of the UN Charter which requires a two-thirds majority of members "present and voting".

Apart from the dubious legality of the proposal, a number of reservations were voiced about the time schedule for the different stages, the large number by which the enlargement was supposed to take place, and the withholding of the veto in respect of new permanent members. However, outright rejection of the plan came from NAM over the participation of its members in the Security Council, which would have been increased significantly in terms of the plan. At the heart of the resistance was the fear that, since there was no consensus amongst the movement's members on unified nominations for Security Council seats, nor on permanent membership, individual or group decisions in the movement on the Razali plan could bring discord and divided loyalties to its ranks. The only solution then was to tie the members into a unified rejection of the plan.[74] The result was a cacophony of new proposals and counter-proposals, accusations of backdoor diplomacy, and the formation of new opposing alliances for pushing new draft resolutions onto the diplomatic scene.[75] The fruitless attempts and discussions were brought to an end when the issue of the applicability of Article 108 of the Charter to the Razali resolutions was put to a vote in the

---

73 For a comprehensive discussion of the *Razali* plan and reactions to it see Bourantonis, see note 63, 74 et seq.

74 Ibid., 77-79.

75 Ibid., 80 et seq.

General Assembly. In 1998 the Assembly adopted the following resolution,

> "*Mindful* of Chapter XVIII of the Charter of the United Nations and of the importance of reaching agreement as referred to in resolution 48/26 of 3 December 1993, [the General Assembly] *determines* not to adopt any resolution or decision on the question of equitable representation on and increase in the membership of the Security Council and related matters, without the affirmative vote of at least two thirds of the Members of the General Assembly."[76]

With this, the momentum for reform was lost. How it can be regained, if at all, after September 11, 2001 is uncertain. There is the belief that only the United States can re-launch the initiative, but the reorganisation that has taken place since this fateful date has been built on the pursuit of United States security interests with less attention to multi-lateral rules and procedures.[77] In 2002, the Secretary-General of the United Nations made a new attempt at redirecting the process in his agenda for further change in strengthening the United Nations. Making it clear that the need for an effective "multilateral institution … has never been more acutely felt than in the current era of globalization", he bemoaned the "stalled process of Security Council reform" and the lack of progress in the Open-ended Working Group which has been at work "for nearly a decade".[78] Of special significance though, is the statement that, although no UN reform would be complete without Security Council reform,

> "it is important to remember that authority derives also from the capacity to take prompt and realistic decisions, and from the will to act on them. A reform process that consisted only of an increase in membership would be unlikely to strengthen the Council in this vital respect."[79]

This was a clear admonition that an increase in numbers based on geographical distribution as the main criterion in determining the future composition of the Council, the rallying point of the developing world, may not necessarily empower the Council to deal more effectively with modern day security threats. The same message is contained in the seminal High-level Panel Report which has tried to revive the debate on

---

76 A/RES/53/30 of 23 November 1998.

77 Fassbender, see note 70, 216.

78 Doc. A/57/387 of 9 September 2002, paras 2, 20.

79 Ibid., para. 20.

Security Council reform by introducing the two-model distribution of seats representing Africa, Asia and the Pacific, Europe and the Americas.[80] The High-level Panel itself had provided two models. Model A which provides for six new permanent seats with no veto being created, and 13 new two-year term non-permanent seats, divided among the major regional areas. Model B providing for no new permanent seats but creating a new category of eight four-year renewable term seats and eleven two year non permanent (and non-renewable) seats, divided among the major regional areas. Under both models, the Council would be enlarged from fifteen to twenty-four members. With specific reference to Article 23 of the UN Charter, the Report, while accepting that a decision on the enlargement of the Council is now a necessity,[81] wanted any reform to increasingly involve the,

> "... decision-making of those who contribute most to the United Nations financially, militarily and diplomatically – specifically in terms of contributions to United Nations assessed budgets, participation in mandated peace operations, contributions to voluntary activities of the United Nations in the areas of security and development, and diplomatic activities in support of United Nations objectives and mandates."[82]

While reforms should increase the democratic and accountable nature of the Council and developing countries should become part of the decision-making process in the interest of broader representation, such reforms, the Report noted, should not "impair the effectiveness of the Security Council."[83] If, on a regional basis members are selected for permanent or longer-term seats, the allocation should go to those states in the specific region that are among the top three financial contributors to the regular budget, or the top three voluntary contributors, or the top three troop contributors to United Nations peace-keeping missions.[84] With this in mind the Report recommended a review of the Security Council composition in 2020, including a review of the contributions by permanent and non-permanent members from the perspective of the Council's ability and effectiveness to respond to the threats of the

---

80 High-level Panel Report, see note 15, 250 et seq. For a detailed analysis of the models put forward by the Panel, cf. Blum, see note 67, 640 et seq.

81 High-level Panel Report, see note 15, para. 250.

82 Ibid., para. 249(a).

83 Ibid., para. 249(c).

84 Ibid., para. 254.

21st century.[85] What is most significant though, is that the Report rejected any expansion of the veto, and adopted, as a compromise position, the recommendation that the permanent members pledge themselves to limit the use of the veto when vital interests are at stake and to refrain from using it in the case of genocide and large-scale human rights abuses.[86]

During the 2006 summit, NAM, while expressing concern about the lack of progress in the General Assembly on the question of equitable representation and increase in the membership of the Security Council, pointed out that Security Council reform should by no means be limited to the question of membership. Consequently, a number of substantive issues relating to the Council's agenda, working methods and decision-making process were introduced with the stated objective of ensuring that the Council's agenda reflects the needs and interests of both developing and developed countries "in an objective, rational, non-selective and non-arbitrary manner."[87] A first concern raised during the summit in this regard was what NAM considered an overzealous resort to enforcement action under Chapter VII of the Charter by the Security Council, often as an umbrella for addressing matters that do not pose an immediate threat to international peace and security. NAM's position on this is that instead of "excessive and quick use" of Chapter VII measures, the Council must more fully utilise the measures provided for in Chapters VI and VIII of the Charter for the peaceful settlement of disputes, so that Chapter VII is only invoked as a measure of last resort.[88]

Similar sentiments were recorded with regard to Security Council imposed sanctions, which, for non-aligned countries "remain an issue of serious concern."[89] The option of sanctions, it was argued, should only be considered after all peaceful means of settlement under Chapter VI of the Charter have been exhausted and a "thorough consideration undertaken of the short-term and long-term effects of such sanc-

---

85 Ibid., para. 255.

86 Ibid., para. 256. In rejecting any expansion of the veto the Report cited the veto's important function in reassuring the most powerful members that their interests would be safeguarded and also because there is no practical way of changing the existing members' veto powers.

87 *Final Document of the 14th Conference*, see note 16, paras 49.1-49.2, 49.6

88 Ibid., para. 49.3.

89 Ibid., para. 49.4.

tions."[90] Not only does the movement want the objectives of a sanctions regime to be better defined and the conditions to be fulfilled by the targeted state clearly spelled out and subjected to periodic review, but the imposition of sanctions should only be considered when there exists a threat to the peace or an act of aggression as opposed to instances of "mere violation of international law, norms or standards."[91]

What the above concerns about Security Council action fail to appreciate is first the influence of a changed understanding of what constitutes a threat to international peace and security on the choice of means in response to the threat. In the Secretary-General's Millennium Declaration it was observed that in the wake of the new kind of conflicts since the 1990s, "a new understanding of the concept of security is evolving. Once synonymous with the defence of territory from external attack, the requirements of security today have come to embrace the protection of communities and individuals from internal violence."[92] Since these circumstances are often found to exist in Member States of NAM, the anxiety over possible Security Council action is understandable. Secondly, in the High-level Panel Report a somewhat different assessment of the situation has been recorded. There it was stated that,

> "... with the Council increasingly active and willing to use its powers under Chapter VII …, the balance between unilateral use of force and collectively authorized force has shifted dramatically. Collectively authorized use of force may not be the rule today, but it is no longer an exception."[93]

The democratisation of the Security Council, a key component of NAM reform proposals, is not limited to the enlargement of membership, but also entails the curtailment of the use of the veto "with a view to its eventual elimination."[94] In rejecting the concept of voluntary self-restraint amongst the permanent members as insufficient, NAM argued for,

> (1) limiting the use of the veto to action taken in terms of Chapter VII of the Charter;

---

90 Ibid.

91 Ibid.

92 Secretary-General of the United Nations, *We the Peoples: The Role of the United Nations in the 21st Century*, 2000, 43, Doc. A/60/L.1 of 15 September 2005.

93 High-level Panel Report, see note 15, para. 81.

94 *Final Document of the 14th Conference*, see note 16, para. 49.6.

(2) overruling the veto by a certain majority vote in an enlarged Council; and

(3) overruling the veto by a two-thirds majority in the General Assembly under the Uniting for Peace Resolution, or in terms of a progressive interpretation of Arts 11 and 24 para. 1 of the Charter.[95]

No indication is given on how a progressive interpretation of the said Charter provisions can achieve the result NAM hopes for. Moreover, whatever the position taken by NAM in this regard there are the developments on the long-standing question about the respective powers of the General Assembly and the Security Council in matters concerning international peace and security and the inherent constraints in overruling the veto power to be taken into account.

The struggle of NAM to accumulate more power for the General Assembly in matters concerning international peace and security is partly driven by the illusion that a more representative body will have greater success in overcoming the political divisions and inaction brought about by the harsh realities of a tempestuous world. Furthermore, the NAM position must also be viewed in the context of developments concerning the Uniting for Peace Resolution and its impact on the relationship between the Assembly and the Council, a matter that was legally tested in the well-known *Certain Expense* case[96] during a time when the Cold War standoff was at its apex. But before doing so the ICJ's confirmation in this advisory opinion of the exclusive right of the Security Council to take enforcement action while recognising the power of the Assembly to make recommendations with regard to matters involving international peace and security, as envisaged in Arts 10, 11 and 14 of the Charter, subject to the provisions of Article 12 para. 1, must be attended to.[97] In terms of the latter provision the General Assembly cannot make any recommendations in respect of a dispute or situation with regard to which the Security Council is exercising its functions assigned to it in terms of the Charter.

It stands to reason that depending on the interpretation given to the rather broad formulation "exercising ... functions" the General Assembly could face serious limitations on its recommendatory powers. For

---

95 Ibid.

96 Certain Expenses of the United Nations, ICJ Reports 1962, 151 et seq.

97 In terms of Article 12 para.1 the General Assembly cannot make any recommendations in respect of a dispute or situation with regard to which the Security Council is exercising its functions assigned to it in terms of the Charter.

instance, if a matter remains on the Council agenda, is debated and discussed without real action being taken with a view to bringing it to finality, will the General Assembly be entitled to make recommendations or should it throughout exercise restraint because the Security Council is "exercising ... functions"? That UN practice on this has followed *ad hoc* arrangements between the General Assembly and the Security Council interspersed with different interpretations of Article 12 para. 1 by the two organs is a consequence one must accept given the uncertainties inherent in the formulation.[98] Recently, in the *Israel Wall* case,[99] the interpretation and scope of Article 12 para. 1 resurfaced in the context of the convening of the General Assembly for the 10th Emergency Special Session under the Uniting for Peace Resolution by means of a special resolution[100] and subsequent events relating to the construction by Israel of a security wall in the Occupied Palestinian Territories.[101] In dealing with past UN practice in regard to Article 12 para.1 the ICJ confirmed that,

> "both the General Assembly and the Security Council initially interpreted and applied article 12 to the effect that the Assembly could not make a recommendation on a question concerning the maintenance of international peace and security while the matter remained on the Council's agenda."[102]

However, it was also pointed out that this interpretation has evolved in accordance with an, "increasing tendency over time for the General Assembly and Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security", in a manner that allows for the General Assembly to take a broader view in considering also the humanitarian, social and economic aspects of the situation while the Council tends to focus on aspects that relate more strictly to questions of international peace and security.

With regard to Article 12, the Court then seemed to confirm an earlier opinion of the Legal Council of the UN in response to the evolving

---

98 See for instance K. Hailbronner/ E. Klein, "Functions and Powers", in: B. Simma et al. (eds), *The Charter of the United Nations: A Commentary,* Volume 1, 2002, 257 et seq. (292, 293).

99 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, 136 et seq.

100 A/RES/ES-10/2 of 5 May 1997.

101 See A/RES/ES-10/13 of 27 October 2003 and A/RES/ES-10/14 of 12 December 2003.

102 See note 99, 149 (para. 27).

Assembly practice, namely that the phrase "is exercising the functions" should be understood as meaning "is exercising ... the functions at this moment."[103] The effect of this is, that the scope of Article 12 has now been narrowed down to the extent that the Council can no longer prevent the Assembly from making recommendations by merely retaining a matter on the agenda without taking further action thereon or by preventing action by means of the veto.[104] However, whether the gains scored by the General Assembly in obtaining greater procedural independence over the Security Council will really further the overall ability of the United Nations to maintain international peace and security remains a matter for debate.

Since the Uniting for Peace Resolution clearly envisaged intervention by the General Assembly in the case of inaction by the Security Council[105] because of a lack of unanimity amongst the permanent members of the Council, there is the further question whether the exercise of the veto by a permanent member constitutes the failure to act that will trigger the power of the Assembly to make recommendations for a collective response to a threat to the peace or an act of aggression. It has been observed that this could not be the correct interpretation since the permanent members are legally authorised to exercise the veto and can therefore not be equated with conduct aimed at paralysing the Council.[106] When enforcement action is blocked by means of the veto because the threat is considered not to be one that falls within the ambit of Chapter VII or because a state is wrongly accused of being responsible for a threat to the peace or an act of aggression, the question remains whether the General Assembly has the power to make an independent assessment of the matter to determine whether the Security Council has failed to exercise its primary responsibility in respect to threats to the peace and acts of aggression.

---

103 Ibid.

104 For a more extensive analysis of these issues see M. Cowling, "The Relationship between the Security Council and the General Assembly with particular reference to the ICJ Advisory Opinion in the 'Israeli Wall' Case", *South African Yearbook of International Law* 30 (2005), 50 et seq.

105 The opening sentence of A/RES/377 A (V) of 1950, see note 57, reads as follows: "The General Assembly resolves that if the Security Council, because of a lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security …".

106 Hailbronner/ Klein, see note 98, 291.

In the *Israel Wall* case it has been contended that in adopting S/RES/1515 (2003) of 19 November 2003, which endorsed the Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict, the Security Council continued to exercise its responsibility for the maintenance of international peace and security and that, as a result, the General Assembly was not entitled under the Uniting for Peace Resolution to act in the Council's place in requesting an advisory opinion from the Court. Instead of taking an holistic view of Security Council involvement in the Israeli/Palestinian conflict in answering this contention, the Court instead was led by the inability of the Council to take a decision on the Israeli settlements and the construction of the wall due to the negative vote of a permanent member on certain occasions and the subsequent absence of a discussion on the construction of the wall. On the basis of this assessment the Court concluded that the conditions for the Uniting for Peace Resolution were fulfilled and that the Assembly was entitled to convene and later reconvene the 10th Emergency Special Session.[107] Had the Court taken into account the general nature of the dispute or situation in the Middle East and the Security Council's continuous involvement over time to bring about a settlement between the parties, any action by the General Assembly could in all probability have been blocked by invoking Article 12 para. 1. But, by dividing the dispute up in different phases and then assessing the responses of the Security Council to each one, the Court was able to expose individual instances of inaction. Whether the Court was fully aware of the legal and political consequences of this approach is difficult to say. Where to draw the line, especially in the absence of clear guidelines, must now become a matter for debate, also since the Court's approach,

> "lays the foundation for the GA simply to ignore the restraints imposed by article 12(1), and consequently to make recommendations on any matter – irrespective of whether or not the SC is dealing with it. This, in turn, will open the door for the UN to be speaking with two contradictory voices in respect of the same matter – which is clearly undesirable from a process and policy perspective. Indeed, it is quite possible that the request for an advisory opinion on the construction of the wall could have had adverse implications for the peace process set out in terms of the 'roadmap'. It is submitted that this is a risk that will always be present where the two UN organs

---

107 See note 99, paras 29-31.

> … can end up competing with one another over the same dispute at the same time."[108]

These latest developments certainly create additional opportunities for NAM to experiment with majority representation in the General Assembly with a view to playing a larger role in matters relating to international peace and security. If at all, this might provide only a partial remedy to the inconsistent and ineffective responses of the Security Council in the face of critical issues of peace and security. A far greater challenge than giving the General Assembly a greater say in these matters, is the re-alignment of the United Nations as a whole to take more effective *preventive* action with regard to the sources and accelerators of conflict. What warrants even more consideration in this regard is the use of preventive military force when deemed necessary to maintain or restore international peace and security. This underscores the imperative of a more proactive Security Council which is prepared to take more decisive action, an outcome that is not necessarily linked to a more representative Council.

c. The Human Rights Council

In April 2006 the United Nation's Human Rights Council replaced the United Nations Commission on Human Rights.[109] This institutional change came in the wake of the High-level Panel Report's findings that,

> "In recent years, the Commission's capacity to perform these tasks has been undermined by eroding credibility and professionalism. Standard-setting to reinforce human rights cannot be performed by States that lack a demonstrable commitment to their promotion and protection. We are concerned that in recent years States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others. The Commission cannot be credible if it is seen to be maintaining double standards in addressing human rights concerns."[110]

With this concrete institutional change the United Nations resolved to raise the issue of human rights protection to one of the three pillars on which all the work of the UN will be based, alongside economic and social development and peace and security.[111] Whether the newly estab-

---

108 Cowling, see note 104, 78.

109 See A/RES/60/251 of 15 March 2006, para. 1.

110 High-level Panel Report, see note 15, 283.

111 See A/RES/60/251, see note 109, preamble para. 6.

lished Council will avoid the errors of the Commission and ensure "universality, objectivity and non-selectivity in the consideration of human rights issues, and the elimination of double standards and politicization"[112] remains to be seen. For current purposes the involvement of NAM in the affairs of the Council provides enough food for thought.

On 14 November 2006 the Third Committee of the General Assembly (Social, Humanitarian and Cultural) adopted a draft resolution sponsored by Belarus and Uzbekistan, countries known for their human rights violations. The resolution was adopted by 77 states in favour, 63 against and 26 abstentions. The resolution refers to all the major international human rights instruments, as well as the UN Charter and on that basis proclaims in its preamble that,

> "All human rights are universal, interdependent and interrelated and must be treated in a fair and equal manner, on the same footing and with the same emphasis, while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind; … Politically motivated and biased country-specific resolutions on the situation of human rights severely undermine the principles of objectivity and non-selectivity in the consideration of human rights issues."[113]

In its operative part the resolution reaffirms that an international dialogue on human rights should be guided by the principles of universality, non-selectivity, impartiality and objectivity and should not be used for political purposes.[114] Secondly, politically motivated and biased country-specific resolutions on the situation of human rights and the selective targeting of individual countries for extraneous considerations and double standards must be avoided.[115] Thirdly, there is a continuing need for unbiased and objective information on the situation of human rights in all countries and the need to present this information in an impartial manner.[116] It is clear from the resolution's preamble that it takes much of its inspiration from the Human Rights Council's mandate to undertake a universal periodic review in a manner that ensures universality of coverage and equal treatment of all states and on the es-

---

112 Ibid., preamble para. 9.

113 Doc. A/C.3/61/L.31 Revision 1 adopted on 14 November 2006 during the 61st session of the Third Committee.

114 Ibid., para. 3.

115 Ibid., para. 4.

116 Ibid., para. 6.

tablishment of an intergovernmental Working Group to develop the modalities of the periodic review mechanism, based on an interactive dialogue and on objective and reliable information.

In the debate that preceded the adoption of the resolution, Belarus, the main sponsor of the resolution, explained that the resolution was the realisation of an idea that was approved at the 14th NAM summit in Cuba in September 2006 and was the spirit of a process that had begun in the spring when the General Assembly created the Human Rights Council. The United States commended the resolution with respect to the elimination of politically motivated or biased country-specific resolutions and referred to Israel which has often been the victim of such resolutions. The United States then also drew attention to the fact that the two main sponsors of the resolution had both been long-term abusers of human rights, and if such countries are to be shielded against investigations, the interests of citizens who hope for reform in such countries will be disregarded. Finland, speaking on behalf of the European Union, pointed out that dialogue and cooperation were successful only if the country concerned is willing to cooperate and open to dialogue. Belarus, Finland argued, was not such a country. Thus, the true intention of the resolution appeared to be to stifle all legitimate expressions of concern about the human rights situation in specific countries. Canada also pointed out that the resolution, which intended to eliminate political motivations for criticising specific countries, is itself politically motivated, since at its root it sought to circumscribe the ability to bring forward serious human rights abuses.

What is also interesting to note is that an earlier draft of the resolution, dated 2 November 2006, contained an operative para. 4 in which the following was stated,

> "Stresses the need to ensure that country-specific resolutions on the situation of human rights should be used only in cases of massive violations of human rights related to genocide, ethnic cleansing and crimes against humanity".[117]

This paragraph was totally removed from the resolution. A week after the 14th November resolution, on the 20 November 2006, Uzbekistan successfully sought a motion in the Third Committee of no action that blocked a draft resolution before the Committee that would have seen the General Assembly express grave concern at serious and con-

---

[117] Doc. A/C.3/61/L.31, 61st session of the Third Commission, 2 November 2006, para. 4.

tinuing human rights violations in that country. The blocked draft resolution had its origin in the indiscriminate and disproportionate use of force by government troops to quell demonstrations in Andijan in May 2005 and the subsequent closure of at least 200 NGO's.

The reason given for no action by the Uzbekistan representative was the decision taken by NAM during the September summit to eliminate country-specific resolutions and criticism and similar decisions taken by the AU and the Organisation of the Islamic Conference. The no-action motion was then adopted by a vote of 74 in favour, 69 against and 24 abstentions.

Another great irony is that on the 2 November 2006 another resolution was supported by a large number of non-aligned Member States under the title "promotion of a democratic and equitable international order" in which the international community was called upon to,

> "devise ways and means to remove the current obstacles and meet the challenges to the full realization of all human rights and to prevent the continuation of human rights violations resulting there from throughout the world".[118]

This simply does not fit well with the stance taken in the resolution of 14 November 2006.

The resolution of 14 November 2006 is based on a careful and selective revision of the words and phrases used in A/RES/60/251 adopted by the General Assembly by virtue of which the Human Rights Council was established. References to "fair and equal treatment", the enhancement of a "human rights dialogue, international cooperation and understanding among civilizations," "objectivity and non-selectivity" have been given a new spin and linked to the universal periodic review mandate of the Council, as if that was the only mandate given to the Council by the General Assembly. What has conveniently been left out of the equation is operative para. 3 of the General Assembly resolution establishing the Council. This paragraph states clearly that the Council "should address situations of violations of human rights, including gross and systematic violations."

It is perhaps not inconceivable that one of the aims of NAM could have been to predetermine the outcome of the Working Group that must this summer establish the *modus operandi* of the universal periodic review mechanism and thereby the future functioning of the Human Rights Council. The Third Committee is an obvious avenue for

---

118 Ibid., para. 10.

achieving just that. It is the only human rights body in the UN system with universal membership and NAM with its 118 members forms a significant block vote within the Third Committee. Furthermore 59 per cent of the current members of the Human Rights Council are also members of NAM. Thus, it is not merely coincidental that the draft resolution of 14 November 2006 refers in particular to the Human Rights Council's universal periodic review mechanism and to the intergovernmental Working Group that must establish the modalities of the mechanism. The composition of the Working Group will therefore also be of great significance. Further light on this development is shed if one considers some developments within NAM since the beginning of 2006.

On 26 January 2006 the Troika of NAM, comprising South Africa, Malaysia and Cuba, issued a communiqué subsequent to a meeting held near Cape Town. In the communiqué, the Troika underscored the "importance of maintaining and enhancing the cohesion, unity and solidarity among the members of the movement." In addition the members of the Troika expressed "their keen interest about ongoing consultations currently underway in New York pertaining to the operationalisation of the Human Rights Council and, in this context, urged the Non-Aligned Movement member countries to remain actively engaged on this important question with a view to developing a common NAM position thereof."

Furthermore, in the movement's Plan of Action, issued after the Havana Summit in September 2006, one also finds the following significant decision,

> "[To] reinforce the presence of the Non-Aligned Movement by advancing its position during the deliberations taking place in the main international fora, particularly the Human Rights Council and the Third Committee of the General Assembly…"[119]

Then in the summit's final document the movement committed itself to support the candidatures of Non-Aligned members in all UN bodies, bearing in mind the ensuing obligation of such countries whose candidatures are successful, to defend, preserve and promote the concerns and interests of the movement.[120] In various parts of the Final Summit document, one comes across references that echo the phrases in the resolution of 14 November 2006. Of particular importance is a refer-

---

119 *Plan of Action of the Non-Aligned Movement (2006-2009) 14th Conference*, see note 16, NAM/2006/Doc.17 para. 235.5.

120 *Final Document of the 14th Conference*, see note 16, para. 14.13.

ence to the periodic review mechanism of the Human Rights Council, which, according to NAM, should take place on "the basis of the report and information submitted by the state under review." This, apparently, excludes all other sources of information.[121]

During the 61st session of the General Assembly, Belarus seized the opportunity to debate the issues surrounding the 14th November resolution in the Third Committee by emphasising and supporting the resolution's objective, namely to achieve the promotion of human rights in every country through an "equitable and mutually respectful dialogue on human rights based on an unbiased analysis of objective data on the human rights situation in a particular country."[122] In calling on states to support the resolution's adoption in the General Assembly too, Belarus indicated that the introduction of the resolution could have been done under the agenda item on the reform of the United Nations, since its adoption "would lay the foundation for the qualitative renewal of a major area of United Nations activities: the protection and promotion of human rights."[123] By contrasting the dialogue approach with country-specific investigations of human rights situations, Belarus then made the following comment,

> "We believe that the prestige of the United Nations cannot and should not be used as a means of political pressure on sovereign States under the outlandish pretext of human rights violations. That runs counter to the very nature of our organization. Unfortunately, we note that it is precisely those methods that are being used with regard to the Republic of Belarus."[124]

In response to the report by the Third Committee on human rights questions, the General Assembly, during its 61st session, *inter alia* adopted two resolutions identical in all salient respects to those of the Third Committee of 2 November and 14 November 2006 respectively and referred to earlier on.[125] However, a few weeks later the Assembly adopted another resolution detailing the Belarus government's human rights violations and uncooperative attitude towards the Human Rights

---

121 Ibid., para. 54 (b).

122 Doc. A/61/PV.81 of 19 December 2006, 13, 14.

123 Ibid, 14.

124 Ibid., 13.

125 See A/RES/61/160 and A/RES/61/166 of 19 December 2006.

Council and recommended remedial action with respect to a number of violations.[126]

As a newly established human rights body, the Human Rights Council finds itself at a difficult juncture between setting itself apart from its predecessor, the UN Commission on Human Rights, and ensuring the cooperation of all states in living up to the commitment made at the body's establishment, namely to strengthen the United Nations human rights machinery. That some states, most notably the members of NAM, have seized the opportunity to start building an argument for casting the Council in the role of a mere dialogue facilitator, a kind of discussion forum where greater and lesser human rights abusers can sit together to reflect on their national state of affairs, is not entirely surprising, given the weak language used in A/RES/60/251 with regard to the Council's mandate and the emphasis on dialogue and cooperation. In view of the current precarious situation, it is rather important that the General Assembly, of which the Council is for the time being a subsidiary organ and to which the Council must report, also reconsiders its past selective and muffled responses to the state-sponsored human rights abuses of some of its own members.

IV. Economic Development

Apart from maintaining peace and security, which is the primary function of the UN, the organisation has also been given another important mandate, i.e. the creation of higher standards of living and of conditions for economic and social progress and development.[127] The Charter itself sees these conditions as necessary for stability, and for peaceful and friendly relations amongst nations and instructs the organisation to find solutions to international economic and related problems and to promote universal respect for human rights and fundamental freedoms.

The economic development aspirations that followed in the wake of their unstable political independence during the decolonisation rush of the 1960s, caused the new states of Africa and Asia to start pushing economic development issues higher up the agenda of the UN. At about this time bilateral programmes provided by the United States dominated development assistance and a multi-lateral set-up were just about to take root with the establishment in 1956 of the International

---

126 A/RES/61/175 of 19 December 2006.

127 Article 55 of the UN Charter and Article 3(1).

Finance Corporation (IFC), the International Development Association (IDA) in 1960 and the United Nations Development Programme (UNDP) in 1965.

Of the many reports on economic and social development, one that warrants special attention in the current context is the Report of the Independent Commission on International Development Issues, also known as the Brandt Commission report after the name of its chairman, the former Chancellor of the Federal Republic of Germany, Willy Brandt. This report looked at development issues from the North-South divide and is considered to be one of the most recognised contributions on UN reform in the field of economic development.[128] At the beginning of the 1980s, the report noted, the world community "faces much greater dangers than at any time since the Second World War" and it has become clear "that the world economy is now functioning so badly that it damages both the immediate and the longer-run interests of all nations."[129]

North-South relations were considered to be the "great social challenge of our time" and the two decades that lie ahead could turn out to be "fateful for mankind" and citizens everywhere "must realize that many global issues will come to a head during this period."[130] Once again the issue of institutional proliferation, of fragmented and diffused activity, of overlapping responsibilities and organisational rivalries were mentioned and a call made for greater effectiveness and institutional rationalisation and reform.[131] On North-South relations, the report made extensive proposals for the 1980s and 1990s on priority needs, technology and mineral development, reform of the monetary system, development finance, power sharing and an emergency programme for the 1980s to address immediate concerns.[132] For the realisation of these goals the report implored states in both the North and the South to start from a position of solidarity, meaning that,

> "Wherever possible, negotiations should look for joint gains, rather than slowly wrestling uncertain 'concessions'. The starting point has to be some perception of mutual interests in change. In North-South negotiations immediate or short-term reciprocal benefits cannot always be expected, and greater equity will sometimes require

---

128 Cf. J. Müller (ed.), *Reforming the United Nations,* Volume IV (2001), 14.

129 Report reprinted in Müller, see above, Volume I (1997) under III.9/28, 29.

130 Ibid., III.9/3.

131 Ibid., III.9/22, 23.

132 Ibid., III.9/31 et seq.

> non-reciprocity. Mutual interests are often longer-term and overall they need to be supplemented with considerations of forward-looking solidarity which go beyond strict 'bargaining'. All sides have an interest in a framework which is designed to enlarge their common ground and the dialogue must be structured to allow the participants to perceive their specific mutual interests clearly on each issue. … At the same time, the mechanism of negotiation should be able to accommodate the principles of universality and joint responsibility."[133]

Although the Brandt Report was well received and seen as a new beginning it suffered a similar fate as that of other reports and a decade later Brandt himself concluded that,

> "North-South relations have undoubtedly not improved – in fact they have deteriorated further. The trend towards unbalanced development has become stronger. … The "global" negotiations under the auspices of the United Nations have led nowhere. The 1981 North/South Summit in Cancun, which was based on an initiative by our Commission, remained an isolated episode. UNCTAD did not achieve very much either."[134]

Elsewhere, the fundamental cause of the breakdown in the North-South dialogue was ascribed to a rejection by Western countries of the philosophy that serves as a basis for the dialogue in the beginning. The main element in this change of attitude is that the rich countries became irritated,

> "by the way the developing countries have used the United Nations; by their ideological propaganda – accusatory, demanding, anti-liberal – that the Group of 77 with its three-quarters majority iterates in the course of many speeches and resolutions; by the manner in which, on all occasions, Western countries are condemned; in general by the moralizing attitude adopted by governments of poorer countries which are moreover more often than not dictatorial and little burdened by scruple in their domestic policy."[135]

As a result of this, and still aware of the need to establish a world-wide system of economic and political co-ordination, the rich countries started to move the debate out of the United Nations by using the

---

133 Ibid., III.9/25.

134 Quoted in Müller, see note 128, 16.

135 M. Bertrand, "A new North/South Dialogue", *International Relations* 9 (1987/89), 244 et seq. (247, 246).

global financial institutions and the opportunities offered by the OECD and regional institutions coupled with regular summits between America, Europe and Japan.[136]

Yet another attempt to revitalise the economic development debate and to forge, once again, a new vision and culture of development occurred in the early 1990s when Bhoutros Bhoutros-Ghali took over as Secretary-General of the United Nations in 1992.

In the same year Bhoutros-Ghali established a panel of experts to advise on restructuring UN institutions in the social, economic and environmental fields with a view to achieve better integration of UN activities in these fields and to secure more effective and speedy implementation.[137] This took place at a time when the Cold War had come to an end and a better spirit for cooperation in the United Nations started to manifest itself. In 1994 Bhoutros-Ghali's Agenda For Development[138] appeared, which was little more than an overview of previous and current development themes, issues and concerns covered in broad and familiar diplomatic language. If something must be singled out it is the emphasis given to sustainable development in the context of environmental concerns,[139] an issue that was raised under a much broader interpretation of development and which assumed prominence in the Rio Declaration on Environment and Development of 1992, the same year Bhoutros-Ghali took office, and which led to the adoption of Agenda 21, the international community's blueprint and action plan for a global partnership for sustainable development. This took place only five years after the Brundtland Commission Report[140] brought a grim picture of environmental decay and unsustainable economic development to the General Assembly, which, among many things, led to a broadening of the traditional concept of peace and security in international relations to include non-military sources of instability such as

---

136 Ibid., 249.

137 Müller, see note 128, 47, 48.

138 Doc. A/48/935 of 6 May 1994.

139 Ibid., paras 68-93.

140 World Commission on Environment and Development (*Brundtland Commission*) Report of 20 March 1987 reprinted in: Müller, see note 128, Volume II (1997), III.16/1.

environmental risks that threaten the collective survival of the global community or large parts thereof.[141]

During the 1995 Cartagena summit, NAM made it clear that the Agenda for Development was given high priority by the movement as a "unique opportunity to launch a process of constructive dialogue, aimed at the creation of a genuine partnership on development issues and the revitalization of international cooperation for development".[142] For the effective implementation of existing international commitments and agreements, the United Nations and its specialised agencies were to assume a key role[143] with the achievement of internationally agreed development goals to be the over-arching framework of the UN.[144]

In this regard NAM associates itself with the statement by the Group of 77,[145] with whom NAM shares a considerable overlap in membership, that the United Nation's capacity and effectiveness in the field of development ought to be strengthened and that the right to development must be accorded the utmost priority by the United Nations.[146] From this stance the G77 wants the United Nations to take control of development policies by means of which the Bretton Woods institutions, the WTO and other development agencies could be directed towards a more comprehensive approach to development, characterised by predictability, sufficiency, flexibility and sustainability under the oversight role of the United Nations.[147]

By bringing development aid back into the fold of the United Nations' multi-lateral system, the aim seems to be to establish what is

---

141 See also C. Tinker, "Environmental Security: Finding the Balance", in: W.A. Knight (ed.), *Adapting the United Nations to a Post-Modern Era*, 2001, 202.

142 *Final Document of the 11th Summit*, see note 20, para. 216.

143 Ibid., para. 219.

144 *Final Document of the 14th Conference*, see note 16, para. 195.

145 Ibid., para. 194. The Group of 77 was established on 15 June 1964 by seventy-seven developing countries to form the largest intergovernmental organisation of developing states with the aim to provide assistance to the countries of the south to articulate and promote their collective economic interests and negotiating capacity on all major international economic issues.

146 Statement adopted by the Special Ministerial Meeting of the Group of 77, Putrajaya, Malaysia, 29 May 2006, paras 1, 3 accessible at <http://www.g77.org/doc/putrajaya.htm>.

147 Ibid., para. 13-19.

called "an effective and comprehensive accountability and monitoring mechanism to track the implementation by developed countries of commitments undertaken in the major United Nations conferences and summits in the economic, social and related fields."[148] In terms of this strategy two objectives are pursued: to ensure greater accountability at the multi-lateral level under a rule-based regime for international economic relations and greater policy latitude for developing countries to determine their own development aims and priorities.[149] This latter objective is also rooted in the Doha Plan of Action adopted in June 2005 when it was decided to,

> "work towards a common strategy for securing national policy space for developing countries in all areas particularly in trade, investment, financial and industrial policy, which allow them to adopt the most appropriate measures and actions suitable to their national interests and priorities, and to realize their right to development."[150]

The emphasis in NAM documents on improving the economic development of developing countries through a United Nations driven multi-lateral system of controls and oversight stands in stark contrast to the scant attention given to regional economic integration, a matter that is of special significance for the African members of NAM. Statements on regional economic integration usually take the form of commonplace undertakings to promote and strengthen regional and sub-regional economic integration "on the basis of mutual benefit, complementarities and solidarity among developing countries with a view to facilitating and accelerating the economic growth and development of their economies."[151]

In 1994 it was observed that the,

> "track record of regional cooperation in Africa has been a major cause of concern. Three decades of continued efforts have ended in near bankruptcy, which has given rise to a growing worry about the direction in which the cooperation drive is heading."[152]

---

148 Ibid., para. 7.

149 See also *Final Document of the 14th Conference*, see note 16, paras 195, 197, 199.

150 Doha Plan of Action, South-South Summit, Doha, Qatar 12-16 June 2005, Doc. G-77/SS/2005/2, 3.

151 Cf. *Final Document of the 14th Conference*, see note 16, para 214.

152 A. Aly (ed.), *Economic Cooperation in Africa: In Search of Direction*, 1994, 1.

The "three decades of continued efforts" is also littered with a multitude of sub-regional organisations[153] which have emerged in an uncoordinated fashion all over Africa only to produce a myriad of problems and disappointing outcomes. Also, the genesis, growth, decline and stagnation of the regional institution-building efforts on economic integration are well-captured in the following assessment by Gruhn,

> "The usual life-cycle of an inter-African organization started with a series of inter-state conferences, which culminated in a charter-signing ceremony attended by heads of states, and the selection of a headquarters site. This was followed by the creation of an organizational bureaucracy, which then generally encountered financial difficulties, bureaucratic disarray, loss of interest by the organization's members, and decline (and sometimes demise) of the organization. It has become a common observation that many inter-African organizations are merely paper organizations."[154]

In 2006, the Economic Commission for Africa still recorded lack of substantial progress and mentioned rationalisation of regional economic communities as one of the main challenges confronting Africa in its quest for full economic integration. Although progress has been made in the areas of trade, infrastructure, regional public goods and peace and security, the Commission pointed out that,

> "only a fifth of the regional economic communities have achieved their targets for trade among members. Common labour laws, free movement of labour, and rights of residence and establishment have still not been undertaken by most regional economic communities, and most are also lagging on almost all critical elements necessary for the success of an economic union … Progress in harmonizing tax

---

153 The following sub-regional organisations exist with the common purpose to achieve economic integration in the areas under their jurisdiction: Central Africa: Economic Community of Central African States; Central African Economic and Monetary Community; Economic Community of Great Lakes Countries; East and Southern Africa: Common Market for Eastern and Southern Africa; East African Community; Inter-Government Authority on Development ; Indian Ocean Commission; Southern African Development Community; Southern African Customs Union; West Africa: West African Economic and Monetary Union; Manu River Union; Economic Community of West African States; North Africa: Arab Maghreb Union, replaced by the Community of Sahel-Saharan States.

154 I.V. Gruhn, *Regionalism Reconsidered: The Economic Commission for Africa*, 1979, 5. See also S. Asante, *The Political Economy of Regionalism in Africa*, 1985, 28.

> policies, deregulating financial sectors, liberalizing the capital account, and other areas has been insufficient. Even with sectoral programmes needed to deepen African integration, a third to a half of the regional economic communities acknowledge shortcomings in the effectiveness of their initiatives towards the integration goals."[155]

Underlying causes for this malaise, according to the Commission, are *inter alia*, overlapping membership in the different organisations, duplication of programmes, institutional inefficiency and ineffectiveness and poor coordination at the continental level.[156]

Whatever vehicle is chosen for economic integration, the process itself as well as its sustainability and successful implementation cannot be separated from finding a solution to the lack of institutional capacity and good governance at the national level. Strong and effective regional institutions are unthinkable without national states that have the capacity and will to work towards the common good at the regional level. This pre-condition is implicit in the Economic Commission for Africa's assessment of the poor national underpinnings for regional efforts towards economic integration. According to the Commission progress is hampered by weak institutions lacking coordinating capacity within national governments; little translation of economic community goals into national plans; poor implementation of agreed programmes due to a lack of effective integration mechanisms at the national level; weak legislative processes for integration; poor fulfilment of financial obligations to regional organisations, and a poor understanding of economic integration issues amongst the general population.[157]

V. Conclusion

Members of NAM have three things in common when it comes to self-preservation: a shared understanding of the need to maintain existing borders; inter-state relations based on the rhetoric of political self-determination, state sovereignty, political independence, solidarity and unity; and claims to formal equality in statehood that must be upheld by equally strong claims to the maintenance of multi-lateral relations in the political organs of the UN. Quite often these claims serve to insu-

---

155 United Nations Economic Commission for Africa (ed.), *Assessing Regional Integration in Africa II*, 2006 at xvi et seq., accessible at <www.uneca.org>.

156 Ibid. Chapters 3-5.

157 Economic Commission for Africa Report, see note 155, 69 et seq.

late Member States against outside scrutiny or to hide unpalatable truths. However, to the extent that there is merit in NAM's concerns in the areas dealt with above, some concluding remarks are warranted.

Firstly, the strong reliance on multi-lateralism as a means of strengthening the weak political and economic position of developing countries fails to take proper account of the direct link between effective multi-lateralism and strong and effective states. As long as some members in a multi-lateral arrangement remain internally weak and dysfunctional, the arrangement itself will be put under strain, becomes exploitable and incapable of securing the strategic interests of the members, individually or collectively. Thus, there is a case to be made out for domestic reform within aberrant Member States first, before institutional reform at the international level will have the desired effects.

Secondly, the unprecedented degree to which the international community and recently created regional institutions are becoming involved in almost every aspect of political and economic governance at the domestic level as well as the strengthening of civil society, is ironically the result of post-colonial states' own double strategy pursued in international fora. In embracing the dominant values of the Westphalian state system to compensate for substantial inequality, weak post-colonial states demanded recognition as *equal* sovereigns through equal membership in the United Nations while, at the same time, they sought economic assistance and other forms of special (*unequal*) treatment for the purpose of which the rules on equal rights and obligations had to be revisited to accommodate a wholly new legal regime on economic rights and duties and development assistance.[158] It is this latter strategy that has over time paved the way for domestic governance issues to become exposed to external inquiry, a process that has assumed a greater urgency in the context of the 21st century's peculiar security dilemmas.

Moreover, the fact that the new demands for substantial reforms in political and economic governance were given form and substance by and through donor institutions and programmes is not a coincidence, but the result of a deliberate decision by donor countries to move the decision-making process away from the "one country one vote" UN system to the Bretton Woods institutions where power is distributed according to economic capability.[159] The reason why NAM countries want to establish UN oversight over donor institutions is to make ma-

---

158 See also G. Sørensen, *Changes in Statehood: The Transformation of International Relations*, 2001, 105.

159 Ibid., 112.

jority representation work for them. Under current conditions, this is unlikely to happen. Moreover, donor initiatives and programmes have themselves become diversified and are no longer located in either the Bretton Woods institutions or UN development agencies. The European Union, for instance has its own development initiatives with African, Caribbean and Pacific countries in terms of the Cotonou Agreement, China has found new interest in Africa and the countries of the South are creating new platforms for development aid and cooperation. These developments also create opportunities for multi-lateral arrangements, although not necessarily of the kind NAM seeks in the political organs of the UN.

Lastly, there is a notable discrepancy in what NAM countries want with regard to institutional efficiency, democratisation and responsiveness to needs at the international level, and what many of their own governments can provide at the national level. There is a simple truth involved here: what is claimed at one level must also be claimed at the other, simply because there is a symbiotic relationship between the health of national institutions and the health of international institutions. In the Non-Aligned Movement there is a striking absence of leadership with regard to these matters. More often than not there is a tendency to go for the lowest common denominator in matters on good governance and human rights protection. A country whose performance is particularly disappointing both in NAM and in the African Union is South Africa which enjoyed unprecedented international support over decades in ousting an undemocratic and repressive government. It is therefore encouraging that the General Assembly has recently adopted a resolution under the title: *The Rule of Law at the National and International Levels*.[160] In the preamble it is stated that the,

> "advancement of the rule of law at the national and international levels is essential for the realization of sustained economic growth, sustainable development, the eradication of poverty and hunger and the protection of all human rights and fundamental freedoms …".
>
> This is followed by the statement that the,
>
> "promotion of and respect for the rule of law at the national and international levels, as well as justice and good governance, should guide the activities of the United Nations and of its Member States … ."

---

160 A/RES/61/39 of 4 December 2006, preamble.

This item is now destined for inclusion in the agenda of the Assembly's 62nd session from whence the sixth committee will facilitate discussions on it. If followed to its logical consequences, this could be one of the more meaningful reform initiatives on the UN agenda.

The International Seabed Authority: Fifth to Twelfth Sessions (1999-2006)

Michael C. Wood

I. Introductory
  1. The Present Status of the Convention and 1994 Implementation Agreement
  2. The Prospects for Deep Seabed Mining
  3. Part XI (The Area) and General International Law
II. Salient Features of the Authority
  1. Precisely Defined Powers and Functions
  2. Powers, Composition and Decision-Making Rules of the Assembly, Council and Finance Committee
  3. Cost-Effectiveness and Attendance
III. The Authority's Work During the Fifth to Twelfth Sessions
  1. Organisational Matters
    a. Election of Assembly Presidents
    b. Rules of Procedure of the Assembly
    c. Election of the Council (2000, 2002, 2004, 2006)
    d. Election of the Secretary-General (2000, 2004)
    e. The Secretariat
    f. Election of Council Presidents
    g. Rules of Procedure of the Council
    h. Election of the Finance Committee and Organisation of Its Work
    i. Budgets for 2000, 2001-2002, 2003-2004, 2005-2006 and 2007-2008
    j. Scale of Assessment
    k. Voluntary Trust Fund
    l. Endowment Fund for Marine Scientific Research in the Area
    m. Financial Regulations
    n. Staff Regulations and Rules
    o. Election of the Legal and Technical Commission and Organisation of Its Work
    p. Relations with the United Nations, ITLOS and Other Bodies
    q. Protocol on Privileges and Immunities
    r. Headquarters Agreement and Relations with the Host State

A. von Bogdandy and R. Wolfrum, (eds.),
Max Planck Yearbook of United Nations Law, Volume 11, 2007, p. 47-98.
© 2007 Koninklijke Brill N.V. Printed in The Netherlands.

s. Five-Year Review (2000, 2005)
t. Official Seal, Flag and Emblem
2. Substantive Work
a. Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area
b. Draft Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area
c. Draft Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts in the Area
d. Plans of Work and Contracts
e. Promotion of Marine Scientific Research
f. Scientific and Technical Workshops
IV. Conclusions

Annex:
Fifth to Twelfth Sessions of the Authority: Overview
Workshops organised by the International Seabed Authority

This article adopts broadly the same outline as an earlier one, published in 1999, which dealt with the first four sessions of the International Seabed Authority (up to the point when provisional membership terminated, on 16 November 1998).[1] The present article, together with the 1999 article, seeks to describe the first twelve years of the Authority, which may be seen as its formative period.[2] The article describes (in Section III) the organisational and substantive work of the Authority in the years between 16 November 1998 and 31 March 2007. Certain introductory matters are covered in Section I. Section II continues the description of some salient features of the Authority that was given in the 1999 article. Further thoughts on the future are set out in Section IV.

During the eight sessions covered by the present article, the various organs of the Authority have continued to deal with organisational matters, but the emphasis has shifted significantly towards substantive work. The organs of the Authority have continued to operate largely by

---

1 M.C. Wood, "International Seabed Authority: The First Four Years", in: J.A. Frowein/ R. Wolfrum (eds), *Max Planck UNYB* 3 (1999), 173 et seq. (hereafter referred to as the "1999 article").

2 The 2004 report of the Secretary-General provides an authoritative account of the work of the Authority over the first ten years of existence, and is most useful: ISBA/10/A/3: *Selected Decisions and Documents of the Tenth Session 10*, 10-50.

consensus, and decisions have been taken essentially on practical and technical grounds, rather than being driven by the more ideological concerns of the negotiating phase in the 1960s, 1970s and 1980s. Increasing emphasis has been given to environmental protection. And interest has grown in resources of the deep seabed other than polymetallic nodules. Discussions in other forums and by certain writers on issues such as genetic resources have not always acknowledged that the Authority's role is limited to mineral resources; the Authority has resisted occasional pressures to go beyond its true mandate.

The Authority is an autonomous international organisation, not part of the United Nations system, though in practice it is closely associated with it, in its origins and in its day-to-day business (including by its participation in the staff common system). As is provided in the *United Nations Convention on the Law of the Sea*, 1982 (hereafter the Convention), the Authority is the organisation through which the parties to the Convention shall, in accordance with its Part XI, organise and control exploration for, and exploitation of, the mineral resources of the Area (the seabed and ocean floor and subsoil thereof, beyond national jurisdiction).[3] The Authority was established in 1994, pursuant to Part XI of the Convention and the Annexes related thereto (Annexes III and IV), the *1994 Agreement relating to the Implementation of Part XI of the Convention* (hereafter the Implementation Agreement or Agreement), and Resolutions I and II of the Third United Nations Conference on the Law of the Sea.[4]

---

3 Article 157.1, read with article 1.1(3) and article 133(a).

4 The most important documents of the Authority are to be found in the annual publication *Selected Decisions and Documents* of each session (hereafter referred to as *Selected Decisions* followed by the number of the session; thus *Selected Decisions and Documents of the Twelfth Session* is referred to as *Selected Decisions 12*). Indexes to the main documents are to be found in *Selected Decisions*. See also *The Law of the Sea: Compendium of Basic Documents* (International Seabed Authority/ The Caribbean Law Publishing Company, 2001) and *International Seabed Authority: Basic Texts* (The International Seabed Authority, Kingston, Jamaica 2003), with a useful Note on Documentation and commentaries and documentary sources for each of the basic texts (hereafter *Basic Texts*). A Note on Documentation is also included in the latest *Selected Decisions*, where there is also a cumulative index of documents. No official records of meetings are kept (though sound recordings are made), and the Press Releases, while useful, are not authoritative or indeed necessarily always accurate. Official accounts of the work of the Assembly and Council are to be found in the successive con-

Highlights of the activities of the Authority during the eight-year period under review include the approval in July 2000 of the *Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area*; the issue of the first seven fifteen-year contracts for exploration in 2001/02 to the seven registered pioneer investors, together with the issue in 2006 of a fifteen-year contract to Germany; the holding of a series of scientific and technical workshops and seminars; and the Tenth Anniversary Session of the Authority held in 2004. While there is a significant record of positive achievements, including the promotion of knowledge and scientific research, the Authority's role remains relatively modest, absent significant commercial interest in the development of deep seabed mineral resources.

The period also saw the publication in 2003 of Volume VI of the *Virginia Commentary*, which contains "an integrated commentary on the deep seabed regime as a whole: 1982 Convention, 1994 Agreement and 2000 Code."[5] And there have been other useful publications, both official[6] and private,[7] as well as a further development of the Authority's website.[8]

---

cluding statements of their Presidents on the work of each session or part of a session. The annual reports of the Authority's Secretary-General under article 166.4 of the Convention provide an invaluable overview of developments (especially that for the Tenth Anniversary Session in 2004, see note 2), as do his statements at the United Nations General Assembly under the agenda item "Oceans and Law of the Sea", and to the annual Meetings of States Parties to the Convention.

5 M.W. Lodge/ S. Nandan/ S. Rosenne (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Volume VI (2003), p.xii (*Virginia Commentary*).

6 *The Law of the Sea: Concept of the Common Heritage of Mankind: Legislative History of Articles 133 to 150 and 311(6) of the United Nations Convention on the Law of the Sea*, United Nations, 1996; *Secretary-General's Informal Consultations on Outstanding Issues Relating to the Deep Seabed Mining Provisions of the United Nations Convention on the Law of the Sea: Collected Documents,* International Seabed Authority, 2002, with bibliography; *Legislative History of the "Enterprise" under the United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of Part XI of the Convention*, International Seabed Authority, 2002; *Proceedings of the Tenth Anniversary Commemoration of the Establishment of the International Seabed Authority*, International Seabed Authority, 2004 (hereafter *Tenth Anniversary Commemoration*).

7 D.A. French, *Der Tiefseebergbau,* 1990; M.C.W. Pinto, "'Common Heritage of Mankind': From Metaphor to Myth, and the Consequences of Con-

The 1999 article suggested three objectives for the short to medium-term:

- The members of the Authority need to ensure that nothing is done that will unnecessarily hamper commercial deepsea mining if and when that becomes a real prospect (since otherwise the common heritage will benefit no one), while taking due account of other interests, in particular the need for adequate environmental protection and the need to avoid unfair competition (subsidies).

- Members also need to ensure that the Convention and Agreement are strictly adhered to, in particular that the Authority does not ex-

---

structive Ambiguity", in: J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krysztof Skubiszewski,* 1996, 249 et seq.; N.J. Seeberg-Elverfeldt, *The Settlement of Disputes in Seabed Mining*, 1998; R. Churchill/ V. Lowe, *The Law of the Sea,* 3rd edition, 1999, 223-254; D. da Empoli, "Public Choice Analysis of a New International Organization: The International Sea-Bed Authority," *Constitutional Political Authority* 11 (2000), 59 et seq.; M.W. Lodge, "International Seabed Authority's Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area," *Journal of Energy and Natural Resources Law* 20 (2002), 270 et seq.; J.P. Lévy, *Le Destin de l'Autorité Internationale des Fonds Marins,* 2002; E. Guntrip, "The Common Heritage of Mankind: An adequate Regime for Managing the Deep Seabed?", *Melbourne JIL* 4 (2003), 376 et seq.; M.W. Lodge, "Environmental Regulation of Deep Seabed Mining," in: A. Kirchner (ed.), *International Marine Environmental Law*, 2003, 49 et seq.; J.P. Lévy, "La première décennie de l'Autorité internationale des fonds marins," *RGDIP* 109 (2005), 191 et seq.; M.W. Lodge, "International Seabed Authority Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area", in: E. Bastide/ T. Wälde/ J. Warden-Fernández (eds), *International and Comparative Mineral Law and Policy*, 2005, 171 et seq.; S. Nandan, "Administering the Mineral Resources of the Deep Seabed", in:. D. Freestone/ R. Barnes/ D. Ong (eds), *The Law of the Sea: Progress and Prospects*, 2006, 75 et seq.; R. Wolfrum, "Rechtsstatus und Nutzung des Tiefseebodens (des Gebiets)", in: W. Graf Vitzthum (ed.), *Handbuch des Seerechts*, 2006, 333. Relevant entries in the second edition of the *Max-Planck Encyclopedia of Public International Law* (publication from 2008) include those on the International Seabed Authority, and the Common Heritage of Mankind.

8 Available at <http://www.isa.org.jm>, described in: ISBA/12/A/2, para. 34: *Selected Decisions 12*, *7*. The Library of the International Seabed Authority in Jamaica is a very useful resource. For further references, see *Bibliography on the Law of the Sea,* published by the United Nations (DOALOS) and *Public International Law,* published by the Max Planck Institute for Comparative Public Law and International Law, Heidelberg.

> ceed its powers and functions and that procedural safeguards (especially the relationship between Council and Assembly, and in the budgetary sphere Finance Committee) are maintained.
>
> - Members further need to ensure that the Authority remains cost effective, and that its budget is no more than strictly necessary for its specific and limited functions under the Convention and Agreement. Depending on the prospects for deep seabed mining radical steps may be needed to avoid unnecessary expenditure.[9]

These objectives have been broadly shared by the Authority and its members thus far. Nothing has been done that would hamper eventual commercial deep seabed mineral exploitation, and cost-effectiveness and evolution continue to be watchwords. Occasional loose interpretations of the Authority's powers and functions have been countered, and there has been no short-circuiting of the procedural safeguards introduced by the Agreement. As the Secretary-General of the Authority has recently written,

> "[t]he relationship between the various organs and subsidiary bodies in the internal structure of the Authority is an important feature of the machinery established by the 1982 LOSC and the 1994 Agreement. It is critical to confidence in the system. … The system we now have provides for checks and balances and promotes cooperation and coordination between the different organs and bodies."[10]

Indeed, nothing in the twelve years of the Authority's existence justifies the criticisms made by some opponents of the Convention. On the contrary, in accordance with the clear terms of the Convention and the Agreement, the Authority has established itself as among the most reliable and cost-effective international institutions.

I. Introductory

1. The Present Status of the Convention and 1994 Implementation Agreement

As of 31 March 2007, there were 153 parties to the Convention, referred to as States Parties (150 states; two self-governing associated states – Cook Islands and Niue; and one international organisation - the Euro-

---

9 1999 article, see note 1, 236-237.

10 Nandan, see note 7, 82.

pean Community); and 127 parties to the Agreement. So as of that date, 26 parties to the Convention were not yet parties to the Agreement.[11] While there has been some improvement in this regard since 16 November 1998,[12] when 34 parties to the Convention were not yet parties to the Agreement, it remains regrettable that nearly one in six parties to the Convention have not yet taken the step of becoming party to the Agreement. However, this appears to be for bureaucratic reasons, not because of any opposition to the Agreement itself. It is "an incongruity"[13] rather than a practical problem, since the members of the Authority of necessity all participate on the same basis. They have repeatedly reaffirmed that the Convention and Agreement are to be interpreted and applied together as a single instrument, and that in the event of any inconsistency the provisions of the Agreement prevail. None has challenged this.[14]

As of 31 March 2007, the parties to the Convention included four of the five permanent members of the Security Council, all 27 Member States of the European Union and the European Community itself, as well as a wide range of states from all regions. Canada became a party in 2003. The United States had still not acceded; many officials, interested government departments, and influential policy makers have made valiant efforts, so far to no avail. Opposition within the United States seems to be largely a matter of domestic politics. Particular individuals seem to be able to block progress in the Senate more or less indefinitely. Such substantive arguments as are made against the Convention are

---

11 See the report of the Secretary-General, ISBA/12/A/2, paras 3 and 4, which lists the states concerned: *Selected Decisions 12*, 1: Angola, Antigua and Barbuda, Bahrain, Bosnia and Herzegovina, Brazil, Cape Verde, Comoros, Democratic Republic of the Congo, Djibouti, Dominica, Egypt, Gambia, Ghana, Guinea-Bissau, Guyana, Iraq, Mali, Marshall Islands, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Sao Tome e Principe, Somalia, Sudan, Uruguay, Yemen. Each year the Secretary-General writes to the states concerned, and it has been suggested that he (and others) might take up the matter in person (in New York and elsewhere), when opportunities arise. The UN General Assembly, in its annual resolution on Oceans and the Law of the Sea, calls upon states to become parties to the Convention and the Agreement: see, for the latest resolution, para. 3 of A/RES/61/222 of 20 December 2006.

12 The latest such state to become party to the Agreement was Viet Nam in August 2006.

13 ISBA/12/A/2, para. 3: *Selected Decisions 12,* 1.

14 1999 article, see note 1, 182-183.

based more on ideology than on reason. It is now over twelve years since the President of the United States affirmed that the Agreement met all objections of the United States to Part XI of the Convention.[15] The changes in Congress following the November 2006 mid-term elections may bring some movement.

2. The Prospects for Deep Seabed Mining

So far as concerns polymetallic nodules, the January 1994 conclusion of a Group of Technical Experts – that it was unlikely that commercial deep seabed mining would take place before 2010 – is proving to have been correct. The Group was unable to assess when commercial production might be expected to commence.[16] Commercial production for polymetallic nodules seems as far away as ever. Writing in 2002, Michael Lodge said,

> "it is apparent that, nearly 20 years after the adoption of the 1982 Convention, seabed mining is further off than ever before. Commercial interest in deep seabed polymetallic nodules has dwindled to the point where commercial exploitation of these resources seems, at best, a remote possibility. In the present economic climate, none of the contractors and sponsoring States are actively pursuing exploration programmes aimed at further exploitation of these resources."[17]

Other mineral resources currently under consideration within the Authority are polymetallic sulphides and cobalt-rich ferromanganese crusts. Prospects for the exploitation of these resources within areas of national jurisdiction seem a good deal more positive than they were only a few years ago; but it is less clear whether and when they will be exploited in the deep seabed. Methane hydrates may also exist in the Area, but they are mainly in the continental shelf and there would seem to be no prospects of commercial production in the Area. In his statement to the United Nations General Assembly on 8 December 2006, the Secretary-General of the Authority said,

> "With regard to polymetallic nodules, the pace of development of these resources has been slow. The Authority has issued exploration licenses to eight entities, all of them State-supported. It has always

---

15 1999 article, see note 1, 184.

16 1999 article, see note 1, 186.

17 Lodge 2002, see note 7, 50.

> been my belief that until the private sector gets involved, the prospects for commercial mining of minerals from the deep seabed will remain uncertain. The two main inhibiting factors for commercial mining have been the lack of development of mining technology and the price of metals. For commercial mining purposes, the two are interrelated.
>
> The rising demand for metals in emerging economies in recent years has altered the economic environment considerably. It has caused metal prices to surge ...
>
> It is therefore not surprising that the private sector has begun to show interest in marine mineral deposits. In that respect, recent developments in the exploration for and exploitation of polymetallic sulphides have been most promising …"[18]

3. Part XI (The Area) and General International Law

Under the heading "Deep Seabed Mining and General International Law", the 1999 article considered the position of deep seabed mining under customary international law. There have been no dramatic developments in this regard, though the increased participation in the Convention and Agreement and the passage of time are not without significance. Such controversy as there used to be seems to have died down. The issue hardly arises nowadays; no one seems to have any ambition to engage in deep sea mining outside the Convention, and it would scarcely be realistic, in commercial or any other terms, to do so.[19] Even those opposed to Part XI do not suggest that deep sea mining would be viable, in practical terms let alone legally, outside the Convention.

The Area is defined in article 1.1(1) of the Convention as "the seabed and ocean floor and subsoil thereof, beyond the limits of national

---

18 Doc. A/61/PV.71, 5-6.

19 Wolfrum, see note 7, 342-345. In a talk at the Centre for International Governance, University of Leeds, on 14 March 2007, David Anderson said that "[t]he regime is applicable on a global basis and any attempt to conduct mining operations on a unilateral basis would meet with the sternest opposition. Any right to do so that, in the past, may have existed as a matter of customary law on the freedom of the seas must now have withered away as a result of the express terms of the adjusted Convention and the practice of States, including both Parties and non-Parties, in regard to the ISA," see the Centre's website.

jurisdiction." The limits of national jurisdiction for the seabed and subsoil are the outer limit of the continental shelf (as defined in article 76 in Part VI of the Convention), and either lie 200 nm from the territorial sea baselines or beyond 200 nm, according to a complex formula and procedure set out in article 76 and Annex II. A copy of each chart or list of geographical coordinates showing the outer limit of the continental shelf is to be deposited with the UN Secretary-General, and with the Secretary-General of the Authority (article 84.2). Neither the Authority nor the United Nations has any other role in this regard and none has been suggested.[20] Article 134.4 provides expressly that nothing in the article (which deals with the scope of Part XI) affects the establishment of the outer limits of the continental shelf.

The precise determination of the extent of the Area is not likely to be completed for many years. Among other things, it depends upon the completion, by all coastal states with shelves extending beyond 200 nm from baselines, of the procedures for establishing the outer limits of their continental shelves (laid down in article 76 and Annex II of the Convention), which is likely to take a long time.

The possibility of the joint exploitation of deposits straddling the boundary between the Area and the continental shelf of a coastal state is anticipated in article 142 of the Convention (which deals with the rights and legitimate interests of coastal states). If such deposits were to be found and joint exploitation seemed desirable, some practical *ad hoc* arrangement would be needed (for which there are precedents in agreements between states).

II. Salient Features of the Authority

The 1999 article noted three salient features of the Authority: its precisely defined powers and functions;[21] the composition and decision-making rules of the Council and Finance Committee;[22] and cost-effectiveness.[23] There have been no major developments in these areas since the earlier article.

---

20 For article 82.4 see Section II 1 below.

21 1999 article, see note 1, 190-2.

22 1999 article, see note 1, 192-3.

23 1999 article, see note 1, 193-4.

1. Precisely Defined Powers and Functions

Some writers seem to overlook the precisely defined powers and functions of the Authority. One author, for example, asserts, despite the clear wording and intent of the Convention and Agreement,[24] that the "mandate" of the Authority (presumably what is meant are its powers and functions), is "already broader than is commonly believed." He argues that the "legal condition" of the Area (i.e., that article 136 provides that the Area and its resources are the common heritage of mankind) "may have an attraction" also on non-mineral resource "matters and activities."[25] But this is to overlook the clear outcome of the negotiations at the Conference and appears to be based on a controversial view of the law of international organisations, including the law concerning their powers and functions.

As regards the scope of the Authority's role under article 82 of the Convention (distribution of certain revenues from the continental shelf beyond 200 nm), the Secretary-General's annual report to the eighth session referred to this matter at paras 59 to 62.[26] When introducing this report in the Assembly the Secretary-General confirmed that the sole competence of the Authority in relation to the continental shelf was that provided for in article 82.4 of the Convention. The point was picked up and stressed in a statement dated 15 August 2002 issued by the Group of Latin American and Caribbean States,[27] and by delegations during the debate in the Assembly following the presentation of the Secretary-General's report.[28] A number of delegates emphasised the need, if the Authority was to retain broad support and legitimacy, for it

---

24 Most notably in Section 1, para. 1 of the Annex to the Agreement, which itself repeats article 157.2 of the Convention, and the frequent and deliberate inclusion in the text of the Convention of limiting words such as "with respect to activities in the Area."

25 T. Scovazzi, "Some considerations on future directions for the International Seabed Authority," in: *Tenth Anniversary Commemoration*, see note 6, 162.

26 ISBA/8/A/5 and Add.1: *Selected Decisions 8*, 9 et seq.

27 ISBA/5/A/14, para. 3: *Selected Decisions 8*, 33-34.

28 Thus, the observer from the United States informed the Assembly on 5 August 2003 that "[l]ike the UK, New Zealand, and Australia, we see the Authority's role as quite limited. Under article 82, paragraph 4, it is responsible only for distributing payments and contributions made by coastal states."

to continue to act within the parameters set by its constituent instruments and to respect the limits of its jurisdiction.

It is clear from the text of the Convention, and specifically from the terms of article 82.4, that the Authority's powers and functions in relation to the continental shelf are limited to the process of distribution of certain revenues. Suggestions that article 82 is somehow part and parcel of the common heritage of mankind, and references, despite contrary negotiating history, to the desirability, if not the legal basis, of some role for the Authority beyond article 82.4, have no legal basis. Confusion is compounded by using the term "deep seabed", which normally refers to the international seabed Area, to include the continental shelf beyond 200 nm, over the resources of which the coastal state has sovereign rights.[29]

Two other issues that go to the scope of the powers and functions of the Authority are the living resources in or near the Area, and bioprospecting/biodiversity. It is important to keep these two matters separate, since separate legal regimes apply.[30] Here again it seems clear, despite occasional assertions to the contrary,[31] that under the Convention and Agreement the Authority's role in relation to the exploration or exploitation of resources is confined to mineral resources on or un-

---

29 The Tribunal in the *Barbados v Trinidad and Tobago* Arbitration stated that "there is in law only a single 'continental shelf' rather than an inner continental shelf and a separate extended and outer continental shelf," Award of 11 April 2006, para. 213, *ILM* 45 (2006), 800 et seq.

30 As is pointed out by Lévy, 2005, see note 7. For recent consideration of these issues, see the report of the UN Secretary-General, Doc. A/60/63/Add. 1; the report of the 2006 meeting of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction, Doc. A/61/65; ISBA/12/A/2, paras 51-54: *Selected Decisions 2,* 11-12; and Section X of UN General Assembly resolution A/RES/61/222 see note 11, especially paras 89 to 94. The Working Group is to meet again in 2008.

31 Scovazzi, see note 25, 177-185, suggests that "the Authority has a role to play in the field of bioprospecting", and suggests that bioprospecting (presumably in the Area) is part of marine scientific research, but offers no legal argument for his suggestion. See also F.M. Armas Pfirter, "The Management of Seabed Living Resources in 'the Area' under UNCLOS", *Revista Electronica de Estudios Internaçionales* <www.reei.org>, 11 (2006).

der the deep seabed.[32] Of course, the Authority's environmental role requires it to have regard to living resources and biodiversity when organising mineral resource mining, but that is another matter.

The Authority has an important but clearly defined role in relation to the environment, set out clearly in the Convention. The Authority does not have a general mandate as regards the protection of the marine environment in the Area.[33] Thus, for example, article 145 does not sustain the claim that the "regulatory powers granted to the Authority are not limited to the harmful effects of those mining effects which belong to the typical field of competence of this organisation."[34] It is of course true that, in addition to mining, threats to seabed ecosystems may derive "from a number of activities, such as marine scientific research, bioprospecting, oil and gas exploitation, geothermal exploitation, and tourism," but (to the extent that such activities take place in the Area at all) it does not follow that the Authority is competent in relation to the environmental consequences of these activities. The basis for this claim is a selective quotation of article 145. The author omits the opening sentence and the linking introductory words to the second sentence "To this end", which together limit the article to "measures … with respect

---

32 1999 article, see note 1, 185-186; *Virginia Commentary*, see note 5, 133.10(c); Wolfrum, see note 7, 334 (MN 136); ISBA/10/A/12, para. 26: *Selected Decisions 10*, 60. See, in addition to the articles mentioned in note 21 of the 1999 article, T. Scovazzi, "Biodiversity in the Deep Seabed", *Yearbook of International Environmental Law* 7 (1996), 481 et seq.; R. Wolfrum/ N. Matz, "The Interplay of the United Nations Convention on the Law of the Sea and the Convention on Biological Diversity," in: J.A. Frowein/ R. Wolfrum (eds), *Max Planck UNYB* 4 (2000), 445 et seq.; D. Leary, "Bioprospecting and the Genetic Resources of Hydrothermal Vents on the High Seas: What is the Existing Legal Position, Where are we heading, and What are our options?", *Macquarie Journal of International and Comparative Law* 1 (2004), 137 et seq.; T. Scovazzi, "Mining, Protection of the Environment, Scientific Research and Bioprospecting: Some Considerations on the Role of the International Sea-Bed Authority", *International Journal of Marine and Coastal Law* 20 (2004), 383 et seq.

33 As may have been suggested in ISBA/8/A/14, para. 1: *Selected Decisions 8*, 33. As the observer from the United States stated in the Assembly on 5 August 2003: "[t]he Authority's mandated role, defined by the Convention and the 94 Agreement, is clearly a limited one: to protect the marine environment from mining activities. We appreciate the expert discussions of biodiversity in the context of the Authority's focused mandate to organize and control mining activities in the Area."

34 Scovazzi, see note 25, 171

to activities in the Area." And it adds nothing to the legal argument to cite article 194.5 or to suggest that "the legal condition of the Area has an attraction in granting the Authority broad competences relating to the protection of the environment of the Area as a whole." The conclusion that "[d]ue to its competences, the Authority would be in the best position to participate in the establishment of a system of marine protected areas in the seabed beyond the limits of national jurisdiction" appears to be a statement of the author's policy preference.

The Authority's powers as regards marine scientific research are likewise clearly set out in the text of the Convention and Agreement. Again it distorts the Convention to suggest that "the legal condition of the Area has an attraction in granting the Authority a number of broad competences relating to the field of scientific research to be conducted in the Area."[35]

Another area in which a greater role is sometimes suggested for the Authority than is warranted by the text of the Convention and Agreement concerns archaeological and historical objects in the Area.[36] The UNESCO Convention, not yet in force, will provide for a informational role of the Authority, which is reflected in the Authority's Polymetallic Nodules Regulations. Regulation 8 of the Regulations provides that prospectors shall notify the Authority's Secretary-General of any finding in the Area of an object of an archaeological or historical nature, and that he shall transmit the information to the UNESCO Secretary-General.

2. Powers, Composition and Decision-Making Rules of the Assembly, Council and Finance Committee

The organs of the Authority have continued to be scrupulous in respecting the allocation of powers and functions as between the Assembly, the Council, and the Finance Committee, and there have been no real issues in this respect during the period under review. When the As-

---

35 Scovazzi, see note 25, 176.

36 Convention, article 149; *Virginia Commentary*, see note 5, 226; article 12 of the Convention on the Protection of the Underwater Cultural Heritage, adopted by the General Conference of UNESCO on 2 November 2001; M. Rau, "The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea", in: J.A. Frowein/ R. Wolfrum (eds), *Max Planck UNYB* 6 (2002), 387 et seq.

sembly approved the Authority's Financial Regulations on 23 March 2000, the United States made a statement for the record that the Financial Regulations did not reflect Section 3, para. 7 of the Annex to the Agreement ("Decisions of the Assembly or the Council having financial or budgetary implications shall be based on the recommendations of the Finance Committee") and that the language used in the Financial Regulations must be read in the context of that provision.[37] In practice, the Assembly has not departed from the recommendations of the Council, and the Council has not departed from the recommendations of the Finance Committee.

3. Cost-Effectiveness and Attendance

Close attention continues to be paid to the principle of cost-effectiveness expressly provided for in Section 1, para. 2 of the Annex to the Agreement. This is especially so in the provision made for staff and facilities (including in negotiations with the host state) and as regards the organisation of meetings. The time allocated to meetings is tailored to anticipated work. Exceptionally, in 2000, there was a reversion to a split session lasting four weeks in total, in order to complete the Nodules Regulations, but subsequent years have reverted to the single meeting formula of 1999 and there has been a single two-week session each year from 2001. A two-week session may well be unnecessarily long.[38] One suggestion made at the eighth session in 2002 was that the Assembly should meet every second year. The budget is now adopted every second year, and it would seem perfectly feasible for the Assembly to move to a biennial cycle, as happens with many other international organisations (including specialised agencies of the United Nations).[39] In 2003 it was intended that the expert bodies – the Legal and Technical

---

37 1999 article, see note 1, 193.

38 The twelfth session, in 2006, for example, had difficulty filling the time allotted and ended one day early. Those who argue for retaining two weeks should recall that many Member States are represented only for part of the time or not at all.

39 ISBA/10/A/3, paras 12-14: *Selected Decisions 10*, 14-15. Although the Convention provides that the Assembly shall meet "in regular annual sessions" (article 159.2), this is superseded by the Agreement, Annex, Section 1, para. 2 (principle of cost-effectiveness). Rule 1 of the Assembly's Rules of Procedure provides that the Assembly "shall meet in regular annual sessions, unless it decides otherwise"; 1999 article, see note 1, 197.

Commission and the Finance Committee – should meet in the first week and the Assembly and Council only in the second week. While this did not prove to be entirely practical, there was some useful rationalisation, with meetings of the Assembly and Council being restricted to a period between the first Wednesday and second Thursday. Efforts at rationalisation continue, though it is to be noted that there is some advantage in having a degree of overlap between meetings of the Legal and Technical Commission and the Council and Assembly so that the membership at large can follow and better understand the important work of the Commission.[40]

One related and recurring problem is poor attendance at the Assembly.[41] This may reflect, and certainly gives the impression of, a certain lack of interest in the Authority's current activities, and a degree of frustration on the part of those not on the Council, who feel that there is little for them to do during a two-week session. There are relatively few meetings of the Assembly, and they tend to be largely a formality, except as regards elections (of the Council, Finance Committee and Secretary-General) and the debate on the Secretary-General's annual report, which is an occasion for general statements about the Authority's work.

Poor attendance is a serious problem. It is not good for the Authority's standing. The absence of a quorum may hamper decision-making within the Authority if any delegation raises the matter, as happened at the time of the adoption of the scale of assessments in 1998.[42] With increased participation in the Convention, the quorum laid down in arti-

---

40 One problem is the frequent need for the Assembly and Council to meet before the Finance Committee and the Legal and Technical Commission respectively, to conduct by-elections. The possibility of such decisions being taken between meetings might be explored.

41 The number of delegations attending recent sessions of the Assembly (though not necessarily present at each meeting) is as follows (numbers taken from the reports of the Credentials Committee): at the 6th Sess. in March 2000, 74; at the resumed 6th Sess. in July 2000, 63; at the 7th Sess. in July 2001, 58; at the 8th Sess. in August 2002, 62; at the 9th Sess. in July/August 2003, 58; at the 10th Sess. in May/June 2004, 89; at the 11th Sess. in August 2005, 63; and at the 12th Sess. in August 2006, 65. Since the 6th Sess. there has been a quorum only during the 10th Sess., which was the anniversary session and the session when a vote took place on the election of the Secretary-General. In general, it is the same delegations who tend to be present (and absent).

42 1999 article, see note 1, 217-218.

cle 159.5 of the Convention of a majority of the members of the Assembly will become even harder to obtain. Currently (31 March 2007) there are 152 members entitled to vote,[43] and so the required quorum is 76.

The Secretary-General highlighted the poor attendance at the Assembly in his statement to the UN General Assembly on 8 December 2006,[44] and the Assembly included the following paragraph in its resolution A/RES/61/222 of 20 December 2006 (Oceans and the Law of the Sea),

> "32. Urges all States parties to the Convention to attend the sessions of the Authority, and calls upon the Authority to continue to pursue all options, including the issue of dates, in order to improve attendance at Kingston and to ensure global participation."[45]

III. The Authority's Work During the Fifth to Twelfth Sessions[46]

The Secretary-General's 2004 report to the Tenth Anniversary Session provides a detailed "overview of the achievements and milestones in the life of the Authority since its establishment."[47] In it, he notes that,

> "[t]he organizational phase of the Authority's work is now complete, and the Authority has entered into a new, more substantive, phase of its existence."[48]

All the principal arrangements (with the exception of those concerning the Economic Planning Committee and the Enterprise) were by then in place.

---

43 The European Community does not have a vote in addition to those of its Member States, and it is not the practice to include it in calculating the quorum.

44 Doc. A/61/PV.71, 6-7.

45 As usual, the resolution was adopted by vote: 157 to 1 (Turkey), with 3 abstentions (Colombia, Libya, Venezuela).

46 An outline of the Authority's work during the period 1999 to 2006 is given, session-by-session, at the end of this article, see Annex.

47 ISBA/10/A/3: *Selected Decisions 10,* 10-50.

48 ISBA/10/A/3, para. 3: *Selected Decisions 10,* 12.

1. Organisational Matters

a. Election of Assembly Presidents

The Presidency of the Assembly has been held as follows: at the 5th Sess. in 1999, Mr. José Luis Vallarta (Mexico); at the 6th Sess. in 2000, Dr. Liesbeth Lijnzaard (Netherlands); at the 7th Sess. in 2001, Mr. Peter Donigi (Papua New Guinea); at the 8th Sess. in 2002, Mr. Martin Belinga-Eboutou (Cameroon); at the 9th Sess. in 2003, Mr. Josef Franzen (Slovakia); at the 10th Sess. in 2004, Mr. Dennis Francis (Trinidad and Tobago); at the 11th Sess. in 2005 Mr. Olav Mykleburst (Norway); and at the 12 Sess. in 2006, Mr. Sainivalati S. Navoti (Fiji).

The Assembly has continued to elect its President without a vote, and in accordance with a rotation among the five regional groups as follows: Asia, Africa, Eastern Europe, Latin America and Caribbean, Western Europe and Others.

b. Rules of Procedure of the Assembly

The Rules of Procedure of the Assembly, adopted on 17 March 1995,[49] have not been amended. In accordance with the Convention and Agreement, and the Rules of Procedure, the Assembly has continued the practice of taking all decisions by consensus, without a vote. The sole exception during the eight-year period covered by this article was on the occasion of the contested election of the Secretary-General in 2004.

The problem of the quorum has been noted in Section II 3 above. A practice has grown up, so far only on the occasion of the election of the Secretary-General, of what may be termed "proxy voting". This is not unknown in other organisations (even, albeit infrequently, in the United Nations General Assembly) when a Member State, which would otherwise not be represented at a critical vote, sends credentials appointing a third person (often a member of another delegation) as a member of its delegation with instructions to cast a vote on a particular matter. This is acceptable procedurally, but requires careful scrutiny by the Credentials Committee. It is important, for the orderly conduct of the voting, that a single individual casts only one vote i.e., the same person

---

[49] ISBA/A/WP.3; ISBA/A/L.2: *Selected Decisions 1/2/3*, 3; *Basic Texts*, see note 4, 8-34, with commentary and documentary sources. For the development of the Rules, see 1999 article, see note 1, 196-201.

should not vote on behalf of more than one Member State in the course of a particular vote.

c. Election of the Council (2000, 2002, 2004, 2006)

The complex provisions for the composition of the Council, and the elections in 1996 and 1998, were described at length in the 1999 article.[50] During the period covered by the present article, the Assembly has proceeded on four occasions to elect one half of the membership of the Council, without significant difficulty. These biennial elections of half of the members of the Council have, nonetheless, continued to be complicated, requiring extensive consultations within the various interest and regional groups (though nothing like as difficult as on the occasion of the first election).

The four partial elections, less hotly contested than on the first occasion, all took place without a vote, as is for the most part mandated in the Agreement, which provides that each of the interest groups shall be represented in the Council by those members nominated by that group.[51] The arrangements agreed in 1996 have essentially stood the test of time. The Secretariat prepares an informal paper containing illustrative lists of states that would fulfil the criteria for membership in certain groups in the Council. These lists are based on publicly available statistics, such as those available to the United Nations Statistical Division. The lists are an indicative guide only.[52]

Certain decisions were required at the fifth session in 1999 because of the cessation in November 1998 of the provisional membership of two members of the Council, the United States (in Group A) and Canada (in Group C). Their places were taken by Italy[53] and Australia respectively. Malta was elected to replace Italy in Group E for the remainder of Italy's term.

The regular election in 2000 proceeded smoothly. A Secretariat Note[54] and an indicative list of states fulfilling the criteria for the vari-

---

50 1999 article, see note 1, 101-109.

51 Agreement, Annex, Section 3, para. 10.

52 ISBA/10/A/3, para. 22: *Selected Decisions 10*, 17.

53 Italy was elected on the understanding, agreed within the Assembly, that it would relinquish its seat if the United States became a member of the Authority before Italy's term expired, but this did not happen: ISBA/5/A/14, para. 4: *Selected Decisions 5*, 39.

54 ISBA/6/A/CRP.1/Rev.1.

ous groups[55] were circulated in advance of the election. The complex arrangements and understandings were negotiated among the members of the various interest and regional groups, and the election itself proceeded without difficulty in the Assembly.[56] The elections in 2002,[57] 2004,[58] and 2006[59] likewise proceeded smoothly.[60]

There are, in fact, some very difficult issues underlying the elections to the Council, flowing from the wording of the Agreement (which in this respect is similar to the original Part XI of the Convention). These have not yet had to be faced squarely. They arise particularly in connection with determining which states are qualified for election to the various groups, not least Groups A and B (the major consumers or importers; and the major investors). The interpretation of the criteria laid down in the Agreement is difficult, as is obtaining the appropriate statistics (especially in the case of the investors). In order properly to calculate which State Parties "have either consumed more than 2 per cent in value terms of total world consumption or have net imports of more than 2 per cent in value terms of total world imports of the commodities produced from the categories of minerals to be derived from the Area" and are thus qualified in Group A, states would first have to agree on the meaning of each of the terms used, beginning with "the categories of minerals to be derived from the Area."

This becomes even more complex as the resources concerned extend beyond nodules. In addition, the investment figures used within Group B for the first election[61] have not yet been updated, despite the obvious need to do so (a need to which the Republic of Korea has drawn attention).[62] When they are updated, some understanding will presumably be needed as to what precisely is covered by the term "investments in

---

55 ISBA/6/A/CRP.2.

56 ISBA/6/A/14: *Selected Decisions 6*, 28.

57 ISBA/8/A/10: *Selected Decisions 8*, 27.

58 ISBA/10/A/12, paras 38 and 39: *Selected Decisions 10*, 62.

59 ISBA/12/A/12: *Selected Decisions 12*, 23-25. See also ISBA/12/A/CRP.1 and ISBA/12/A/CRP.2 (informal papers prepared by the Secretariat).

60 Unlike the case with many other international bodies where membership is contested, given the complexity of the arrangements and above all the fact that the election to the Council is not in practice put to a vote, there is no real scope for doing deals between voting in the Council election and voting in other elections outside the Authority.

61 1999 article, see note 1, 206 (notes 64-66).

62 ISBA/10A/12, para. 27: *Selected Decisions 10*, 60.

preparation for and in the conduct of activities in the Area," unless, possibly, it is sufficiently obvious which states qualify as the top eight without the need for a precise calculation.

So far these matters have been handled with great pragmatism. It may be possible to continue in the same way for some time, but the time may well come when it is no longer possible to avoid answering some of the difficult questions which the drafters of the Convention and Agreement left to posterity.

d. Election of the Secretary-General (2000, 2004)

On 31 March 2000, the Assembly re-elected Satya N. Nandan, the sole candidate recommended by the Council, for a second four-year term beginning on 1 June 2000.[63]

On 3 June 2004, the Assembly re-elected Satya N. Nandan for a further four-year term (beginning on 1 June 2004). Two candidates were nominated by their governments, Mr. Charles Manyang D'Awol by Sudan and Mr. Satya N. Nandan by Fiji. The Council proposed to the Assembly a list consisting of the two candidates,[64] and the Assembly proceeded to a vote. Mr. Nandan received 48 votes, Mr. D'Awol 29 votes.

The Finance Committee asked for a study of the terms of service of the Secretary-General, including pension arrangements at the eighth session. The Secretary-General reported back at the ninth session in 2003.[65] At the tenth session the Committee recommended that the Secretary-General be able to chose between joining the UN Joint Staff Pension Fund or receiving a monthly supplement to his remuneration equivalent to the contribution that would otherwise have been payable to the Fund (the so-called ICAO arrangement). This was endorsed by the Council and the Assembly.[66]

e. The Secretariat

"The Secretariat is organised on a cost-effective basis. It is compact and has 38 staff members consisting of experts, and administrative and sup-

---

63 Therefore a list of one name was forwarded to the Assembly, but since there was only one candidate this is not necessarily conclusive of the controversy: 1999 article, see note 1, 210.

64 ISBA/10/C/9: *Selected Decisions 10*, 70.

65 ISBA/9/FC/R.1.

66 ISBA/10/A/8, para. 10: *Selected Decisions 10*, 55.

port staff."[67] Its technical capacity has been enhanced by the recruitment of appropriately qualified scientists.[68] The detailed arrangements concerning the staff members, including the participation of the Authority in the Inter-Organization Agreement and access to the United Nations Administrative Tribunal, are set out in the Secretary-General's 2004 report.[69]

f. Election of Council Presidents

Beginning with the first election the Council has elected its President without a vote. In no case was the election even contested. Indeed, on at least one occasion it proved difficult to secure a willing candidate.

The presidency of the Council has been held as follows during the period under review: at the 5th Sess. in 1999, Mr. Charles Manyang D'Awol (Sudan); at the 6th Sess. in 2000, Mr. Sakiusa Rabuka (Fiji Islands); at the 7th Sess. in 2001, Mr. Tadeusz Bachleda-Curús (Poland); at the 8th Sess. in 2002, Mr. Fernando Pardo Huera (Chile); at the 9th Sess. in 2003, Mr. Domenico da Empoli (Italy); at the 10th Sess. in 2004, Mr. Baïdy Diène (Senegal); at the 11th Sess. in 2005, Mr. Park Heekwon (Republic of Korea); and at the 12th Sess. in 2006, Mr. Mariusz-Orion Jędrysek (Poland).

The following rotation among the five regional groups has established itself: Latin America and Caribbean, Western European and Others, African, Asian, Eastern European. At the twelfth session in 2006, the Eastern European Group (which was sparsely represented) initially sought to relinquish their turn to the next in line, the Group of Latin American and Caribbean states, which declined (understandably, since presumably they had not come prepared to assume the presidency in 2006, and preferred to assume it in 2007, in accordance with the usual rotation). Eventually, the Eastern European Group did produce a candidate.

---

67 Nandan, see note 7, 81.

68 ISBA/10/A/3, paras 39-53: *Selected Decisions 10*, 21-24.

69 ISBA/10/A/3, paras 39-53: *Selected Decisions 10*, 21-24.

g. Rules of Procedure of the Council

The Rules of Procedure of the Council, adopted on 16 August 1996,[70] have not been amended. Nor have any particular issues arisen in their application.

h. Election of the Finance Committee and Organisation of Its Work

The first election of the 15 members of the Finance Committee was described in the 1999 article.[71] They were elected for a five-year term until 31 December 2001.[72] As of 16 November 1998, when the United States ceased to be a provisional member of the Authority, the US member of the Committee (Ms Deborah Wynes) automatically ceased to be a member. The Italian member, Mr. Domenico da Empoli, who would otherwise have stepped down on 1 January 1999 to be replaced by an Eastern European,[73] remained on the Committee in her place (Italy being then the fifth highest contributor), on the understanding that he would depart if the United States once again become a member of the Authority.[74] In accordance with the understanding reached at the time of the first election in 1996,[75] an Eastern European (Ms Maria Dragun-Gertner from Poland) was elected by the Assembly in August 1999 to complete the Committee.

The second election to the Finance Committee, held in 2001, was uneventful, there being 15 candidates for 15 seats. The members elected on that occasion held office from 1 January 2002 to 31 December 2006. The same geographical distribution of seats was respected.[76]

At the third election in 2006, there were again 15 candidates for 15 seats, and all were elected. However, the re-election for a third term of two candidates nominated by states which were among the five largest

---

70 *Basic Texts*, see note 4, 63-71, with commentary and documentary sources.

71 1999 article, see note 1, 212-213.

72 The term was deemed to have started on 1 January 1997, though the members had actually been in office since August 1996.

73 1999 article, see note 1, 213.

74 Cf. Italy's place in Group A of the Council.

75 ISBA/A/L.13, para. 10 (b): *Selected Decisions 1, 2, 3*, 31; 1999 article, see note 1, 213.

76 In the course of each five-year term, a number of members have resigned from the Finance Committee; in each case a member having the same nationality was elected at an early meeting of the Assembly.

financial contributors (and thus entitled to a seat on the Committee)[77] proved to be highly contentious. The question turned on the interpretation of the words "for a further term" in para. 4 of Section 9 of the Annex to the Agreement, together with the relationship between this paragraph and the right of the five largest financial contributors to a seat pursuant to para. 3.

At the eleventh session, in anticipation of the election to be held at the twelfth session, the question arose, and was left unresolved, concerning the eligibility for re-election of members of the Finance Committee (and of the Legal and Technical Commission[78]) who had already served two terms.[79] At the twelfth session itself, prior to the election, there was a protracted two-day debate over the interpretation of paras 3 and 4 of Section 9 of the Annex to the Agreement. As a result of the debate, upon the proposal of Brazil, the following language was included in the report recording the decision of the Assembly electing the fifteen members of the Finance Committee for a five-year term beginning on 1 January 2007,

> "the Assembly recognized that there were perceived differences in the interpretation of the combined effect of paragraphs 3 and 4 of Section 9 of the annex to the 1994 Agreement. Following an extensive exchange of views, the Assembly proceeded to the election of the members the Finance Committee. The Assembly decided to elect all 15 nominees, on an exceptional basis, with the understanding that the election of two nominees (France and Italy) for a third term is a one-time only decision, that will not constitute a precedent for future elections and that for future elections States Parties shall indicate their candidates at least two months before the beginning of the session."[80]

---

77 Jamaica also re-nominated their member (Mr. Coy Roache) for a third term, but withdrew his name and substituted another just prior to the election: ISBA/12/A/6/Add.1 and Corr.1; ISBA/12/A/6/Add.2.

78 The issue was different as regards the Legal and Technical Commission, where there are no seats as of right. Italy nominated Mr. Rosa for a third term, but withdrew the nomination and nominated Ms Elena Sciso instead.

79 ISBA/11/A/11, para. 24: *Selected Decisions 11*, 22.

80 Statement of the President of the Assembly, ISBA/12/A/13, paras 32-33: *Selected Decisions 12*, 30-31.

The Finance Committee adopted its Rules of Procedure on 20 August 1999,[81] after considering the matter over three sessions (in 1997, 1998, and 1999) on the basis of drafts prepared by the Secretariat.[82]

The chairmanship of the Finance Committee has not rotated annually, or in accordance with any geographical rotation. This is not inappropriate, given that it is an expert body, the members of which sit in their personal capacity and not as representatives of their governments. The following have chaired the Committee: Mr. Rama Rao (India) from 1997 to 1998; Mr. Domenico da Empoli (Italy) from 1999 to 2002; and Mr. Hasjim Djalal (Indonesia) from 2003 to 2006.

In accordance with the Annex to the Implementation Agreement (Section 9, para. 8) and its Rules of Procedure, the Finance Committee has throughout acted by consensus on questions of substance. It has also done so on all such procedural matters as come up for decision. It has met each year at the same time as the annual meeting of the Authority, except in 1999 when there was considered to be insufficient business to justify a meeting. Its work is summarised in its reports to the Council and the Assembly, which since the fifth session in 1999 are to be found in *Selected Decisions*.

The main work of the Finance Committee is to recommend every two years to the Council and the Assembly the draft budgets of the Authority for the next two-year financial period. In addition, it proposes the scale of assessed contributions, recommends the appointment of auditors, and generally supervises all matters having budgetary implications, including staff matters.

i. Budgets for 2000, 2001-2002, 2003-2004, 2005-2006 and 2007-2008

Article 172 of the Convention refers to an annual budget. The Authority adopted its budget annually up until 2000; since then (as provided for in the Financial Regulations), it has adopted two annual budgets at the same time, for a two-year financial period. This has been done for reasons of efficiency and cost-effectiveness, so as to allow for better planning and so as to avoid the various organs having to go through a budget exercise every year. It means, for example, that the Assembly does not have to meet each year for budgetary purposes.

---

81 ISBA/5/FC/1: *Basic Texts*, see note 4, 63-71, with commentary and documentary sources.

82 ISBA/F/WP.1; ISBA/4/F/WP.2.

The budget has continued to be relatively modest, with little growth, other than certain inevitable increases dictated by decisions of the UN General Assembly over which the Authority has no control. For the year 2000 it was the amount of US$ 5,275,200; for the two-year financial period 2001-2002 US$ 10,506,400; for 2003-2004 US$ 10, 509,700; and for 2005-2006 US$ 10,800,000. The budget for 2007-2008 rose to US$ 11,782,400, a substantial increase in real terms. This was caused entirely by changes in staff costs decided upon by the UN General Assembly, which the Authority was required to follow as part of the common system.

The procedure for the adoption of the budget has been for the Council to recommend to the Assembly the budget recommended by the Finance Committee. Neither the Assembly nor the Council has questioned the recommendations of the Finance Committee. Given the terms of the Agreement, they cannot amend the Finance Committee's recommendations, but they could of course return the draft budget to the Finance Committee (with comments) for its reconsideration. This has not happened.

Within the Finance Committee the procedure has been as follows: the Secretary-General puts forward budgetary proposals to the Committee (which are not to be distributed more widely at this stage). The Committee examines them in detail, together with the Secretary-General and other members of the Secretariat,[83] who then reformulate them in light of the discussion in the Committee. The Committee then reviews the revised proposals, and the Secretary-General makes any further changes requested by members of the Committee. The Committee then makes its recommendations to the Council and the Assembly. The process has been one of accommodation and agreement with the Secretary-General, with flexibility and goodwill on all sides.

j. Scale of Assessment

The adoption of the scale of assessment has continued to be largely uncontroversial. It is based upon the scale used for the regular budget of the United Nations[84] for the previous year (since that for the current year is not always available in time). It was this that caused the crisis in

---

83 The practice of having a discussion within the Committee in the absence of the Secretariat, as happens in the UN's ACABQ, has not always been followed, but can be a useful stage on occasion.

84 Article 160. 2(e) of the Convention.

1998, leading to a special meeting of the Assembly in New York in October 1998.[85] In 2002, while certain concerns were expressed within the Finance Committee, the ceiling was lowered to 22 per cent in line with the decision of the UN General Assembly.[86]

The question of contributions to the budget by the European Community proved contentious. The agreed contribution of the European Community to the administrative budget of the Authority for 1998 was US$ 75,000.[87] In October 1998, the Assembly, on the recommendation of the Finance Committee and the Council, decided,

> "that the amount of the agreed contribution of the European Community to the administrative budget of the Authority for 1999 shall be 80,000 dollars,"[88]

thus reducing by that figure the amount to be shared among the other members of the Authority in accordance with the scale of assessment. It is important to note that the Community's contribution is an "agreed contribution", not an "assessed contribution." In other words, it is an *ad hoc* sum agreed between the Authority and the Community. The distinction is clear in regulation 6.1 (a) and (b) of the Authority's Financial Regulations.[89]

The Finance Committee has,

> "recognized that [the European Community's] contributions would be reviewed and determined from time to time by the Authority, taking into consideration the total amount of the budget."[90]

The sum of US$ 80,000 is no mere token amount (in fact, it makes the Community one of the larger contributors to the Authority's budget), and effectively means that the Member States of the Community are - albeit indirectly - paying considerably more than their proper share under the United Nations scale. There would seem to be no good reason for this, and certainly no good reason to increase the amount ex-

---

85 1999 article, see note 1, 216-218.

86 ISBA/8/A/7/Rev.1-ISBA/8/C/3/Rev.1, para. 12: *Selected Decisions 8,* 25.

87 ISBA/3/A/10.

88 ISBA/4/A/L.21, which contains a footnote (c) reading "This contribution will be adjusted taking into account the evolution in the administrative budget and related funds."

89 *Basic Texts*, see note 4, 91.

90 ISBA/5/A/8-ISBA/5/C/7, para. 7: *Selected Decisions 5*, 19; ISBA/6/A/13-ISBA/6/C/6, para. 9: *Selected Decisions 6*, 27; ISBA/8/A/7/Rev.1-ISBA/C/3/Rev.1, para. 24: *Selected Decisions 8*, 25.

cept perhaps in the event of a major increase in the Authority's budget. If, on policy grounds, the Community wished to make a larger contribution then it might be more appropriate for it to contribute to the Voluntary Trust Fund or the Endowment Fund for Marine Scientific Research in the Area.

k. Voluntary Trust Fund

In 2002, a Voluntary Trust Fund was established by the Secretary-General, at the request of the Assembly, to enhance the participation of members from developing countries in the Finance Committee and the Legal and Technical Commission.[91] The Convention and Agreement provide that the expenses of the members of these bodies should be borne by the Party which nominates them, but there was concern that some members from developing countries were not attending because of difficulties in finding the necessary funds.

Provisional terms and conditions for the use of the Trust Fund were adopted by the Assembly, on the recommendation of the Finance Committee[92] and the Council,[93] in 2003 and amended in 2004.[94] The Fund is made up of voluntary contributions.[95] A proposal made by the Japanese delegation to finance the Trust Fund from the regular budget[96] was unacceptable to other major contributors, not least because of the unwelcome precedent that could have been set.

To supplement the Fund, in 2004 and 2005 the Assembly, on the recommendation of the Finance Committee and the Council, authorised sums to be advanced from the interest from the registered pioneer investor account.[97] There was no need to do this at the twelfth session in

---

91 ISBA/8/ A/11, paras 12 and 13: *Selected Decisions 8*, 29.

92 ISBA/9/A/5-ISBA/9/C/5, para. 6 and Annex: *Selected Decisions 9*, 15-18.

93 ISBA/9/C/6, paras 10-12: *Selected Decisions 9*, 28.

94 ISBA/10/A/6- ISBA/10/C/7, para. 12: *Selected Decisions 10*, 52.

95 As of March 2007, contributions had been received from Angola, Indonesia, Namibia, Nigeria, Norway, Oman, Trinidad and Tobago. Brazil announced that it would contribute US$ 10,000, ISBA/12/A/13, para. 30: *Selected Decisions 12*, 29.

96 ISBA/9/A/8: *Selected Decisions 9*, 19-20; ISBA/10/A/10.

97 ISBA/12/A/2, paras 24-27: *Selected Decisions 12*, 5. The registered pioneer investor account was a special account consisting of the money remaining (after the processing of the applications) from the application fees paid to the Preparatory Commission by the seven pioneer investors in accordance

2006, since the Trust Fund had adequate resources for the next year. For the future, such transfers will, where necessary and possible, be made from the income of the Endowment Fund for Marine Scientific Research in the Area.

l. Endowment Fund for Marine Scientific Research in the Area

At the twelfth session in 2006, the Assembly, acting upon the recommendation of the Council and the Finance Committee,[98] requested the Secretary-General to establish an Endowment Fund for Marine Scientific Research in the Area.[99] The Assembly resolution establishing the Endowment Fund was based on a draft prepared by the Secretariat[100] following discussion in the Assembly at the eleventh session.[101] The Secretariat's draft was simplified by the Finance Committee, having regard in particular to the fact that the Endowment Fund was to be a special account to which the Authority's Financial Regulations would apply and that further rules and procedures are to be drawn up.

The Endowment Fund is to be used primarily to promote and encourage marine scientific research in the Area, which is a function of the Authority by virtue of article 143 of the Convention, and moreover one highlighted in the Agreement. The Fund is to be used in particular to support the participation of personnel from developing countries in the

---

with Resolution II of the Third United Nations Conference on the Law of the Sea (1999 article, see note 1, 226-227). These fees had been placed in a trust account administered by the United Nations, and the balance was transferred to the Authority upon its establishment. The balance, together with interest, had been kept separate from the Authority's budget (see ISBA/12/A/2, paras 28-30: *Selected Decisions 12*, 5-6).

98 The Council modified the proposal of the Finance Committee by replacing the words "to the extent necessary" in para. 7 of the draft resolution by the words "where possible and to the extent necessary." The Council is not empowered under the Agreement to modify a proposal of the Finance Committee. But this modification was essentially a drafting one, and (as was essential for this departure from the letter of the Agreement) the modified resolution was adopted by consensus in both the Council and the Assembly.

99 ISBA/12/A/11: *Selected Decisions 12*, 22-23.

100 ISBA/12/FC/L.1.

101 ISBA/11/A/11, paras 6-16: *Selected Decisions 11*, 20-21; and see also the 2005 Report of the Secretary-General: ISBA/11/A/4 and Corr.1, para. 64: *Selected Decisions 11*, 13-14; and the 2006 Report of the Secretary-General: ISBA/12/A/2 and Corr.1, paras 28-30: *Selected Decisions 12*, 5-6.

activities concerned. A subsidiary use for the Fund is, "where possible and to the extent necessary", and up to US$ 60,000 in any year, to make allocations to the Voluntary Trust Fund (in the same way as was done over the last couple of years with advances from the registered pioneer investor account).

The initial capital of the Endowment Fund consists of the balance remaining in the registered pioneer investor account on 18 August 2006.[102] States and private persons are invited to contribute. Only the interest may be disbursed for the purposes of the Fund.

The Endowment Fund will only become operational (except for allocations to the Trust Fund) upon the approval by the Assembly of rules and procedures for the administration and utilisation of the Fund. These rules and procedures are to be prepared by the Secretary-General, and (like all matters having financial implications) will be considered in turn by the Finance Committee, Council and Assembly.

m. Financial Regulations

The preparation of the Financial Regulations was a lengthy process.[103] The starting point was article 171 to 175 of the Convention. The Finance Committee prepared a draft during the third and fourth sessions in 1997 and 1998,[104] which was considered at some length by the Council at the fifth session in 1999. The Secretariat then prepared a revised draft,[105] and on 26 August 1999, upon the recommendation of the Finance Committee, the Council adopted and applied the draft Regulations provisionally.[106] The Assembly, acting on the recommendation of

---

102 The use of the registered pioneer investors account for the Endowment Fund was proposed by the Secretary-General, after consultations with the states of the pioneer investors and Finance Committee members. It was widely seen as a good solution to the problem of the effective use of the interest on the sizable amount involved (US$ 2,660,958, as of 31 December 2005).

103 1999 article, see note 1, 218; *Virginia Commentary*, see note 5, 531 and 645. Pending the adoption of its own Financial Regulations, the Authority applied those of the United Nations.

104 ISBA/4/C/L.3.

105 ISBA/5/C/L.3.

106 ISBA/5/C/10.

the Council, approved the Financial Regulations of the Authority on 23 March 2000, during the sixth session.[107]

The Secretary-General has not yet established the more detailed rules and procedures provided for in Regulation 10.1(a), because the United Nations itself is currently reviewing its own Financial Rules. Pending the establishment of its own rules, the Authority is applying the UN Rules *mutatis mutandis*. This has not caused any difficulty in practice.

The Introductory Note to the Financial Regulations recalls that adjustments and additions will be needed when the Authority has sufficient income to meet its administrative expenses from sources other than assessed contributions.

n. Staff Regulations and Rules

The Staff Regulations of the Authority largely follow those of the United Nations, with additions required by the special nature of the Authority and by the provisions of the Convention.[108]

The Finance Committee completed its work on the Staff Regulations during the fifth session in 1999, and submitted them to the Council. The Council then adopted them on 13 July 2000, during the sixth session, and decided that they should be applied provisionally pending approval by the Assembly.[109] They were finally adopted by the Assembly on 10 July 2001, upon the recommendation of the Council.[110]

The Secretary-General, as the chief administrative officer, is to provide and enforce such (more detailed) staff rules consistent with the Staff Regulations, as he considers necessary. The Secretary-General issued Staff Rules in November 2001, which followed the UN Staff Rules. Amended Staff Rules, reflecting changes that have been made to the UN Staff Rules, are to be promulgated in the course of 2007.

---

107 ISBA/6/A/3: *Selected Decisions 6*, 1. The Financial Regulations are also reproduced in *Basic Texts*, see note 4, 87-100, with commentary and documentary sources.

108 For the text of the Staff Regulations, see ISBA/6/C/10, Annex. (The Annex is not reproduced in *Selected Decisions 6*, 83, but may be found on the Authority's website, see note 8).

109 ISBA/6/C/10: *Selected Decisions 6*, 83.

110 ISBA/7/A/5: *Selected Decisions 7*, 16.

o. Election of the Legal and Technical Commission and Organisation of Its Work

At the seventh session in 2001 there were 24 candidates nominated by their states for election to the Legal and Technical Commission. The Council decided, as it had already done at the first election in 1996,[111] and "without prejudice to future elections", to use the power given to it under article 163.2 of the Convention to enlarge the size of the Commission, this time from 15 to 24, and then to elect all 24 candidates.[112] Once again, concerns were voiced both as to the enlargement itself and as to the qualifications required and the imbalance in regional representation among the membership of the Commission.[113]

In 2006, and despite similar concerns, which this time also included the possible additional costs, the Council again used its powers under article 163.2 to increase the size of the Commission. There were 25 candidates, and all were elected, again "without prejudice to future elections." On this occasion, however, the Council requested the Secretary-General,

> "to prepare, for consideration by the Council, at its next session, a report on considerations relating to the future size and composition of the Legal and Technical Commission and the process for future elections."[114]

In effect, the Council (and the wider membership of the Authority) have not yet reached an accommodation on the question of the composition of the Legal and Technical Commission. While it was perhaps understandable that in 1996, exhausted by the struggle over the composition of the Council itself, states took the easy way out provided by article 163.2, this was really an abuse of that provision and the continued use of this provision cannot really be justified.

As with the other organ composed of experts, the Finance Committee, originally the chair of the Legal and Technical Commission did not change annually, but in 2006 the Commission decided on annual rotation, with the Vice-Chairman becoming Chairman the subsequent year. So far the chairmen have been Mr. Lenoble (France) from 1997 to 1999; Ms Inge Zaamwani (Namibia) from 2000 to 2001; Mr. Bjølykke (Nor-

---

111 1999 article, see note 1, 219.

112 ISBA/7/C/6: *Selected Decisions 7*, 35-6.

113 ISBA/7/C/7, paras. 4 -7: *Selected Decisions 7*, 37.

114 ISBA/12/C/11: *Selected Decisions 12*, 39.

way) in 2002; Mr. Hoffmann (South Africa) from 2003 to 2004; Mr. Diène (Senegal) in 2005; and Mr. Lindsay Parson (United Kingdom) in 2006.

The Commission adopted its Rules of Procedure on 26 August 1998 as an "informal revised text."[115] This was submitted to the Council for approval in accordance with article 163.10 of the Convention. Following a detailed examination by the Council, the Secretariat prepared a revised draft.[116] After further debate, the Council approved the Rules of Procedure on 26 August 1999, with the exception of rule 6 (meetings) and rule 53 (participation by members of the Authority and entities carrying out activities in the Area).[117] These rules were controversial because of the insistence of some delegations that the Commission's meetings be open to them. Rule 6 as eventually adopted in 2000 requires the Commission to take into account the desirability of holding open meetings when issues of general interest to members of the Authority, which do not involve the discussion of confidential information, are being discussed. Rule 53 enables any member of the Authority to send a representative to attend the Commission when a matter particularly affecting that member is being discussed. The Council approved the Rules of Procedure of the Commission on 13 July 2000.[118] Early controversy about the possibility of having open meetings of the Commission[119] seems to have died away. The Commission has decided to hold open meetings when it discusses matters of general interest, though not of course when confidential matters are under consideration.

The regular work of the Commission includes consideration of the reports from contractors, the drafting of rules and regulations relating to activities in the Area, as well as recommendations for the guidance of contractors on such matters as environmental data collection.

Although there is no formal requirement for the Chairman of the Commission to report to the Council, a practice has developed, whereby the Chairman prepares an agreed report on the work of the Commission. The reports made each session by the Chairman to the Council are normally reproduced in *Selected Decisions*.

---

115 ISBA/5/C/L.1; 1999 article, see note 1, 220.

116 ISBA/5/C/L.1/Rev.1.

117 ISBA/5/C/L.2.

118 *Basic Texts*, see note 4, 72-86, with commentary and documentary sources.

119 1999 article, see note 1, 219-220; ISBA/10/A/3, paras 31-2: *SelectedDecisions 10*, 19.

p. Relations with the United Nations, ITLOS and Other Bodies

The Authority is an autonomous international organisation, not in any sense part of the United Nations. A Relationship Agreement with the United Nations was concluded and entered into force in 1997.[120]

The Authority has continued to participate in the work of the United Nations General Assembly, with which it has observer status, in accordance with the invitation extended in 1996. The Secretary-General addresses the Assembly each year under the item on Oceans and Law of the Sea. The UN Secretary-General's annual report on Oceans and the Law of the Sea, and the General Assembly's annual resolution, include a section on the Authority. The Secretary-General and the Secretariat maintain personal links with the Division for Ocean Affairs and the Law of the Sea (DOALOS) of the Office of Legal Affairs of the United Nations Secretariat.

The Authority participates, having regard to its "specific" mandate, in the Oceans and Coastal Areas Network (UN-Oceans);[121] is collaborating in the United Nations Atlas of the Oceans;[122] and participates in the Steering Group of the UN General Assembly Task Force to establish a regular process for a global marine assessment.[123]

The Authority uses the conference-servicing facilities of the United Nations to service its annual sessions, in accordance with the Relationship Agreement. The corresponding payments to the United Nations are a significant part of the Authority's budget each year. While the quality of the UN conference-servicing is high, the costs are also high, despite efforts to keep them down.

Both in their negotiating history and in the Convention as adopted, there are close links between the Authority and the International Tribunal for the Law of the Sea in Hamburg. As the Secretary-General said on the occasion of the Tenth Anniversary Ceremony of the Tribunal, "the Seabed Disputes Chamber is an essential part of the regime for the deep seabed mining in the international area."[124]

---

120 *Basic Texts*, see note 4, 143-154, with commentary and documentary sources.

121 ISBA/12/A/2, para. 14: *Selected Decisions 12*, 3.

122 ISBA/12/A/2, paras 15-16 and 57: *Selected Decisions 12*, 3-4.

123 ISBA/12/A/2, paras 17-18: *Selected Decisions 12*, 4.

124 S. Nandan, "The Work of the International Seabed Authority and its Relationship with the Tribunal," statement at the Tenth Anniversary Ceremony

The Preparatory Commission had made some not entirely satisfactory recommendations concerning the establishment of a Relationship Agreement between the Authority and the Tribunal.[125] Following discussions between the Secretariat and the Registry of the Tribunal,[126] an administrative arrangement on cooperation between the Secretariat and the Registry was concluded by exchange of letters in 2003.[127] Subject to the requirements of confidentiality of each institution, cooperation takes place in respect of the following: regular and free exchange of information, publications and reports of mutual interest; exchange of information relating to seminars, training courses and internships organised by each institution; provision of conference services and facilities; and personnel matters. An illustration of this cooperation is the workshop held by the Tribunal at the Authority's headquarters in April 2007, with administrative assistance from the Secretariat and a presentation on the technical and legal aspects of the work of the Authority.

In May 2000, the Secretary-General and the Executive Secretary of the Intergovernmental Oceanographic Commission (IOC/UNESCO) signed a Memorandum of Understanding concerning cooperation in promoting the conduct of marine scientific research in the Area.[128]

The following intergovernmental bodies have observer status with the Authority: the Secretariat of the Convention on Biological Diversity; the Permanent Commission of the South Pacific; and the South Pacific Applied Geoscience Commission. Certain non-governmental organisations are observers at the Assembly, pursuant to rule 82.1(e) of the Assembly's Rules of Procedure: Greenpeace International; the International Association of Drilling Contractors; the International Ocean Institute; the Law of the Sea Institute; and the Center for Ocean Law and Policy, University of Virginia.

---

of the International Tribunal for the Law of the Sea, Hamburg, 29 September 2006.

125 ISBA/10/A/3, para. 78: *Selected Decisions 10*, 29-30; 1999 article, see note 1, 221-222.

126 ISBA/4/A/11, para. 14: *Selected Decisions 4*, 54; ISBA/5/A/1, para. 11: *Selected Decisions 5*, 2.

127 Letter from the Registrar dated 4 July 2003; letter in reply from the Secretary-General of 16 July 2003.

128 ISBA/6/A/9, para. 13: *Selected Decisions 6*, 15; *Basic Texts,* see note 4, 155-156, with commentary and documentary sources.

q. Protocol on Privileges and Immunities

The Protocol on the Privileges and Immunities of the International Seabed Authority[129] was adopted by the Assembly on 26 March 1998, and was open for signature at the headquarters of the Authority from 17 to 28 August 2000 (with a formal signing ceremony on 26-27 August 1998) and remained open until 16 August 2000. Thereafter it remains open for accession. Only 28 members of the Authority had signed by 16 August 2000. It entered into force on 31 May 2003, when 10 states had ratified. As of 31 March 2007 there were only 22 Parties (including, importantly, the host country, Jamaica). The main reason for the slow adherence to the Protocol would appear to be bureaucratic inertia, rather than objection to its terms.

r. Headquarters Agreement and Relations with the Host State

After arduous negotiations, the Headquarters Agreement between the Authority and the government of Jamaica[130] was signed on 26 August 1999, having been approved by the Assembly on 25 August 1999.[131] The Agreement entered into force on 26 August 1999.[132] The Agreement largely follows precedent, but a point of some difficulty in the negotiations was the right of the Authority to decide on the precise location within Jamaica of its headquarters site and the right to move within Jamaica.[133]

The permanent headquarters have now been established in Kingston, and are located within a building adjacent to the Jamaica Confer-

---

129 1999 article, see note 1, 221-223; *Basic Texts*, see note 4, 127-138, with commentary and documentary sources.

130 Agreement between the International Seabed Authority and the Government of Jamaica regarding the Headquarters of the International Seabed Authority; ISBA/5/A/11: *Selected Decisions 5*, 22-38; *Basic Texts*, see note 4, 104-126, with commentary and documentary sources.

131 ISBA/5/A/11: *Selected Decisions 5*, 21.

132 Article 54.1 of the Agreement provides for it to enter into force on its approval by the Assembly and the Government of Jamaica. Signature of the Agreement signified the Government of Jamaica's approval (cf. the position under the Supplementary Agreement: ISBA/11/A/4/Corr.1; since the Assembly had already approved the Agreement it entered into upon signature and there was no period of provisional application as foreshadowed in article 54.2.

133 1999 article, see note 1, 225. See article 2 of the Agreement.

ence Centre by the harbour in downtown Kingston. Difficult and protracted negotiation on a Supplementary Agreement continued. Finally, on 2 June 2004, the Assembly was able to approve, upon the recommendation of the Council (which itself acted upon the recommendation of the Finance Committee),[134] a Supplementary Agreement between the Authority and the government of Jamaica regarding the headquarters of the Authority and the use of the Jamaica Conference Centre complex.[135] The Supplementary Agreement had been provisionally applied from the date of its signature (17 December 2003) and entered into force on the date of its approval by the Assembly. Under the Agreement the government grants the Authority free of rent and all other charges (except as provided for in the Agreement) premises in the block 11 building at 14-20 Port Royal Street, Kingston, together with guaranteed use of the Jamaica Conference Centre at rates no less favourable than those applied to the government of Jamaica and other local organisations.

At the eleventh session, tribute was paid to Dr. Kenneth Rattray, who had passed away on 3 January 2005. Dr. Rattray, a former Solicitor-General of Jamaica, had been one of the leading participants at the Third United Nations Conference on the Law of the Sea (and General Rapporteur of the Conference), and in the Secretary-General's Informal Consultations which led to the adoption of the Implementation Agreement. At the twelfth session, the Honourable G. Anthony Hylton, Minister of Foreign Affairs and Foreign Trade of Jamaica, announced in the Assembly that the main room of the Jamaica Conference Centre, in which the Assembly meets, would henceforth be known as the "The Dr. Kenneth Rattray Conference Room."[136]

s. Five-Year Review (2000, 2005)

Article 154 of the Convention (Periodic Review), unlike article 155 (The Review Conference),[137] was not directly affected by the Imple-

134 ISBA/10/C/5: *Selected Decisions 10*, 68.

135 ISBA/10/A/2-ISBA/10/C/2: *Selected Decisions 10*, 1-10; ISBA/10/A/11: *Selected Decisions 10*, 55

136 ISBA/12/A/13, para. 16: *Selected Decisions 12*, 27.

137 See *Virginia Commentary*, see note 5, 318. Article 155, as it originally appeared in the Convention, would have provided for a Review Conference 15 years after the commencement of commercial production. The Conference would have been empowered to adopt amendments to the system of exploration and exploitation (the so-called parallel system), which could

mentation Agreement, though it is, of course, subject to the overriding principle of cost-effectiveness set forth in Section 1 para. 2, of the Annex to the Agreement. Article 154 provides that the Assembly shall undertake every five years,

> "a general and systematic review of the manner in which the international regime of the Area has operated in practice,"

and that in the light of the review the Assembly may take, or recommend that other organs take,

> "measures in accordance with the provisions and procedures of [Part XI and the Annexes related thereto] which will lead to the improvement of the operation of the regime."

No additional powers are conferred upon any organ of the Authority upon the occasion of the review; the emphasis is upon conformity to the "provisions and procedures" of Part XI and the Annexes relating thereto.

The first five-year review happened at the sixth session in July 2000, on the basis of a report prepared by the Secretary-General[138] and in conjunction with the consideration by the Assembly of the Secretary-General's annual report. In the report, the Secretary-General proposed that in the light of the very short experience that the Authority had had in implementing the regime, it would be premature for the Assembly to take or recommend any measures. The Assembly agreed.[139] The second five-year review in 2005, for which the Secretary-General's comprehensive 2004 report provided useful background material,[140] likewise passed uneventfully.

---

come into force for states without their consent. As such it was one of the principal obstacles for industrialised countries, and was disapplied by the Implementation Agreement, Annex, Section 4. Section 4 provides instead that the Assembly, on the recommendation of the Council, may undertake a review at any time of the matters referred to in article 155.1. Any resulting amendments are subject to the general provisions of the Convention concerning amendments (arts 314, 315 and 316).

138 ISBA/6/A/8, Annex: *Selected Decisions 6*, 12.

139 ISBA/6/A/19, Annex: *Selected Decisions 6*, 68.

140 ISBA/10/A/3, para.5: *Selected Decisions 10*, 12.

t. Official Seal, Flag and Emblem

On 14 August 2002, the Assembly, on the basis of a report by the Secretary-General,[141] adopted the official seal, flag and emblem of the Authority.[142] The emblem is similar to that used in connection with the Third United Nations Conference on the Law of the Sea and the Office of the Special Representative of the UN Secretary-General for the Law of the Sea, as well as that adopted by the International Tribunal for the Law of the Sea.

> "Apart from representing justice governing the oceans, the emblem also reflects the strong links between the United Nations Division of Ocean Affairs and the Law of the Sea, the International Tribunal for the Law of the Sea and the Authority."[143]

In the decision adopting the official seal, emblem and flag, the Assembly recommended that the members of the Authority take such legislative or other appropriate measures as may be necessary for the protection of the emblem, official seal and name of the International Seabed Authority. This follows the practice in the United Nations and other international organisations. As in those cases, states may find it difficult to implement this recommendation by adopting legislative or other appropriate measures. But hopefully serious problems will not arise in practice.

2. Substantive Work

The substantive functions of the Authority are set out in the Convention and in the Agreement. Pending the approval of the first plan of work for exploitation the Authority is to concentrate on the eleven areas of work listed in para. 5 of Section 1 of the Annex to the Agreement. These eleven areas mostly concern plans of work for exploration, the protection and preservation of the marine environment, and the promotion and encouragement of marine scientific research with respect to activities in the Area.

In the four years covered by the 1999 article, the main achievements were the approval of the plans of work for exploration for the seven

---

141 ISBA/8/A/4: *Basic Texts*, see note 4, 101-103, with commentary and documentary sources.

142 ISBA/8/A/12: *Selected Decisions 8*, 30-31.

143 *Basic Texts*, see note 4, 103.

registered pioneer investors,[144] and work on the draft Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area.[145]

During the period 1999 to 2004, the Council and Assembly adopted the Nodules Regulations. The Secretariat, Legal and Technical Commission, and Council began work on draft Regulations on Prospecting and Exploration for Polymetallic Sulphides and Cobalt-rich Ferromanganese Crusts in the Area. Contracts were concluded with the seven registered pioneer investors, as well as with a German governmental body, and work proceeded in various ways to enhance knowledge of the Area and its resources (through studies, data-gathering, workshops etc.).

A detailed work programme of the Authority for the three-year period 2005-2007 was approved by the Assembly at the tenth session, which focuses on the implementation of para. 5(c), (d), (f), (g), (h), (i) and (j) of Section 1 of the Annex to the Agreement, in particular the following main areas:

> (a) The supervisory functions of the Authority with respect to existing contracts for exploration for polymetallic nodules;
>
> (b) The development of an appropriate regulatory framework for the future development of the mineral resources of the Area, particularly hydrothermal polymetallic sulphides and cobalt–rich crusts, including standards for the protection and preservation of the marine environment during their development;
>
> (c) Ongoing assessment of available data relating to prospecting and exploration for polymetallic nodules in the Clarion-Clipperton zone;
>
> (d) The promotion and encouragement of marine scientific research in the Area through, inter alia, an ongoing programme of technical workshops, the dissemination of the results of such research and collaboration with Kaplan, the Chemosynthetic Ecosystem Group and the Seamounts Group;
>
> (e) Information-gathering and the establishment and development of unique databases of scientific and technical information with a view to obtaining a better understanding of the deep ocean environment.[146]

---

144 1999 article, see note 1, 226-7.

145 1999 article, see note 1, 228-234.

146 ISBA/12/A/2, para. 78: *Selected Decisions 12*, 18.

A further work programme for the three-year period 2008 to 2010 will be proposed for approval at the thirteenth session of the Authority in 2007.[147]

a. Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area

In July 2000, at the resumed sixth session, the Council adopted by consensus[148] and applied provisionally, pursuant to article 162.2 of the Convention, the Regulations on the Prospecting and Exploration for Polymetallic Nodules in the Area (Nodule Regulations).[149] Thereafter, on 13 July 2000, the Assembly, acting upon the recommendation of the Council, approved the Regulations without amendment. The Regulations have been analysed in detail elsewhere.[150]

As the Secretary-General said in his 2006 report,

> "Given the dearth of knowledge of the marine environment of the Area and the potential impact of mineral exploration and exploitation on its biodiversity, the regulations have a strong environmental focus. In addition, they are flexible in that they allow the Legal and Technical Commission to issue guidance to contractors with the Authority relating to such matters as environmental impact assessments and the standardization of relevant environmental data and information."[151]

The Legal and Technical Commission has issued "recommendations for guidance" for contractors on the assessment of possible environmental impacts.[152]

---

147 ISBA/12/A/2, para. 79: *Selected Decisions 12*, 18.

148 As required by article 161.8(d) of the Convention.

149 ISBA/6/A/18, Annex: *Selected Decisions 6*, 31; *Basic Texts*, see note 4, 226-270. The Nodules Regulations used sometimes to be referred to as the Mining Code, though they are only a part of the Code because they deal only with one of the mineral resources of the deep seabed and they do not deal with exploitation.

150 Lodge, see note 7, 2002 and 2005; Nandan, see note 7, 86-89.

151 ISBA/12/A/2 and Corr. 1, para. 37: *Selected Decisions 12*, 8.

152 ISBA/7/LTC/1/Rev.1. Similar recommendations are foreshadowed in the draft regulations on prospecting and exploration for polymetallic sulphides and for cobalt-rich ferromanganese crusts in the Area.

b. Draft Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area

When Part XI of the Convention and the Agreement were drafted, the negotiators had chiefly in view the eventual commercial exploitation of manganese nodules (polymetallic nodules). Lack of knowledge of the deep seabed, and perhaps the unrealistic expectations of untold wealth to be derived from nodules, meant that little thought was given to the possible exploitation of any other mineral resources of the Area (though article 162.2 (o) (ii) of the Convention provides that regulations for any other resource "shall be adopted within three years" of a request by a member of the Authority). While most provisions of Part XI and the Agreement were drafted in seemingly general terms, much of Annex III of the Convention appears to have been drafted only with polymetallic nodules in mind, and its provisions are not necessarily appropriate for other resources. Issues such as the size of the contract area, anti-monopoly provisions, and the participation of the Enterprise go to the heart of the system as set out in the Convention (and modified by the Agreement), and the drafting of regulations for resources other than polymetallic nodules has the potential for reopening these matters.

The Legal and Technical Commission thus faced very real practical and legal difficulties when they were called upon to address polymetallic sulphides and cobalt–rich ferromanganese crusts, difficulties which have still not been resolved. The relationship between the regulations and the terms of the Convention and Agreement would require careful consideration. Knowledge of these resources in the Area is far from complete. Moreover, it seems very likely that these resources will first be exploited in areas within national jurisdiction. It would therefore make sense to await greater knowledge (not least as regards the size and distribution of the deposits), and experience of exploitation within national jurisdiction, before seeking definitively to resolve these difficult issues within the Authority. But the terms of article 162.2 (o) (ii) of the Convention, together with the strong pressure at the time, initially appeared not to leave open that option. However, the pressure now seems to have lessened, and there is growing appreciation on the part of the members of the Authority that time is available before the regulations have to be in place and of the need for more information before coming up with a final draft of the regulations.

It was the then representative of the Russian Federation who, in August 1998, requested that the Authority adopt regulations on cobalt-

rich crusts and polymetallic sulphides.[153] Matters moved slowly. By general agreement, the three-year deadline in article 162.2 (o) (ii) passed. The Secretariat, Legal and Technical Commission and Council began work on draft regulations covering both cobalt-rich crusts and polymetallic sulphides, and it was not until 2006 that the decision was taken to divide the draft into two.

A workshop on these resources was held in June 2000, and in 2001 a document was placed before the Council summarising the workshop and indicating the considerations to be borne in mind in elaborating regulations.[154] After extensive discussions, the Council decided to ask the Legal and Technical Commission to prepare draft regulations. The Legal and Technical Commission, with much assistance from the Secretariat, did a great deal of work on a first draft in 2003 and 2004.[155] During the eleventh session in 2005, the Council completed a first reading of the draft Regulations on Prospecting and Exploration for Polymetallic Sulphides and Cobalt-rich Crusts, prepared by the Secretariat and the Legal and Technical Commission.[156]

The Council then asked the Secretariat for clarification of certain points, and the Secretariat submitted two technical information papers to the Council in 2006.[157] The four matters on which further information was sought from the Secretariat were the relationship between prospecting and exploration;[158] the system for participation by the Authority (the Enterprise); the environmental provisions; and the allocation of exploration areas. The Secretariat's response also considered the question whether the Assembly may impose new and additional obligations on prospectors, going beyond those set forth in the Convention.

---

153 1999 article, see note 1, 235.

154 ISBA/8/LTC/2.

155 The interchange between the Commission and the Council is described in the Secretary-General's 2004 report: ISBA/10/A/3, paras 111-113: *Selected Decisions 10*, 37-8.

156 ISBA/10/C/WP.1. After the first reading, the Secretariat prepared a slightly revised version (ISBA/10/C/WP.1/Rev.1), which formed the basis for a second reading that commenced at the 12th Session. Nandan, see note 7, 89-91.

157 ISBA/12/C/2; ISBA/12/C/3.

158 While it is clear, as a matter of legal definition, from the text of the Convention that "prospecting" does not fall within the term "activities in the Area", which is defined clearly and deliberately in the Convention to exclude prospecting, the line between the two is not necessarily clear-cut in practice.

Also at the 2006 session the Council had before it a summary of the results of the workshop that took place just before the session,[159] and a paper by the Russian delegation.[160]

At the twelfth session, a particular point of controversy was the size of the contract area to be awarded in respect of cobalt-rich ferromanganese crusts. At the workshop held just before the session, there was a general move to agree that the area should be small, but China, in particular, wanted to stick with the Legal and Technical Commission's higher figure. It was because of this issue, among others, that the Council decided to split the draft regulations into two, and deal separately with polymetallic sulphides and cobalt-rich ferromanganese crusts, giving priority to the sulphides regulations.[161]

In light of the first reading and the discussions in the 2006 workshop and in the Council in 2006, and after consulting the members of the outgoing Legal and Technical Commission, the Secretariat will submit a revised draft of the sulphides regulations for consideration by the Council at the 2007 session. Among the key issues to be dealt with are the formula for determining the size of the exploration area; the possibility of a progressive fee per block system; the relinquishment schedule; and the provisions concerning the participation of the Authority (joint venture arrangements).

c. Draft Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts in the Area

As noted above, the Council in 2006 decided to split off the regulations on ferromanganese crusts, so as to concentrate in the first place on those concerning polymetallic sulphides. The Legal and Technical Commission intends to review the draft regulations for cobalt-rich ferromanganese crusts and submit them to the Council for consideration in 2008.

d. Plans of Work and Contracts

The Authority has issued eight exploration contracts. Following the adoption in 2000 of the Nodule Regulations, in 2001 and 2002 the Authority entered into contracts with entities sponsored by China, France,

---

159 ISBA/12/C/7.

160 ISBA/12/C/6.

161 ISBA/12/C/12, para.15: *Selected Decisions 12*, 43.

Japan, and the Russian Federation, with the governments of India and the Republic of Korea, and with a consortium based in Poland and sponsored by a number of states.[162]

In 2005, the Council, acting on the recommendation of the Legal and Technical Commission, approved an application for a plan of work for exploration of polymetallic nodules submitted by Germany, represented by the Federal Institute for Geosciences and Natural Resources (BGR).[163] The Secretary-General was requested to issue the plan of work in the form of a contract between the Authority and Germany, and the contract was signed on 19 July 2006.[164] This is the first plan of work/contract to be issued to an applicant other than a registered pioneer investor. In his annual report for 2006, the Secretary-General noted that this was the first new application for a plan of work since the Convention entered into force and "[a]s such, it represented confidence in the International Seabed Authority and the system established to administer the resources of the Area."[165]

The reporting requirement is important. Each contractor's annual report (which remains confidential) is examined by the Commission, which reports (in very general terms) to the Council.[166] A more detailed report, including any clarifications or remedial action requested (for example, additional data), is send to each contractor in the form of a letter from the Secretary-General.

e. Promotion of Marine Scientific Research

Promoting and encouraging marine scientific research in the Area, and collecting and disseminating information about the deep seabed, have

---

162 China (China Ocean Mineral Resources Research and Development Association–COMRA); France (Institut français de recherche pour l'exploitation de la mer – IFREMER); India (Government of India); Japan (Deep Ocean Resources Development Company); Republic of Korea (Government of the Republic of Korea); Russian Federation (Yuzhmorgeologiya); Interoceanmetal (a consortium formed by Bulgaria, Cuba, Czechoslovakia – now the Czech Republic and Slovakia, Poland, and the Union of Soviet Socialist Republics – now the Russian Federation).

163 ISBA/11/C/10.

164 Press Release 17/07/2006; also *ISA Handbook 2006*, 30.

165 ISBA/12/A/2, para. 8; *Selected Decisions 12*, 2.

166 For a general description of the reporting requirements, see ISBA/1/A/2, paras 42-44: *Selected Decisions 12*, 9-10. See also ISBA/12/C/8, paras 4-7: *Selected Decisions 12*, 23-33; ISBA/12/LTC/ 2.

become increasingly important areas of the Authority's work. Details are to be found in the Authority's documentation[167] and on its website,[168] and will not be repeated here. The various scientific and technical workshops which have been held by the Authority are described below in the Annex.

As explained in Section III 1 l above, at the twelfth session, in 2006, on the basis of a proposal by the Secretary-General, an Endowment Fund for Marine Scientific Research in the Area was established by the Assembly. The object of the Fund is to promote and encourage scientific research in the Area, and in particular to support the participation of personnel from developing countries in the activities concerned. It will become operational when the Assembly approves rules and procedures for its administration and utilisation.

The Authority itself is playing an increasingly important role in relation to the promotion of scientific research concerning the Area. It has in particular developed a strategy of engaging in cooperative projects aimed at broadening understanding of the deep seabed. These include the Kaplan project and other activities described in the Secretary-General's 2006 report.[169] The geological model for the Clarion-Clipperton fracture zone is also described at length in that report.[170] The Secretariat is developing a Central Data Repository across a whole range of areas, and is to contribute to the United Nations Atlas of the Oceans.[171]

f. Scientific and Technical Workshops

Beginning in 1998, a series of scientific and technical workshops has been organised by the Secretariat, in Kingston and elsewhere. The themes are chosen to complement the substantive work of the Authority. The workshops have been important in assisting the Legal and Technical Commission, and the Council, in their work, and have also led to an impressive series of publications. A list of workshops and publications is to be found at the end of this article.

---

167 See, in particular, the relevant sections of the Secretary-General's annual reports to the Assembly and Council, most recently ISBA/12/A/2, paras 55-77: *Selected Decisions 12*, 12-18.

168 See note 8.

169 ISBA/12/A/2, paras 69-77: *Selected Decisions 12*, 16-18.

170 ISBA/12/A/2, paras 58-68: *Selected Decisions 12*, 13-16.

171 ISBA/12/A/2, paras 55-56: *Selected Decisions 12*, 12.

There has also developed a practice of arranging technical briefings for the representatives of members of the Authority present in Kingston on matters relevant to the work of the Council and the Assembly. For example, there was a one-day seminar by invited experts on the status and prospects for polymetallic nodules and cobalt-rich ferromanganese crusts during the eighth session in 2002. Such briefings enable delegates to gain greater understanding of highly technical matters that are so important for the work of the Authority, and are much appreciated.

IV. Conclusions

The International Seabed Authority has many positive achievements to its credit, not least in relation to the promotion of knowledge and scientific research in the Area.[172] Yet the Authority's current role remains quite modest, which is inevitable in the absence of significant commercial interest in the development of deep seabed mineral resources. It is believed that the three objectives suggested in the 1999 article, reproduced above,[173] remain valid.

No one knows when exploitation of the mineral resources of the deep seabed will take place on a commercial basis. This uncertainty may make it harder to justify the financial contributions required from the parties to the Convention to maintain an autonomous international organisation, the Authority, on the same basis as at present. It must, however, be remembered that support for the Authority is a legal obligation under the Convention and indeed an important part of the overall package embodied in the Convention.

Thought may need to be given to imaginative ways of further rationalising the Authority's position so as to ensure that the necessary operations under the Convention are fully cost-effective. Cost-effectiveness is, after all, one of the principles enshrined in the Implementation Agreement.[174] At the very least, consideration needs to be

---

172 Nandan, see note 7. Nandan concludes (at page 92) by saying that "the Authority has begun to play a critical catalytic role in promoting international cooperation aimed at the development of the resources of the deep seabed for the benefit of mankind as a whole."

173 See note 9.

174 Implementation Agreement, Annex, Section 1, para. 2, reads: "In order to minimize costs to States Parties, all organs and subsidiary bodies to be es-

given to further steps aimed at rationalising and reducing the length and frequency of meetings. The move to biennial meetings of the Assembly, suggested in 2002, should again be considered.

Much of the ideological passion that characterised the debates in the First Committee of the Third United Nations Conference on the Law of the Sea, and to some degree also in the Preparatory Commission, have now subsided. The difficulties encountered in the initial establishment of the Authority, especially as regards the first elections to the Council and (to a somewhat lesser degree) the Finance Committee, also lie mostly in the past, though the composition of the Legal and Technical Commission remains problematic. In the course of its first 12 years, the Authority has successfully established itself as a lean and cost-effective organisation. Its budget is modest. The Authority has proved to be a responsible and reliable institution. Neither the Authority nor the modified regime for the mineral resources of the deep seabed should be seen as an obstacle to universal participation in the United Nations Convention on the Law of the Sea. For this, the Secretary-General and his staff, and delegates from all regional groups, deserve great credit.

---

tablished under the Convention and this Agreement shall be cost-effective. This principle shall also apply to the frequency, duration and scheduling of meetings."

Annex:

Fifth to Twelfth Sessions of the Authority: Overview

Fifth Session, 1999 (9-27 August 1999)

- Council adopts and provisionally applies Financial Regulations
- Assembly approves Headquarters Agreement with Jamaica
- Assembly elects two members of Council (to replace Canada and the United States)

Sixth Session, 2000

First part (20-31 March 2000)

- Assembly approves Financial Regulations
- Assembly re-elects Satya N. Nandan as Secretary-General

Second part (resumed sixth session) (3-14 July 2000)

- Council approves Rules of Procedure of the LTC
- Council provisionally applies Staff Regulations and recommends them to Assembly
- Council adopts Nodules Regulations
- Assembly approves Nodules Regulations
- Assembly adopts budget for 2001-2002
- Assembly elects half the Council

Seventh Session, 2001 (2-13 July 2001)

- Council elects LTC
- Assembly elects Finance Committee
- Assembly approves Staff Regulations
- LTC issues "Recommendations for Guidelines"

Eighth Session, 2002 (5-16 August 2002)

- Assembly adopts budget for 2003-2004
- Assembly elects half the Council
- Assembly requests Secretary-General to establish Voluntary Trust Fund

Ninth Session, 2003 (28 July-8 August 2003)

- Assembly adopts decision concerning Voluntary Trust Fund

Tenth Session, 2004 (24 May-4 June 2004)

- Tenth anniversary commemorative special session
- Assembly adopts budget for 2005-2006
- Assembly elects half the Council
- Assembly re-elects Satya N Nandan as Secretary-General
- Assembly approves Supplementary Headquarters Agreement

Eleventh Session, 2005 (15-26 August 2005)

- Council approves Germany's application for a plan of work
- Council's first reading of draft Regulations for polymetallic sulphides and cobalt-rich ferromanganese crusts

Twelfth Session, 2006 (7-18 August 2006)

- Assembly adopts budget for 2007-2008
- Assembly establishes Endowment Fund for Marine Scientific Research in the Area
- Assembly elects half the Council
- Assembly elects Finance Committee
- Council elects Legal and Technical Commission
- Council decides to separate draft Regulations on polymetallic sulphides from those on cobalt-rich ferromanganese crusts, requesting the Secretariat to revise the former and returning the latter to the Legal and Technical Commission

Workshops organised by the International Seabed Authority

Deep Seabed Polymetallic Nodule Exploration: Development of Environmental Guidelines (China, 1998)[175]

Proposed Technologies for Deep Seabed Mining of Polymetallic Nodules (Kingston, Jamaica, 3-6 August 1999)[176]

Minerals other than Polymetallic Nodules of the International Seabed Area (Kingston, Jamaica, 26-30 June 2000)[177]

Standardization of Environmental Data and Information: Development of Guidelines (Kingston, Jamaica, 25-29 June 2001)[178]

Prospects for International Collaboration in Marine Environmental Research to Enhance Understanding of the Deep-Sea Environment (Kingston, Jamaica, 29 July-2 August 2002)[179]

Establishment of a Geological Model of Polymetallic Nodule Resources in the Clarion-Clipperton Zone (CCZ) of the Equatorial North Pacific Ocean (Nadi, Fiji, 13-20 May 2003)

Establishment of Environmental Baselines at Deep Seafloor Cobalt-Rich Crusts and Deep Seabed Polymetallic Sulphide Mine Sites in the Area for the Purpose of Evaluating the Likely Effects on the Marine Environment (Kingston, Jamaica, 16-20 September 2004)

---

175 *Deep Seabed Polymetallic Nodules Exploration: Development of Environmental Guidelines*: Proceedings of the International Seabed Authority's Workshop held in Sanya, Hainan Island, People's Republic of China, 1-5 June 1998 (ISA, Kingston, 1999).

176 *Proposed Technologies for Mining Deep Seabed Polymetallic Nodules*: Proceedings of the International Seabed Authority's Workshop held in Kingston, Jamaica, 3-6 August, 1999 (ISA, Kingston, 2002).

177 *Minerals Other than Polymetallic Nodules of the International Seabed Area*: Proceedings of the International Seabed Authority's Workshop held in Kingston, Jamaica, 26-30 June 2000 (ISA, Kingston, 2004). A summary of the workshop was before the Council in 2001, included in ISBA/7/C/2.

178 *Standardization of Environmental Data and Information – Development of Guidelines:* Proceedings of the International Seabed Authority's Workshop held in Kingston, Jamaica, 25-29 June 2001 (ISA, Kingston, 2002).

179 *Prospects for International Collaboration in Marine Environmental Research to Enhance Understanding in the Deep-Sea Environment:* Proceedings of the International Seabed Authority's Workshop, 29 July-2 August 2002, Kingston, Jamaica (ISA, Kingston, 2006).

Cobalt-Rich Crusts and the Diversity and Distribution Patterns of Seamount Fauna (Kingston, Jamaica, 27-31 March, 2006)

Mining of Cobalt-Rich Crusts and Polymetallic Sulphides – Technological and Economic Considerations (Kingston, Jamaica, 31 July-4 August 2006)[180]

[180] The results of the 2006 workshop were summarized in ISBA/12/C/7.

The Second Lebanon War: *Jus ad bellum*, *jus in bello* and the Issue of Proportionality*

*Andreas Zimmermann***

I. Introduction
II. The Second Lebanon War, the Prohibition of the Use of Force and the Exercise of the Right to Self-Defense
  1. Factual Background
  2. Possible Justifications for the Use of Military Force by Israel
  3. The Intensity of the Military Actions by Hezbollah and the Notion of "Armed Attack" under Article 51 of the Charter of the United Nations
  4. Attributability of the Acts of Hezbollah
    a. Attribution of the Acts of Hezbollah as *de jure* Organs of Lebanon (Article 4 ILC Articles on State Responsibility)
    b. Attribution of the Acts of Hezbollah as Persons or Entities Exercising Elements of Governmental Authority of Lebanon (Article 5 ILC Articles on State Responsibility)
    c. Attribution of the Acts of Hezbollah as *de facto* Organs of Lebanon (Article 4 ILC Articles on State Responsibility)
    d. Attribution of the Acts of Hezbollah as Acting Under the Direction and Control of Lebanon (Article 8 ILC Articles on State Responsibility)

---

* Revised English version of a lecture given at the joint annual meeting of legal advisors of the German Red Cross and the German Armed Forces, 9 March 2007, Bad Mergentheim, Germany.

** Thanks go in particular to Simon Hentrei, Dörte Herrmann, Eva Linde, as well as to the other student assistants at the Walther-Schücking-Institute for their help in collecting the relevant literature and material.

A. von Bogdandy and R. Wolfrum, (eds.),
Max Planck Yearbook of United Nations Law, Volume 11, 2007, p. 99-141.
© 2007 Koninklijke Brill N.V. Printed in The Netherlands.

5. Exercise of the Right to Self-Defense Against Attacks Emanating from Non-State Actors
6. Self-Defence under Article 51 of the UN Charter and the Principle of Proportionality

III. The Second Lebanon War and International Humanitarian Law
1. Character of the Armed Conflict and Applicable Norms of International Humanitarian Law
2. The Second Lebanon War and Possible Violations of the Principle of Proportionality
a. Customary Law Nature and Content of the Principle of Proportionality as Part of International Humanitarian Law
b. Notion of Military Targets
c. Weighing Military Advantages and Civilian Damages

IV. Concluding Remarks

I. Introduction

The 34 days of intense fighting which took place between Hezbollah on the one hand and Israel on the other during the summer of 2006, now commonly referred to as the "Second Lebanon War",[1] raised not only political, but also significant, and to a large extent yet unresolved, fundamental legal issues of both, *jus ad bellum* and *jus in bello*.[2] More specifically, given the circumstances and realities of the armed conflict as it unfolded, one has to address in particular[3] issues of proportionality

---

1 The Israeli cabinet had, by decision of 25 March 2007, formally decided to call said conflict with Hezbollah the "Second Lebanon War", cf. Cabinet Communiqué of 25 March 2007, available at: <http://www.mfa.gov.il/MFA/Government/Communiques/2007/Cabinet%20Communique%2025-Mar-2007>. In Lebanon, the conflict is also referred to as the "July war".

2 Cf. C. Tomuschat, "Der Sommerkrieg des Jahres 2006. Eine Skizze", *Friedenswarte* 81 (2006), 179 et seq.; as well as S. Weber, "Die israelischen Militäraktionen im Libanon und in den besetzten palästinensischen Gebieten 2006 und ihre Vereinbarkeit mit dem Völkerrecht", *AVR* 44 (2006), 460 et seq. and E. Cannizzaro, "Contextualizing Proportionality: *jus ad bellum* and *jus in bello* in the Lebanese War", *International Review of the Red Cross* 88 (2006), 779 et seq.; but cf. also for a critical view from an international relations standpoint H. Münkler, "Asymmetrie und Kriegsvölkerrecht. Die Lehren des Sommerkrieges 2006", *Friedenswarte* 81 (2006), 59 et seq.; as well as D. Kramer, "Rechtliche Regelung asymmetrischer Konflikte? Völkerrecht und empirische Realität", ibid. , 96 et seq., but cf. for a critical analysis of their views C. Tomuschat, "Der Sommerkrieg des Jahres 2006. Ein Schlusswort", *Friedenswarte* 82 (2007), 107 et seq. Besides, the conflict also raised thorny issues *post bellum* since S/RES/1701 (2006) of 11 August 2006 adopted by the Security Council to bring about an end of the fighting, raises serious problems as to its nature and binding effect, which, however, will not be considered here.

3 The conflict also raises other issues of international humanitarian law, including the use of certain weapons as such, and more specifically the use of cluster munitions, cf. generally in that regard V. Wiebe, "Footprints of Death: Cluster Bombs as Indiscriminate Weapons under International Humanitarian Law", *Mich. J. Int. L.* 22 (2000), 85 et seq., as well as specifically as to the use of cluster ammunition in Kosovo T.M. MacDonnell, "Cluster Bombs over Kosovo – a Violation of International Law?", *Arizona Law Review* 44 (2002), 31 et seq. As to current attempts to outlaw cluster ammunition, the use of which is currently not regulated by specific rules of international humanitarian law, but solely by general rules, and, in particular the prohibition to use weapons of an indiscriminate nature cf. the homepage on the recent Oslo Conference on Cluster Munitions, February

with regard to both *jus ad bellum*, i.e. questions of the prohibition of the use of force under international law and possible exceptions thereto, and questions of the scope and possible limits of the right to self-defense under Article 51 of the Charter of the United Nations,[4] as well as questions of proportionality within the context of *jus in bello*, namely in relation to the causation of civilian damages when attacking military objects.[5]

Before doing so, it has to be noted, however, that many factual questions concerning the "Second Lebanon War" remain open and will most probably do so for a significant period of time, if not forever. This is the case notwithstanding the report of the *Commission of Inquiry on Lebanon* established by the Human Rights Council of the United Nations[6] on the occasion of its second special session on 11 August 2006.

---

22 - 23 2007, available at: <http://www.regjeringen.no/en/dep/ud/selected-topics/Humanitarian-efforts/The-Norwegian-Governments-initiative-for/conference.html?id=449312>. As to the follow-up conference held in Lima from May 23-25, 2007 cf. <http://hrw.org/english/docs/2007/05/25/global16006.htm>. As of today, the legality of the use of cluster munitions would depend on the way they are used, i.e. whether they are exclusively used against larger concentration of members of the enemy armed forces (in which case their use is not prohibited by international humanitarian law) or rather in circumstances where their use can (or even necessarily would) lead to prohibited excessive incidental damage to civilians or civilian objects.

4 Cf. A. Cassese, "Article 51", in: J.P. Cot/ A. Pellet/ M. Forteau (eds), *La Charte des Nations Unies. Commentaire article par article,* 3rd edition 2005, 1329 et seq.; N. Ocho-Ruiz/ E. Salamanca-Aguado, "Exploring the Limits of International Law relating to the Use of Force in Self-defence", *EJIL* 16 (2005), 499 et seq.

5 Cf. J. Gardam, *Necessity, Proportionality and the Use of Force by States,* 2004, 85 et seq.; Y. Dinstein, "Collateral Damage and the Principle of Proportionality", in: D. Wippman/ M. Evangelista (eds), *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts*, 2005, 211 et seq.

6 Cf. generally as to the overall mandate and structure of the new Human Rights Council P. Alston, "Reconceiving the UN Human Rights Regime – Challenges confronting the new UN Human Rights Council", *Melbourne Journal of International Law* 7 (2006), 185 et seq.; M. Bossuyt, "The new Human Rights Council – a first Appraisal", *NQHR* 24 (2006), 551 et seq.; W.S. Heinz, "Von der Menschenrechtskommission zum Menschenrechtsrat", *Friedenswarte* 81 (2006), 129 et seq.; G. Theissen, "Mehr als nur ein Namenswechsel – der neue Menschenrechtsrat der Vereinten Nationen", *Vereinte Nationen* 54 (2006), 138 et seq.

Still the report, delivered on 23 November 2006,[7] had in any case to deal only with alleged violations of Israel against international law.[8]

It follows therefore that any evaluation of legal issues arising under applicable norms of international humanitarian law is somewhat hampered. This is particularly true, *inter alia*, with regard to the attack on military objects within or in the vicinity of civilian settlements. It is against this background that the following considerations will almost exclusively focus on legal issues *stricto senso*.

Before considering issues of international humanitarian law, one has to first consider whether the use of force by Israel as such was justified under international law and, in particular under the Charter of the United Nations.

---

7 Cf. Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1, Doc. A/HRC/3/2 of 23 November 2006, available at: <http://www.ohchr.org/english/bodies/hrcouncil/docs/CoILebanon.pdf>.

8 Human Rights Council resolution S-2/1 had already determined in its operative para. 1, notwithstanding the outcome of the report of the Commission of Inquiry that was about to be set up by this very resolution, that Israel had committed breaches of international humanitarian law in Lebanon. It is also worth noting that the very same resolution in its operative para. 7 had deliberately decided to limit the focus of the Commission both *ratione personae* and *ratione loci* to,
"(a) (…) investigate the systematic targeting and killings of civilians *by Israel in Lebanon*, (…)
(b) [t]o examine the types of weapons used *by Israel* and their conformity with international law; [and finally]
(c) [t]o assess the extent and deadly impact of *Israeli* attacks on human life, property, critical infrastructure and the environment", (emphasis added),
thus per se excluding any investigation of possible violations of international humanitarian law by Hezbollah. The Human Rights Council was criticized for this approach by the Commission of Inquiry which stated that said mandate, "does not allow for a full examination of *all* of the aspects of the conflict, nor does it permit consideration of the conduct of *all* parties" (emphasis in the original), cf. Report of the Commission of Inquiry, ibid., para. 10. Cf. also paras 14-15 of the Report of the Commission of Inquiry.

II. The Second Lebanon War, the Prohibition of the Use of Force and the Exercise of the Right to Self-Defense

1. Factual Background

The conflict began after Hezbollah had fired a series of Katyusha rockets and mortars at Israeli border villages.[9] At the same time, another armed Hezbollah unit crossed the Lebanese-Israeli border, kidnapping two Israeli soldiers and killing three other members of the Israeli armed forces.[10] Israeli troops attempted to rescue the abducted soldiers, but were unsuccessful, whereby five more members of the Israeli army were killed.[11] This raises the question which possible justifications might be relevant when considering the legality of the acts of Israel for the purposes of *jus ad bellum*.

2. Possible Justifications for the Use of Military Force by Israel

There is no doubt that the use of military force by Israel against Lebanon was not authorized by the Security Council. Besides, armed reprisals, or to use the more recent terminology used by the ILC in its Arti-

---

9 Israel-Hezbollah Conflict, Summary of Events, 12 July 2006, available at: <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+from+Lebanon-+Hezbollah/Israel-Hezbollah+Conflict-+Summary+of+Events+July-Aug+2006.htm>. Cf. also Israeli Ministry of Foreign Affairs, Israel's War with Hezbollah – Preserving Humanitarian Principles While Combating Terrorism, April 2007, available at: <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+from+Lebanon-+Hezbollah/Preserving+Humanitarian+Principles+While+Combating+Terrorism+-+April+2007.htm>.

10 Special Cabinet Communiqué: Hezbollah Attack, 12 July 2006, available at: <http://www.mfa.gov.il/MFA/Government/Communiques/2006/Special+Cabinet+Communique+-+Hezbollah+attack+12-Jul-2006.htm>. See also Report of the Commission page 20/21 and S/RES/1701 (2006) of 11 August 2006.

11 Ibid.

cles on State Responsibility,[12] countermeasures involving the use of force, have for a long time, but at the very latest since the inclusion of such a prohibition in the Friendly Relations Declaration of the General Assembly of 1970,[13] been prohibited under customary international law. This view is now confirmed in article 50 para. 1. (a) of the ILC Articles on State Responsibility.[14]

---

12 Articles on the Responsibility of States for Internationally Wrongful Acts adopted by the ILC at its fifty-third session (2001) and by the General Assembly, cf. A/RES/56/83 of 12 December 2001.

13 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, which *inter alia* provides that, "States shall refrain in their international relations from the threat or use of force". Besides, it was previously in 1968 that the Security Council had condemned Israeli military attacks of 28 December against the airport of Beirut which Israel had attempted to justify as armed reprisal, see S/RES/262 (1968) of 31 December 1968,

"(…) *Observing* that the military action by the armed forces of Israel against the civil International Airport of Beirut was premeditated and of a large scale and carefully planned nature,

Gravely concerned about the deteriorating situation resulting from this violation of the Security Council resolutions,

Deeply concerned about the deteriorating situation resulting from this violation of the Security Council resolutions,

Deeply concerned about the need to assure free uninterrupted international civil air traffic,

1. *Condemns* Israel for its premeditated military action in violation of its obligations under the Charter and the cease-fire resolutions;

2. *Considers* that such premeditated acts of violence endanger the maintenance of the peace;

3. *Issues* a solemn warning to Israel that if such acts were to be repeated, the Council would have to consider further steps to give effect to its decisions;

4. *Considers* that Lebanon is entitled to appropriate redress for the destruction it has suffered, responsibility for which has been acknowledged by Israel."

14 Said norm provides, "1. Countermeasures shall not affect: (a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nation (…)". The ICJ has frequently confirmed in its jurisprudence the customary law nature of various principles of State Responsibility, as codified in the ILC Articles on State Responsibility (cf. lately Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, available at: <http://www.icj-

It is against this background that any justification under international law of the Israeli use of force against Lebanon during the summer of 2006 may rely only, if at all, on Article 51 of the Charter of the United Nations.[15] This, in turn, raises three issues, namely, first, whether the use of military force by the Lebanese side had reached the necessary intensity in order to constitute an armed attack within the meaning of Article 51 of the Charter;[16] second, whether the shelling of Israeli dwellings and cities by Hezbollah[17] and the killing respectively the hijacking of Israeli soldiers since late June 2006 can be attributed to the state of Lebanon;[18] third, whether, and if so under what conditions, attacks by non-state entities such as Hezbollah, the acts of which may eventually not be attributed to any state, do in themselves trigger the right to self-defense under Article 51 of the Charter of the United Nations.[19]

---

cij.org/>, with regard to arts 4 (cf. paras 385 et seq. of the judgment), 8 (cf. paras 398 et seq. of the judgment), 31 and 36 of the ILC articles (cf. para. 460 of the judgment)), but has so far never dealt with the issue of countermeasures involving the use of armed force, not least because no state has ever invoked such a right which, in itself, is quite telling. It is worth noting, however, that it was back in 1949 that the Court in the Corfu Channel case rejected what it referred to as "power politics", cf. Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), ICJ Reports 1949, 4 et seq. (35 et seq.).

15 Cf. generally as to the development of the law of self-defense until 2002, A. Randelzhofer, "Article 51", in: B. Simma et al. (eds), *The Charter of the United Nations – A Commentary*, 2nd edition, 2002; for more recent developments cf. the comprehensive study by Y. Dinstein, *War, Aggression and Self-Defence*, 4th edition 2005, in particular 175 et seq.

16 Cf. under II. 3.

17 For an account of these actions prior to the Israeli counter-attack from an Israeli point of view cf. *inter alia* Hezbollah attacks along Israel's northern border May 2000 - June 2006, 1 June 2006, available at: <http://www.mfa.gov.il/NR/exeres/9EE216D7-82EF-4274-B80D6BBD1803E8A7,frameless.htm?NRMODE=Published>.

18 Cf. under II. 4.

19 Cf. under II. 5.

3. The Intensity of the Military Actions by Hezbollah and the Notion of "Armed Attack" under Article 51 of the Charter of the United Nations

It is common knowledge that Article 51 of the United Nations Charter grants a state, which is exposed to an *armed attack*, the right to have recourse to acts of self-defense. It is the ICJ, however, which, ever since its judgment in the Nicaragua case,[20] takes the position that not each and every violation of the prohibition of the use of force under Article 2 para. 4 of the Charter of the United Nations in itself necessarily constitutes an armed attack within the meaning of Article 51 of the Charter. Instead, such violation of the prohibition of the use of force must, according to the Court's jurisprudence, reach a certain level of intensity in order to simultaneously constitute an armed attack.[21] Accordingly, the ICJ had, by way of example, considered smaller border incidents, even when constituting a violation of Article 2 para. 4, as not (yet) amounting to an armed attack within the meaning of Article 51 of the Charter.[22] Following up on this jurisprudence, the ICJ had in 2003 in the Oil Platforms Case between Iran and the United States,[23] while generally acknowledging that a single attack on a foreign ship might

---

20 Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), ICJ Reports 1986, 14 et seq.

21 Ibid., para. 191:
"As regards certain particular aspects of the principle in question, 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." But cf. for a critical view on this threshold approach *inter alia* J.L. Hargrove, "The *Nicaragua* Judgement and the Future of the Law of Force and Self-Defence", *AJIL* 81 (1987), 135 et seq., (139 et seq.).

22 Ibid., para. 195, the Court stated:
"In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to' *(inter alia)* an actual armed attack conducted by regular forces, 'or its substantial involvement therein'."

23 Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America), ICJ Reports 2003, 161 et seq.

constitute an armed attack,[24] *in concreto* not considered the damage to a U.S.-American ship as an armed attack which could be attributed to Iran.[25]

This approach raises the issue of the existence of a "grey zone" of such military acts, which on the one hand are prohibited by virtue of Article 2 para. 4 of the Charter, but which at the same time do not yet trigger the right to self-defense under Article 51 of the Charter.[26] Regarding the "Second Lebanon War", there is no need to tackle that issue in detail, however, since the acts under consideration had, even when using the standard set out by the ICJ,[27] reached the level of intensity amounting to an armed attack.

---

24 The Court stated, "The Court does not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the 'inherent right of self-defence'"(para. 72). Cf. also as to the question whether attacks on foreign vessels may, under Article 51 of the Charter respectively under parallel norms of customary international law, trigger the exercise of the right of self-defense, C. Lerche, *Militärische Abwehrbefugnisse bei Angriffen auf Handelsschiffe,* 1993, in particular 77 et seq.

25 Oil Platforms case, see note 23, para. 78.

26 Cf. most recently for a comprehensive study of this possible "lacuna", K. Oellers-Frahm, "Der IGH und die 'Lücke' zwischen Gewaltverbot und Selbstverteidigungsrecht – Neues im Fall 'Kongo gegen Uganda'?, *Zeitschrift für Europarechtliche Studien* 10 (2007), 71 et seq. with ample further references.

27 As a matter of principle, there are two possible ways to avoid the problems raised by the creation of such a "grey zone" of violations of the prohibition of the use of force not amounting to an armed attack: on the one hand, one might either consider that only large-scale instances of the use of force do amount to a violation of Article 2 para. 4 of the Charter and that by the same token similarly low-instance reactions by the "attacked" state, even when involving small-scale use of force are not prohibited, cf. for such proposition *inter alia* C. Kreß, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte Privater,* 1995, 172 et seq.; A. Verdross/ B. Simma, *Universelles Völkerrecht*, 1984, 289 – 290, and lately the Separate Opinion of Judge Simma in the Oil Platforms case, see note 23, Separate Opinion Simma, para. 12. In the alternative, one could also, in order to bring the two notions of "use of force" under Article 2 para. 4 and "armed attack" under Article 51 of the Charter in line consider that the content of both coincide, cf. e.g. Q. Wright, *The Role of International Law in the Elimination of War,* 1961, 60; J. Becker, "The Continuing Relevance of Art. 2 (4)", *Den. J. Int'l L. & Pol'y* 32 (2004), 583 et seq. (589-590).

Inter alia, it is not disputed there had been rocket attacks on Israeli territory from late 2005 until mid 2006 during which several people were killed.[28] On 12 July 2006, several Israeli soldiers were killed on Israeli territory by Hezbollah fighters, while two others were hijacked and taken into Lebanese territory.[29] At least when taken together, there seems to be no doubt that these acts involving both relatively large-scale and protracted cross-border shelling and incursions into the territory of another state, did amount to an armed attack within the meaning of Article 51 of the Charter of the United Nations, as defined by the above-mentioned jurisprudence of the ICJ.[30]

It is doubtful, however, whether such an attack must be attributable to another "state" in order to trigger the right of self-defense under Article 51 of the Charter, or whether instead this right of self-defense also comes into play in a case of armed attacks attributable to non-state entities such as Hezbollah.[31] This question would, however, be irrelevant provided the attacks undertaken by Hezbollah could under general international law be attributed to the state of Lebanon, anyway. It is therefore this question of attributability that must be tackled first.

4. Attributability of the Acts of Hezbollah

As a matter of principle, acts by private persons or entities, *in concreto* Hezbollah, can be attributed to a state, *in concreto* Lebanon, if those persons or entities, first, are *de jure* or *de facto* governmental organs of a state;[32] or if they, second, perform governmental functions on behalf of such state,[33] or finally, third, if they are *de facto* directed or controlled by official authorities.[34]

---

28 Cf. note 9 et seq. above.

29 Ibid.

30 It is against this background that Israel did, by letter addressed to the president of the Security Council, notify the Security Council of its actions against Lebanese territory, as required by Article 51, 2nd phrase of the Charter, claiming to act in self-defense, cf. Doc. A/60/937-S/2006/515 of 12 July 2006.

31 Cf. under II. 5.

32 Cf. under II. 4. a. and c.

33 Cf. under II. 4. b.

34 Cf. under II. d.

a. Attribution of the Acts of Hezbollah as *de jure* Organs of Lebanon (Article 4 ILC Articles on State Responsibility)

Notwithstanding the fact that Hezbollah, under the circumstances prevailing at the relevant time, was (and indeed continues to be) represented in the Lebanese government,[35] the Hezbollah fighters which started the armed attack against Israel may not be considered formal organs of the Lebanese state within the meaning of article 4 of the ILC Articles on State Responsibility, which in turn has codified customary international law.[36]

This is due to the fact that any such attribution would, under article 4 para. 2 of the ILC Articles on State Responsibility, require that the persons acting on the ground must possess the "status [of an organ] in accordance with the internal law of the State",[37] i.e. must "make up the organization of the State [in question] *and* act on its behalf."[38] Thus, in order to qualify as a *de jure* organ, a person or group of persons must be formally incorporated into the state structure of the state concerned, which, as mentioned, was not the case with those military forces involved in the armed attack against Israel.

b. Attribution of the Acts of Hezbollah as Persons or Entities Exercising Elements of Governmental Authority of Lebanon (Article 5 ILC Articles on State Responsibility)

Neither may the acts of Hezbollah fighters be considered the conduct of persons or entities exercising elements of governmental authority within the meaning of article 5 of the ILC Articles on State Responsi-

---

35 This is true, *inter alia* for Muhammad Fneish and Trad Hamadeh, as well as independent Hezbollah-endorsed member Fawzi Sallouhk, cf. Heads of State and Cabinet Members, available at: <http://www.infoplease.com/world/leaders/lebanon.html>.

36 Bosnian Genocide case, see note 14, para. 385.

37 Cf. ibid., para. 386, where the Court reiterates the very formulation contained in article 4 para. 2 of the ILC Articles on State Responsibility. The Court also confirmed that, unless there is a clear *lex specialis* to the contrary, the general rules of attribution apply to all different forms of violations of international law, ibid., para. 401.

38 ILC Commentary to article 4 para. 1 of its Articles on State Responsibility, para. 1, referred to by the ICJ in its recent judgment in the Bosnian Genocide case, see note 14, para. 388 (emphasis added).

bility, since this would not only somewhat similarly require an empowerment by virtue of the law of the state concerned, i.e. Lebanon, but furthermore also require that the specific acts were undertaken in such capacity.[39] Since the Lebanese government had neither empowered Hezbollah to exercise governmental authority, nor still less to undertake military action on its behalf, the acts of Hezbollah may not be attributed by virtue of article 5 of the ILC Articles on State Responsibility.

c. Attribution of the Acts of Hezbollah as *de facto* Organs of Lebanon (Article 4 ILC Articles on State Responsibility)

Notwithstanding the fact that Hezbollah does not qualify as a *de jure* organ of Lebanon,[40] the military attacks undertaken by Hezbollah fighters against Israel might nevertheless be attributed to Lebanon, provided they could be considered to have acted as *de facto* organs of Lebanon. As the ICJ had already stated, however, in the Nicaragua case[41] and most recently reconfirmed in the Genocide case,[42] such attribution would presuppose not only a complete dependence by the respective group,[43] lacking any real autonomy of its own,[44] so that it could be considered a mere instrument or agent of the state concerned,[45] but also a particularly great degree of control by the state involved.[46] Accordingly, any such qualification solely serves to cover an exceptional situation,[47] where the state could escape its otherwise existing international responsibility despite the alleged independence of the group being nothing but a pure fiction.[48]

Yet, the very fact that the Security Council had frequently requested that Lebanon should exercise full control over its entire territory, and

---

39 ILC Commentary to article 5 para. 7 of its Articles on State Responsibility, see note 38.

40 Cf. under II. 4. a.

41 Nicaragua case, see note 20, para. 109/110.

42 Bosnian Genocide case, see note 14, para. 385.

43 Ibid., para. 110.

44 Ibid., para. 394.

45 Ibid., para. 392.

46 Ibid., para. 393.

47 Ibid.

48 Ibid., para. 392.

particularly those parts of its territory bordering Israel,[49] already demonstrates that Hezbollah could not be considered to have been subject to complete control by Lebanon. Besides, since even Israel itself had continuously claimed that third states such as Syria and Iran had supported Hezbollah, e.g. by the delivery of weapons,[50] shows that Hezbollah was not sufficiently dependent on Lebanon. Its acts could therefore not be attributed to Lebanon as constituting *de facto* organs.

d. Attribution of the Acts of Hezbollah as Acting Under the Direction and Control of Lebanon (Article 8 ILC Articles on State Responsibility)

Accordingly, the only remaining possibility of attribution is to consider that the acts of Hezbollah were directed or controlled by Lebanon within the meaning of article 8 of the ILC Articles on State Responsibility. According to article 8 the conduct of a person or group of persons shall be considered an act of a state if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that state. This raises the question, however, to what extent Lebanon has controlled or directed the acts of Hezbollah.

Previously, in the Nicaragua case the ICJ, relying on article 3 lit. g.) of the Definition of Aggression in A/RES/3314 (XXIX),[51] considered that private acts of military violence might the attributed to a state, provided such state uses these armed groups under its control against another state. This general possibility of attributing acts of irregular troops, acting on behalf of a state, relying on article 3 lit. g.) of the

---

49 Cf. note 89 below.

50 Cf. e.g. the allegations contained in "Iranian complicity in the present Lebanese crisis – July-August 2006", 15 August 2006, available at: <http://www.mfa.gov.il/MFA/The+Iranian+Threat/Support+of+terror/Iranian%20complicity%20in%20the%20present%20Lebanese%20crisis%20-%20July-Aug%202006>.

51 Under article 3 lit. g.) of the Definition of Aggression, as contained in A/RES/3314 (XXIX) of 14 December 1974, "The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein", shall qualify as an act of aggression; for a detailed analysis of the definition of aggression, see B. Ferencz, "Defining Aggression: Where It Stands and Where It's Going", *AJIL* 66 (1972), 491 et seq.

Resolution, has lately been reconfirmed once again by the ICJ in December 2005 in the case between the Democratic Republic of the Congo and Uganda.[52]

It was in 1986 in the Nicaragua case, that the ICJ had taken the position, however, that any such attribution by virtue of the principle now contained in article 8 of the ILC Articles on State Responsibility, which the Court considers to have also codified customary international law,[53] requires a so-called "effective control" over the groups or non-state entities concerned and their military or paramilitary operations.[54] Yet, unlike in the case of attribution under article 5 ILC Articles on State Responsibility,[55] there is no need to prove "complete" dependence of the group.[56] On the other hand, it was again in its Nicaragua judgment, that the ICJ had also stressed that, in order to attribute such acts emanating from irregular groups, the control by the state concerned must extend to specific individual acts.[57] In other words, a simple "overall control" would not be sufficient in order to bring about attribution of acts of non-state entities.

In sharp contrast thereto, the International Criminal Tribunal for the Former Yugoslavia (ICTY) had in its own jurisprudence, both in relation to the somewhat different question of the qualification of an armed conflict as possessing an international or a non-international character, and with regard to the question of attribution for purposes of state responsibility, considered it to be sufficient that the state con-

---

52 Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005, para. 146, available at: <http://www.icj-cij.org/docket/index.php?p1=3&k=51&case=116&code=co&p3=4>. The Court stated *inter alia* that it:
"has found (…) that there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 3314 (XXIX) on the definition of aggression, adopted on 14 December 1974", thus implying, had it found otherwise, that those acts would then have to be attributed to the Democratic Republic of Congo.

53 Bosnian Genocide case, see note 14, para. 398.

54 Nicaragua case, see note 20, para. 116/117.

55 See note 38 .

56 Bosnian Genocide case, see note 14, para. 143.

57 Nicaragua case, see note 20, para. 115.

cerned was exercising "overall control" over the acts of the respective non-state group.[58]

Notwithstanding, the ILC had in turn, in its own codification work on the law of state responsibility, however, followed the approach originally taken by the ICJ in the Nicaragua case, as is demonstrated by the official commentary accompanying article 8 of the then Draft Articles on State Responsibility.[59] Most recently, the ICJ has once again reiterated its own strict view in its judgment of 26 February 2007 in the Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro). In particular, it underlined that this form of strict attributability does apply, as a matter of principle, to all various forms of illegal acts under international law.[60] It thus also applies to possible violations of the prohibition of the use of force and the undertaking of an armed attack within the meaning of Article 2 para. 4 respectively Article 51 of the UN Charter, unless there is proof of a divergent *lex specialis.*[61] More specifically, the ICJ has underlined that the rule contained in article 8 of the ILC Articles on State Responsibility is to be considered as an extension of the general rule, under which states are, at least as a matter of principle, only responsible for acts of their

---

58 International Criminal Tribunal for the Former Yugoslavia, IT-94-1-A, Judgment of 15 July 1999, Prosecutor v. Dusko Tadić, paras 124 et seq., discussing the Nicaragua standard, and more specifically para. 131 where the Appeals Chamber stated, "In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, *it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law."* (emphasis added). Cf. also A. de Hoogh, "Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the Tadić case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia", *BYIL* 72 (2001), 255 et seq.

59 ILC Commentary to article 8 para. 5 of its Articles on State Responsibility, see note 38 where the ILC explicitly rejected the standard of attribution developed by the ICTY in the Tadić case.

60 Bosnian Genocide case, see note 14, para. 401.

61 Ibid.

own organs.[62] Accordingly, it is necessary, that the organs of the state concerned are indeed in a position to direct the behavior of the non-state actor, since otherwise the necessary nexus would no longer exist.[63]

Following this line of argument so far consistently followed by the ICJ, it is probably true to say that the attacks by Hezbollah in June 2006 may not be attributed to the state of Lebanon, given both the degree of independence of Hezbollah and the lack of effective control Lebanon was exercising in the southern part of its own territory, including over Hezbollah fighters operating in the area.[64] Yet, even if one were to follow, be it only *arguendo*, the approach chosen by the ICTY in its Tadić line of jurisprudence, any attribution would still require, as the Appeals Chamber of the ICTY had stated, "*overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations."[65] Accordingly, there still would be serious doubts, as to whether one could consider that the authorities of Lebanon, considering the role of Hezbollah as a "state within the Lebanese state", had been in a position to exercise such overall control over the acts of Hezbollah. Thus, and in any event, at the time the Israeli military measures were taken against Lebanese territory, there was no armed attack which could be attributed to the state of Lebanon under traditional rules of state responsibility.

Still it follows the question, whether an armed attack emanating from a non-state actor, such as Hezbollah, nevertheless empowers the attacked state to exercise its right to self-defense under Article 51 of the Charter of the United Nations.

5. Exercise of the Right to Self-Defense Against Attacks Emanating from Non-State Actors

In its Advisory Opinion on the legality of the Israeli security wall in the occupied Palestinian territories,[66] the ICJ has, without further justi-

---

62 Ibid., para. 406.

63 Ibid.

64 Ibid., para. 401.

65 Tadić case, see note 58, para. 145.

66 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, 136 et seq.

fication and explanation, however, taken the position that the scope of application of Article 51 of the Charter of the United Nations is limited to the defense against attacks emanating from another *state*. The Court specifically stated in that regard, when dealing with the Israeli argument that the security wall allegedly served Israel's defense against attacks from non-state terrorist organizations and accordingly did not amount to a violation of international law, that,

> "Article 51 of the Charter (...) recognizes the existence of an inherent right of self-defence in the case of *armed attack by one State against another State*. However, Israel does not claim that the attacks against it are imputable to a foreign State. (...)"[67]

Consequently, the Court concluded that Article 51 of the Charter had no relevance in that case.

Hereby the Court continued a line of jurisprudence which it had started, be it only implicitly, in 2003 in its judgment in the Oil Platforms case.[68] In said judgment, the Court had considered that the United States, in order to be able to rely on Article 51 of the Charter of the United Nations *vis-à-vis* attacks on ships occurring in the Persian Gulf, must at least claim to be the victim of attacks which are attributable to Iran, when stating that "[t]he United States has to show that attacks had been made upon it for which Iran was responsible."[69]

In the meantime, the ICJ no longer seems to take a firm position on the matter anymore. *Inter alia*, it was in 2005 in the Case concerning Armed Activities on the Territory of the Congo[70] that the Court expressly left it open whether, and if so under what conditions, contemporary international law provides for a right of self-defense against large-scale attacks by irregular forces, i.e. non-state armed attacks.[71]

In that regard, one must first take note of the fact that the very wording of Article 51 of the Charter does not contain any specific ref-

---

67 Ibid., para. 139 (emphasis added).

68 Oil Platforms case, see note 23.

69 Ibid., para. 51.

70 Congo/Uganda case, see note 52.

71 Cf. ibid., para. 147, where the Court stated that, given the circumstances of the case, there is, "no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces."

erence to the state character of a given armed attack.[72] This is even more important since Article 2 para. 4 of the UN Charter, in turn, indeed does refer to such an inter-state relation insofar as the latter norm only provides 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* ..." (emphasis added). This difference between Article 2 para. 4 on the one hand, and Article 51 of the UN Charter on the other, seems to imply, by way of an *argumentum e contrario,* that Article 51 of the Charter in turn does not require any inter-state situation.[73] A teleological interpretation in line with the very purpose of Article 51 of the Charter, i.e. the goal of protecting the victim of an armed attack pending action by the Security Council, also seems to militate for the proposition that Article 51 of the Charter does not require an armed attack emanating from another state, but instead only refers to the perspective of said victim state, for whom it is irrelevant and indeed in most instances not even recognizable from whom the attack is emanating or whether the acts of a non-state entity might be attributed to a state or not.[74]

---

72 Cf. for such proposition e.g. Separate Opinion Koijmans, ibid., paras 26 et seq. (27), where Judge Koijmans takes the position that, "[i]f the activities of armed bands present on a State's territory cannot be attributed to that State, the victim State is not the object of an armed attack by it. But if the attacks by the irregulars would, because of their scale and effects, have had to be classified as an armed attack had they been carried out by regular armed forces, there is nothing in the language of Article 51 of the Charter that prevents the victim State from exercising its *inherent* right of self-defence." (emphasis in the original). Cf. also already his Separate Opinion in the Advisory Opinion on Legal Consequences of the Construction of a Wall, see note 66, para. 35 where he had already stated that Article 51 merely, "conditions the exercise of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another State (…)".

73 T. Bruha/ C. Tams, "Self-Defence Against Terrorist Attacks. Considerations in the Light of the ICJ's 'Israeli Wall' Opinion", in: K. Dicke et al. (eds), *Weltinnenrecht – liber amicorum Jost Delbrück*, 2005, 85 et seq. (94 et seq.).

74 S. Talmon, "Grenzen der 'Grenzenlosen Gerechtigkeit'", in: W. März (ed.), *An den Grenzen des Rechts*, 2003, 101 et seq. (142); cf. J. Delbrück, "The Fight Against Global Terrorism: Self-defence or Collective Security as International Police Action? Some Comments on the International Legal Implications of the 'War Against Terrorism'", *GYIL* 44 (2001), 9 et seq. (15); Dinstein, see note 15, 204 – 208. Cf. also Rule 6 of the Chatham House

On the other hand, one could also argue that Article 51 of the UN Charter, providing for an exception from the general prohibition of the use of force as contained in Article 2 para. 4 of the Charter, has, in line with general principles of interpretation, to be interpreted restrictively.[75]

Besides, subsequent state practice within the meaning of article 31 of the Vienna Convention on the Law of Treaties relating to Article 51 of the UN Charter was, at least until the end of the last century, largely, if not almost exclusively, formed by the conviction that the right to self-defense would and could only apply in cases of armed attacks emanating from or initiated by a state.[76] This state practice has, however, significantly changed since the attacks of 11 September 2001. *Inter alia*, both, S/RES/1368 (2001), as well as S/RES/1373 (2001), have confirmed the right to self-defense against those actors responsible for the attacks, without mentioning and indeed still less discussing, the question whether the attacks did indeed emanate from a state or not. The Security Council has thereby recognized the inherent right of individual or collective self-defense without making any reference to an armed attack which may be attributed to a state.[77] It is certainly not the least the Security Council and its practice which is, given its primary responsibility for the maintenance of international peace and security under the UN Charter, and further given the fact that Article 51 is to be found in

---

"Principles of International Law on the Use of Force by States in Self-Defence" adopted by a group of British scholars in 2005 (for further details and the accompanying report cf. <http://www.chathamhouse.org.uk/index.php?id=79>): "Article 51 is not confined to self-defence in response to attacks by states. The right of self-defence applies also to attacks by non-state actors. In such a case the attack must be large scale. If the right of self-defence in such a case is to be exercised in the territory of another state, it must be evident that that state is unable or unwilling to deal with the non-state actors itself, and that it is necessary to use force from outside to deal with the threat in circumstances where the consent of the territorial state cannot be obtained. (footnote omitted) (...)".

75 Cf. for such a proposition e.g. M. Bothe in: W. Vitzthum (ed.), *Völkerrecht*, 2004, 589 et seq. (597), as well as Randelzhofer, in: Simma, see note 15, 788 et seq. (802).

76 Judge Koijmans, in his Separate Opinion in the Congo/Uganda case, see note 72, para. 28, refers to what he calls a "generally accepted interpretation for more than 50 years".

77 See preamble para. 3 of S/RES/1368 (2001) of 12 September 2001, as well as preamble para. 4 of S/RES/1373 (2001) of 28 September 2001.

Chapter VII of the UN Charter as an exception to Article 2 para. 4 of the Charter, relevant when considering and interpreting the content of the provisions of the Charter of the United Nations dealing with the prohibition of the use of force.[78]

The same more liberal approach as to the possibility to act in self-defense *vis-à-vis* a non-state armed attack is also mirrored in the reactions by a significant number of states, after 11 September 2001, within the framework of both NATO[79] and the OAS,[80] which serve as further examples of recent state practice and *opinio juris* allowing for self-defense against armed attacks by non-state actors.

Yet, even if one were to take the position that measures of self-defense could not be taken against the aggressor in each and every case of armed attacks emanating from non-state actors (even provided they reach a sufficient level of intensity in order to constitute an armed attack[81]), one would have to still recognize that at least under certain circumstances, as proven by the example of Afghanistan after 11 September 2001, different considerations must prevail.

In the case of Afghanistan, the Security Council had requested the Taliban regime not to use by themselves and not to allow territory under their control to be used for aggressive acts against other states.[82] It was after the Taliban regime had failed to do so that the Security Council adopted S/RES/1368 and 1373 (2001) recognizing the right to take

---

78 J. Alvarez, *International Organizations as Law-makers*, 2005, 184 et seq. and 196 et seq.

79 Press Release 124 (2001) of 12 September 2001, "Invocation of Article V of the Washington Treaty", available at: <http://www.nato.int/docu/pr/2001/p01-124e.htm>.

80 Press Release E-194 (2001) of 21 September 2001, "Invocation of the Treaty of Reciprocal Assistance", available at: <http://www.oas.org/OASpage/press2002/en/press2001/sept01/194.htm>.

81 Cf. under II. 3.

82 Cf. *inter alia* S/RES/1267 (1999) of 15 October 1999, operative para. 1, which provides that, "the Taliban [shall ....] cease the provision of sanctuary and training for international terrorists and their organizations, take appropriate effective measures to ensure that the territory under its control is not used for terrorist installations and camps, or for the preparation or organization of terrorist acts against other States or their citizens, and cooperate with efforts to bring indicted terrorists to justice (…)". This obligation was reconfirmed by S/RES/1333 (2000) of 19 December 2000.

measures of self-defense against the attacks of 11 September 2001.[83] This practice of the Security Council might be interpreted in the way, that the Security Council, by determining that a given situation did constitute a threat to the international peace and security[84] and by further requiring either a territorial state or an entity exercising *de facto* control over certain territory, to take certain actions, thereby provided for a specific norm of attribution, constituting a *lex specialis*, in case no such action is taken and further provided such territory is then used for acts by non-state actors constituting an armed attack against another state.

Such a situation where the Security Council had specifically requested a certain state to take action against a non-state group and not to have its territory used for hostile acts against another state is significantly different from a mere absence of action by the territorial state. In that regard, it is quite telling that the ICJ, when confronted in the case concerning Armed Activities on the Territory of the Congo[85] with the claim that,

> "armed attacks by armed bands whose existence is tolerated by the territorial sovereign generate legal responsibility and therefore constitute armed attacks for the purpose of Article 51",
>
> leading to,

---

83 As was rightly pointed out by R. Wolfrum/ C.E. Philipp, "The Status of the Taliban: Their Obligations and Rights under International Law", in: J.A. Frowein/ R. Wolfrum (eds), *Max Planck UNYB* 6 (2002), 559 et seq. (589, there footnote 114), there can be no doubt, that the attacks of 11 September 2001 were clearly of a magnitude that, if undertaken by a state or by state organs, would have constituted an armed attack and would accordingly have clearly triggered the right of self-defense under Article 51 of the Charter.

84 With regard to Afghanistan generally and the behavior of the Taliban more specifically, the Security Council had on various occasions determined that a threat to international peace and security within the meaning of Article 39 of the Charter did exist, cf. *inter alia* S/RES/1267 (1999) of 15 October 1999, S/RES/1333 (2000) of 19 December 2000 and S/RES/1363 (2001) of 30 July 2001.

85 Congo/Uganda case, see note 52.

> "a separate, a super-added standard of responsibility, according to which a failure to control the activities of armed bands, creates a susceptibility to action in self-defence by neighbouring States"[86]

stated that it,

> "cannot conclude that the absence of action by Zaire's Government against the rebel groups in the border area is tantamount to 'tolerating' or 'acquiescing' in their activities."[87]

It therefore, and rightfully so, rejected that part of Uganda's first counter-claim alleging Congolese responsibility for tolerating the rebel groups.[88]

It follows that, as in the case of Afghanistan, the inaction by a territorial state which has been expressly requested by the Security Council to take action against armed groups operating from its territory against other states, does constitute a specific form of *qualified* inaction which in turn must enable states concerned, pending Security Council action under Chapter VII, to themselves exercise their right of self-defense under Article 51 of the Charter.

This approach can, *mutatis mutandis*, be transposed to the situation between Israel and Lebanon as it existed after the shelling of Israeli dwellings by Hezbollah forces and the Hezbollah incursions into Israeli territory. As a matter of fact, the Security Council had, on several occasions, previously called upon Lebanon to fully extend and exercise its sole and effective authority throughout its own territory. More specifically, Lebanon had been called upon by the Security Council to prevent attacks from Lebanon across the so-called "Blue Line" into Israel.[89] The fact that the Security Council had with regard to Lebanon, and unlike in the case of Afghanistan, not acted under Chapter VII

---

86 Congo/Uganda case, see note 52, Statement of I. Brownlie of 18 April 2005, Compte Rendue 2005/7, 30, para. 80.

87 Congo/Uganda case, see note 52, para. 301.

88 Ibid.

89 See e.g. S/RES/1614 (2005) of 29 July 2005, operative para. 6, whereby the Security Council called upon the government of Lebanon to, "fully extend and exercise its sole and effective authority throughout the south, (…) and to exert control and monopoly over the use of force on its entire territory and to prevent attacks from Lebanon across the Blue Line". Similar requests were reiterated *inter alia* in S/RES/1583 (2005) of 28 January 2005, operative para. 4, as well as in operative para. 8 of S/RES/1655 (2006) of 31 January 2006.

seems to be irrelevant. This is due to the fact that the non-action by Lebanon *vis-à-vis* relevant Security Council resolutions is solely taken as a factor in considering its behavior in deciding upon the question of attribution, but does not purport to endow Security Council resolutions adopted under Chapter VI with binding force.

On the whole, there therefore seems to be no doubt that Israel, at least as a matter of principle, was in a position to exercise its right of self-defense against the armed attacks emanating from Hezbollah, either because such attacks emanating from non-state actors do *per se* trigger the right to self-defense, or because of the specific situation Lebanon found itself in, with regard to relevant Security Council practice prior to the Israeli acts of self-defense.

One might wonder, however, whether Israel, when exercising its rights to self-defense under Article 51 of the UN Charter, was still acting within the limits prescribed by Article 51, and namely the principle of proportionality.

6. Self-Defense under Article 51 of the UN Charter and the Principle of Proportionality

There seems to be no dispute that the actions by a state exercising its right of self-defense under Article 51 of the Charter must abide by the principle of proportionality.[90] This requirement has also been referred to by the ICJ in its Nicaragua judgment.[91] It was later reconfirmed in its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons.

The issue of proportionality is defined by the nature and the scope of the armed attack and the question, how the attack could, under the prevailing circumstances, be refuted. The ICJ stated in that regard that "[s]elf-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it."[92]

---

90 Cassese, see note 4, 1333; P. Malanczuk, *Akehurts's Modern Introduction to International Law,* 7th edition 1997, 315 et seq.; Randelzhofer, see note 15, marginal note 42.

91 Nicaragua case, see note 20, para. 194.

92 Ibid., para. 176, and with regard to Article 51 of the Charter, Legality of the Threat or Use of Nuclear Weapons case, ICJ Reports 1996, 226 et seq. (para. 41).

This statement by the ICJ has to be interpreted in the sense that only those measures of self-defense are legitimate and legal under international law, which serve the overall goal to counter the armed attack.[93] In that regard much depends on the specific circumstances of the concrete situation and not least depends on the command and control structure of the aggressor. If there are military control centers located in the *hinterland* of the attacking state, they might be attacked in accordance with the principle of proportionality, even if the armed attack as such, which triggered the exercise of the right to self-defense in the first place, only originated from a limited territory adjacent to the territory of the attacked state.

On the other hand, the exercise of the right to self-defense must not be a mere motive for military sanctions, since otherwise the exercise of the right to self-defense would amount to nothing but hidden armed counter-measures, which, as was mentioned,[94] are illegal under international law. In particular, the actions allegedly taken in the exercise of the right to self-defense must, by their very nature, be able to diminish the military abilities of the aggressor and to induce the enemy not to continue its attack.[95]

It is against this background that one has to take account of the determination of the ICJ of December 2005, which in the case between the Democratic Republic of the Congo and Uganda, considered the taking of airports and towns many hundreds of kilometers away from Uganda's border as not being proportionate within the meaning of Article 51 of the Charter of the United Nations.[96] Yet, the longer the armed attack continues, the more measures of self-defense may then aim at the infrastructure of the aggressor, such as roads or oil refineries, provided it is only by such attacks that the aggressor can be prevented from continuing the attack or is forced to stop its attack.[97]

---

93 R. Higgins, *Problems and Process,* 1994, 232 et seq.

94 Cf. under II. 2.

95 G. Dahm, *Völkerrecht II*, 1961, 417; also Randelzhofer, see note 15, 788 et seq. (805).

96 Congo/Uganda case, see note 52, para. 147. The Court stated, "The Court cannot fail to observe, however, that the taking of airports and towns many hundreds of kilometres from Uganda's border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end."

97 K. Doehring, *Völkerrecht*, 2nd edition 2004, para. 584; Gardam, see note 5, 155 et seq.

Finally, a further prerequisite relates to the fact that measures taken under Article 51 of the Charter must be also legal for purposes of *jus ad bellum*, i.e. must abide by applicable rules of international humanitarian law.[98] This inter-linkage between *jus ad bellum* and *jus in bello* was unequivocally confirmed by the ICJ in its Advisory Opinion concerning the Legality of the Threat or Use of Nuclear Weapons, since in the view of the Court, any,

> "use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflicts which comprise in particular the principles and rules of humanitarian law."[99]

Reviewing the conflict as it unfolded between Israel and Hezbollah during the summer of 2006, it seems to be unproblematic for purposes of *jus ad bellum,* that Israel was exercising its right of self-defense, and that it particularly abided by the principle of proportionality, when it attacked military targets in southern Lebanon.

It might be more problematic, however, to reach the same conclusion when considering Israeli military measures taken far beyond southern Lebanon, given that the original armed attack by Hezbollah triggering the Israeli reply originated only in southern Lebanon. The legality of such measures of self-defense involving targets beyond southern Lebanon would, in view of the above considerations, depend on the answer to the question whether, and if so to what extent, command and control structures of Hezbollah were located in other parts of Lebanon, and especially in Beirut, from where the attacks of Hezbollah were coordinated or controlled.

Israel also argued at the time of the conflict and continues to do so, that weaponry had entered Lebanon via both, the airport of Beirut, and via roads from Syria. Assuming these allegations to be correct, they would lead to the legality of attacks on such objects at least for purposes of *jus ad bellum*. Yet, one might wonder, who carries the burden of proof in that regard. In order to increase the efficiency of the prohibition of the use of force, the ICJ had, in its judgment in the Oil Platforms case between the United States and Iran concerning U.S. attacks on Iranian oil platforms in the Persian Gulf during the first Gulf

---

98 For further details as to the principle of proportionality as forming part of international humanitarian law cf. Gardam, see note 5, 59 et seq.

99 Legality of the Threat or Use of Nuclear Weapons case, see note 92, para. 42.

War,[100] taken the position that the United States not only carried the burden of proof as to the existence of an armed attack as such, but also as to the question whether this alleged armed attack was attributable to either Iran or Iraq. The Court stated that it did not,

> "have to attribute responsibility for firing the missile (...) on the basis of a balance of evidence, either to Iran or to Iraq."

It rather considered that,

> "if at the end of the day the evidence available [was] insufficient to establish that the missile was fired by Iran, then the necessary burden of proof ha[d] not been discharged by the United States."[101]

One might wonder whether this consideration should not also be applied, *mutatis mutandis*, with regard to the question of the proportionality of measures of self-defense. Otherwise, and similar to the burden of proof concerning the legality of the use of force as such, the danger of an escalation of military violence might significantly increase. Yet, one of the fundamental goals of Article 51 of the UN Charter, as demonstrated by Article 51, second phrase and the duty contained therein to inform the Security Council about measures taken in the exercise of the right to self-defense, is an attempt to, as far as possible, limit the unilateral use of military force.

On the other hand, an argument could also be raised as to whether the state which is exercising its right of self-defense under Article 51 of the Charter, as being exposed to the threat of an ongoing or imminent armed attack, should not be granted a somewhat lowered *standard of proof*. In line with a parallel rule applicable for purposes of *jus in bello* concerning the legality of attacking objects, the civilian status of which is doubtful,[102] it seems plausible to argue that the relevant standard is that of the person, who was responsible for the specific planning, decision-making and taking of actions in self-defense, taking into consideration the information that was available *ex ante*.

It would accordingly be sufficient, in order for the reply to the armed attack to be considered legal under international law, that a *bona fide* claim could be made, that it could have *ex ante* been expected that the measures of self-defense, given the available information, would be proportionate in light of the anticipated armed attack.

---

100 Case concerning Oil Platforms, see note 23.

101 Ibid., para. 57.

102 Cf. under III. 2. b.

As was mentioned before,[103] military actions in self-defense must, in order to be legal under international law, also abide by applicable norms of humanitarian law. It is against this background, that one must now address the issue of possible violations, by Israel, of relevant rules of international humanitarian law. This, however, first of all, requires a qualification of the conflict in order to be able to determine which rules were applicable, i.e. requires a determination whether the "Second Lebanon War" should indeed be qualified as an international armed conflict.

III. The Second Lebanon War and International Humanitarian Law

1. Character of the Armed Conflict and Applicable Norms of International Humanitarian Law

At least for purposes of *jus ad bellum*, the "Second Lebanon War" constituted an armed conflict.[104] This could raise the question what kind of armed conflict we are facing for purposes of *jus in bello*. In Hamdan v. Rumsfeld,[105] the United States Supreme Court had deliberately left it open how to qualify the conflict between the United States and Al-Qaida respectively the Taliban, provided one was to agree that said conflict did constitute an armed conflict,[106] and took the position that at least common article 3 of the Four Geneva Conventions, which is applicable to all different forms of armed conflict, would apply.[107]

---

103 Cf. under II. 6.

104 Cf. under II. 3.

105 Decision of 29 June 2006, 126 S. Ct. 2749 (2006); text to be also found at: <http://www.supremecourtus.gov/opinions/05pdf/05-184.pdf>.

106 Ibid., 2766.

107 Ibid., 2766 et seq. But cf. also the judgment by the Israeli Supreme Court in the so-called targeted killings case, HCJ 769/02, Judgment of 12 December 2006, Public Committee against Torture in Israel et al. v. The Government of Israel et al., para. 21, (text to be found at: <http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf>), where the Court qualified the conflict between Israel and armed groups in the Gaza strip as amounting to an international armed conflict.

Yet, at least when, as was undoubtedly the case during the "Second Lebanon War" of 2006, one state uses military means on the territory of another state, the rules of international armed conflicts do apply even if the "real" enemy in the conflict is not the territorial state as such, but rather a non-state group operating on and from the territory of said territorial state.[108] This conclusion can *inter alia* be based on an *argumentum a fortiori* to common article 2 para. 2 of the Four Geneva Conventions. Under this provision the four Geneva Conventions do apply even where in case of an occupation, the occupying power is not encountering armed resistance. If, therefore, norms of international humanitarian law, applicable to international armed conflicts, do apply in all types of occupation, even if no resistance takes place, this must be even more true where, as was clearly the case in Lebanon, military operations meet significant resistance, be it only by non-state armed groups.[109]

Besides, the issue how to qualify the "Second Lebanon War" for purposes of *jus in bello* is of a somewhat limited relevance. This is due, first, to the fact that, while Israel is a contracting party to the Four Geneva Conventions[110] it is not a contracting party to the First Additional Protocol of 1977.[111] Yet, it is only this latter Protocol that contains express regulations dealing with the issue of proportionality.[112] It follows that in order to determine whether a given military operation was proportionate or not, one has to rely on applicable norms of customary international law, to the extent that they are binding upon Israel.

Moreover, it must also be noted that the norms of customary international law applicable in international and non-international armed

---

108 D. Schindler, "Different Types of Armed Conflicts", *RdC* 163 (1979), 125 et seq. (132); M. Frostad, *Jus in bello after September 11, 2001,* 2004, 30 et seq.

109 Frostad, see above, 32.

110 List of State parties, available at: <http://www.icrc.org/ihl.nsf/Pays?ReadForm&c=IL#S>.

111 Unlike the United States, Israel has not even signed the First Additional Protocol to the four Geneva Conventions. For the reasons underlying Israel's decision not to become a contracting party to the protocol cf. A. Zimmermann, "Israel and the International Criminal Court – An Outsider's Perspective, *Isr. Y. B. Hum. Rts* 36 (2006), 231 et seq. (241 et seq.) with further references.

112 Arts. 51 para. 5. lit. b.); 57 para. 2, lit. a.) iii), and 85 para. 3, lit. b.) and c.) First Additional Protocol.

conflicts concerning means and measures of warfare that can be legitimately used during an armed conflict, seem increasingly to merge.[113] It is true that, as far as the Rome Statute of the ICC is concerned, the crime of causing excessive collateral damage only applies in an international armed conflict setting.[114] Yet, the Rome Statute is, at least in that regard, not fully in line with modern customary international law.[115] Moreover said norm, as contained in the Rome Statute, solely covers the issue of individual criminal responsibility for the causation of excessive damage to civilians or civilian objects.[116] This, therefore, does not preclude that a more far-reaching prohibition does indeed exist under customary international law for purposes of state responsibility.[117]

The general nature and applicability of the principle of proportionality in every kind of armed conflicts, be they of an international or a non-international nature, has, besides, been confirmed by the jurispru-

---

113 Cf. for such a proposition *inter alia* K. Ambos, *Internationales Strafrecht*, 2006, 241 et seq.

114 Cf. on the one hand article 8 para. 2 lit. b.) iv) of the Rome Statute, and the lack of any parallel provision in article 8 para. 2 lit. e) of the Rome Statute on the other; for the underlying reasons of this unfortunate *lacuna* cf. A. Zimmermann, "Preliminary Remarks on para. 2 (c) - (f) and para. 3: War Crimes Committed in an Armed Conflict not of an International Character", in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court,* 1999, 263 et seq.

115 Cf. C. Kreß, "War Crimes committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice", *Isr. Y. B. Hum. Rts* 30 (2000), 103 et seq. (134).

116 Cf. article 25 para. 4 of the Rome Statute. As to the interrelationship between the Rome Statute and general international law, as well as international humanitarian law cf. A. Pellet, "Applicable Law", in: A. Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II (2002), 1051 et seq. (1082-1084).

117 Cf. for a similar proposition distinguishing attribution for purposes of state responsibility from involvement of a third state in a military conflict in order to internationalize the conflict the judgment of the ICJ in the Bosnian Genocide case, see note 14, para. 405, where the Court stated, "It should first be observed that logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict."

dence of the ICTY,[118] as well as by relevant state practice.[119] This led the International Committee of the Red Cross in its customary law study to the conclusion that the principle of proportionality indeed equally applies to both, international and non-international armed conflicts.

It is against this background that the issue of proportionality shall now be considered with regard to the "Second Lebanon War" regardless of a definite characterization of the armed conflict.

2. The Second Lebanon War and Possible Violations of the Principle of Proportionality

a. Customary Law Nature and Content of the Principle of Proportionality as Part of International Humanitarian Law

The principle of proportionality, as a limit for military attacks, is enshrined in particular in article 51 para. 5 lit. b) of the First Additional Protocol to the Four Geneva Conventions of 1977 according to which,

> "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated",

is prohibited. It seems to be generally recognized, that the content of this norm is generally accepted to form part of customary international law.[120]

---

118 International Criminal Tribunal for the Former Yugoslavia, IT-95-16-T, Judgment of 14 January 2000, Prosecutor v. Zoran Kupreskic et al., paras 521 et seq.

119 Cf. for a survey of relevant state practice in that regard J.M. Henckaerts/ L. Doswald-Beck, *Customary International Humanitarian Law, Volume I,* 2005, 47; Gardam, see note 5, 110 et seq.

120 Cf. Henckaerts/ Doswald-Beck, see note 119, 49 et seq.; D. Casey, "Breaking the Chain of Violence in Israel and Palestine: Suicide Bombings and Targeted Killings Under International Humanitarian Law", *Syracuse Journal of International Law* 32 (2005), 311 et seq. (319). Cf. also most recently as to the position of the Israeli Supreme Court its judgment in the targeted killings case, Supreme Court of Israel sitting as the High Court of Justice, see note 107, para. 43, affirmatively referring to article 51 of the First Additional Protocol as being declaratory of customary international law.

While it is true that Israel itself is not a contracting party to the First Additional Protocol and therefore not bound by the said provision as a matter of treaty law, it must be noted that this rejection of the protocol is not due to the principle contained in article 51 para. 5 lit. b.) of the Protocol.[121] Even if one were to generally consider Israel as a persistent objector[122] *vis-à-vis* the development of customary international law as enshrined in the First Additional Protocol of 1977,[123] this would not hold true for the principle of proportionality.

On the one hand, Israel has lost its status as a persistent objector at least with regard to those parts of the First Additional Protocol which, like the principle of proportionality, have found their way into the Rome Statute of the ICC,[124] which Israel at least at a certain point had signed,[125] before it later indicated its intention not to ratify the Rome Statute.[126] On the other hand, it is Israel itself that maintains that the principle of proportionality does apply in armed conflicts. *Inter alia*, the official manual on the law of war of the Israeli Defense Forces provides that the commander shall not go ahead with an attack if it is to be anticipated that the damage to the civilian population would be excessive as compared to the anticipated military advantage.[127]

---

121 As to the reasons why Israel is not becoming a contracting party of the First Additional Protocol cf. Zimmermann, see note 111.

122 Cf. generally as to the notion of persistent objection and its effects M. Akehurst, "Custom as a Source of International Law", *BYIL* 47 (1974-75), 1 et seq. (23 et seq.); M. Bos, "The Identification of Custom in International Law", *GYIL* 25 (1982), 10 et seq. (43 et seq.).

123 Cf. for such a proposition A. Zimmermann, "Responsibility for Violations of International Humanitarian Law, International Criminal Law and Human Rights Law – Synergy and Conflicts", in: V. Epping/ W. Heintschel v. Heinegg (ed.), *International Humanitarian Law – Facing new Challenges*, 2006, 203 et seq. (218).

124 Cf. for example article 8 para. 2 lit. b.) i) Rome Statute; for a detailed analysis of this provision cf. W.J. Fenrick, "Other serious Violations of the Laws and Customs applicable in International Armed Conflicts", in: Triffterer, see note 114, 186 et seq.; cf. also Zimmermann, note 111, 240.

125 Israel signed the Rome Statute on 31 December 2000, see : <http://www.un.org/law/icc/statute/status.htm>.

126 Communication from Israel to the Secretary General of 28 August 2002, available at: <http://www.amicc.org/icc_ratifications.html>.

127 Henckaerts/ Doswald-Beck, see note 119, 302.

When considering the issue of proportionality, one might wonder, however, what is the relevant military advantage to be balanced against the ensuing damage to civilians or civilian objects. The study undertaken by the International Committee of the Red Cross on the current status of customary international law in the field of international humanitarian law[128] in that regard simply repeats the formula contained in article 51 para. 5 of the First Additional Protocol. On the other hand, it is well known that almost all NATO Member States ratifying the First Additional Protocol including the Federal Republic of Germany, but also other states such as the United States of America, Australia, New Zealand, or Nigeria, have, when signing or ratifying the First Additional Protocol, made almost identical declarations under which *mutatis mutandis*,

> "[i]n applying the rule of proportionality in Article 51 and Article 57 [of the First Additional Protocol], 'military advantage' is understood to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack."[129]

If one was to now, following the International Committee of the Red Cross and its customary law study, consider that customary international law does not take account of the advantage of the attack taken as a whole, but that one had to rather consider the specific attack as such and the specific advantage resulting there from, one would wonder, whether those states which had made the above mentioned declarations were now, and if so since when, bound by this new, stricter rule of customary international law. Furthermore, it must also be noted, that article 8 para. 2 lit. b) iv) of the Statute of the ICC, in turn, does criminalize such attacks only, when committed in the knowledge,

> "(…) that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct *overall military advantage* anticipated (…)".[130]

In this context, it is particularly interesting to take note of the elements of crimes adopted by the contracting parties of the Rome Stat-

---

128 Ibid.

129 Text of this, as well as that of the other, parallel declarations to be found at: <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=475&ps=P>.

130 Emphasis added.

ute,[131] which hint at the fact that the military advantage anticipated "may or may not be temporally or geographically related to the object of the attack".[132] It is against that background that at least under customary international law, when considering the proportionality of a given attack, the anticipated military advantage of the attack as a whole has to be kept in mind and taken into account.

Yet in any case, and first and foremost, the attack must be directed against a legitimate military target. Otherwise, i.e. when the attack is not directed against such a legitimate military target, the attack would *per se* be illegal under applicable norms of international humanitarian law. This, therefore, raises the question what constitutes a legitimate military target.

b. Notion of Military Targets

A generally accepted[133] definition of what constitutes a military target is to be found in article 52 para. 2 of the First Additional Protocol. Under said provision, in order to qualify as a military target, it is decisive whether these are objects,

> "which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage."

In that regard one must take account of the fact, however, that an object does not loose its status as a military object, simply due to the fact that in such an object or in the vicinity of such an object, protected persons, and in particular, civilians are to found.[134] This is particularly

---

131 Text to be found, *inter alia*, at: <http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/elements(e).html?page=library/officialjournal/basicdocuments/elements(e)>.

132 Elements of Crimes, see above, there note 36 relating to article 8 para. 2 lit. b.) iv) of the Rome Statute.

133 For a general overview as to the notion of "military target" cf. A.P.V. Rogers, "What is a Legitimate Military Target?", in: R. Burchill et al. (eds), *International Conflict and Security Law*, 2005, 160 et seq.

134 Cf. H. Fischer, "The Jurisdiction of the International Criminal Court for War Crimes: Some Observations concerning Differences between the Statute of the Court and War Crimes Provisions in Other Treaties", in: V. Epping/ H. Fischer/ W. Heintschel v. Heinegg (eds), *Brücken bauen und begehen, Festschrift für Knut Ipsen zum 65. Geburtstag,* 2000, 77 et seq. (98);

true in situations where the enemy deliberately stations military objects or installations in the vicinity of, or even within civilian installations, or close to a civilian population.[135] At the end of the day, the qualification of a specific object as a military or non-military one depends on the specific circumstances prevailing at the time of the attack, its use, as well as the general structure of the conflict. It is against this background that some specific issues will now be dealt with.

With regard to considering roads and bridges in southern Lebanon destroyed by Israeli attacks,[136] one may argue that they are to be considered legitimate objects, provided that those roads and bridges were actually used or could have been used for the transport of Hezbollah fighters or ammunition or other kinds of logistical support of Hezbollah.[137] This result just reached is also in line with the list of military objects set up by the International Committee of the Red Cross in 1956, according to which roads, bridges, and tunnels of military relevance may, as a matter of principle, be targeted in times of conflict as constituting legitimate military targets.[138]

---

see also W.J. Fenrick, "Utilizing the Presence of a Protected Person to render certain Objects immune from Military Operations", in: Triffterer, see note 114, 253.

135 Cf. M. Sassòli, "Targeting: The Scope and Utility of the Concept of 'Military Objectives' for the Protection of Civilians in Contemporary Armed Conflicts", in: D. Wippman/ M. Evangelista (eds), *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts*, 2005, 181 et seq. (207).

136 Cf. as to the position of the Israeli government in that regard the statement by the Israel Ministry of Foreign Affairs of 25 July 2006, *Responding to Hezbollah attacks from Lebanon: Issues of Proportionality,* available at: <http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Responding+to+Hezbollah+attacks+from+Lebanon-+Issues+of+proportionality+July+2006.htm>.

137 See for such a proposition also the above mentioned statement of the Israeli Ministry of Foreign Affairs, see above.

138 Cf. Y. Sandoz/ C. Swiniarski/ B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 1987, 632-633, "In 1956, the International Committee of the Red Cross (ICRC) drew up the following proposed list of categories of military objectives (…):
(6) Those of the lines and means of communications (railway lines, roads, bridges, tunnels and canals) which are of fundamental military importance.
(7) The installations of broadcasting and television stations; telephone and telegraph exchanges of fundamental military importance. (…)".

The same is true for private homes in southern Lebanon, but also in Beirut and other cities, as far as and as long as they were used for military purposes by Hezbollah as such or by Hezbollah fighters, be it as launching pads for missiles or for the setting-up of command and control installations, which allegedly happened not infrequently.

It seems to be more problematic, however, to also qualify roads in the Lebanese *hinterland* as legitimate military targets. This could only be done if, on the basis of reliable information, Israel could have taken the position that those roads had then been used in order to transport logistics and ammunition, e.g. from Syria, via those roads towards Hezbollah positions in southern Lebanon. The same is true, *mutatis mutandis*, for the airport of Beirut, the runways of which had been bombarded by the Israeli defense forces provided they were used for such military purposes.[139]

Somewhat similarly, the attack on the TV installation *Al Manar* run by Hezbollah in Beirut,[140] may only be considered a legitimate attack on a military object provided it was not only used for propaganda purposes but, at the same time, was used as a so-called "dual-use" installation for both, civilian and military purposes, and especially if the telecommunication installations contained therein were used in order to coordinate military attacks by Hezbollah. On the other hand, and in line with the final report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia,[141] one must take the position that the sole fact that a mass medium was or is used for war propaganda does not *per se* make it a legitimate military target.[142] Even more problematic, keeping this result in mind, are obviously attacks on other, state-run Lebanese TV stations which, as far as can be discerned, were not connected to Hezbollah activities, whether of a military or a non-military nature.

---

139 For such allegation, see note 136.

140 Ibid.

141 Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, available at: <http://www.un.org/icty/pressreal/nato061300.htm>.

142 ICTY, NATO Final Report, ibid., para. 47. The report stated, "Whether the media constitutes a legitimate target group is a debatable issue. If the media is used to incite crimes, as in Rwanda, then it is a legitimate target. If it is merely disseminating propaganda to generate support for the war effort, it is not a legitimate target."

Particularly problematic in light of applicable rules of international humanitarian law, given the very nature of the specific conflict here under consideration and further given the command and control structure of Hezbollah, seem to be attacks on other infrastructure installations of Lebanon, namely water and electricity installations. This applies particularly to those facilities which were not located in the immediate combat-zone of southern Lebanon since any such attacks, even if successful, would not bring about a definite military advantage, as required by article 52 para. 2 of the First Additional Protocol to the Four Geneva Conventions and parallel norms of customary international law.[143]

Similar considerations do apply with regard to attacks on oil refineries or oil deposits, where once again the question arises, whether their destruction could have brought about a definite military advantage in light of the decentralized structure of Hezbollah, which therefore does not seem, or if so only to a very small degree, to have been dependent on transportation. This could eventually lead to the result that such attacks on oil refineries did not constitute attacks on legitimate military targets. Otherwise, those installations would indeed constitute legitimate military targets, provided they were subject to control of Hezbollah and were located in southern Lebanon, in which case it seems that their destruction could have brought about, at least from the *ex ante* viewpoint of a reasonable military commander,[144] a definite military advantage.

It is against this classification of various groups of objects as military or non-military objects, that one must now consider the issue of proportionality in a strict sense, i.e. the relationship between the military advantage anticipated and the ensuing civilian damages.

c. Weighing Military Advantages and Civilian Damages

An attack upon a military target is to be considered illegal under applicable norms of international humanitarian law, if, upon weighing the anticipated civilian damages, the attack is to be regarded as excessive in relation to the anticipated military advantage. This leads, however, as is indeed acknowledged in the authoritative ICRC Commentary on article 51 of the First Additional Protocol, to significant value judg-

---

143 Cf. for a similar proposition already Tomuschat, see note 2, 187.

144 See note 142, para. 37, 50; cf. Henckaerts/ Doswald-Beck, see note 119, 36 et seq.

ments.[145] More specifically this raises the problem to evaluate a given anticipated military advantage as compared to ensuing collateral damage to either civilians or civilian objects or both.

One has to bear in mind, be it only with a heavy heart, that even causing the death of civilians as collateral damage as the result of an attack against a legitimate military object does not render the attack *per se* illegal under current rules of international humanitarian law.[146] It was the office of the prosecutor of the ICTY that took the position in that regard, that there exists a grey zone in which one may not yet determine that a violation of the principle of proportionality has indeed occurred.[147] In the Kupreskic case, a trial chamber of the ICTY took the position that a multitude of such "grey zone" cases could lead to the assumption, that the overall attacks under consideration could then, when taken as a whole, violate the principle of proportionality, as applicable under customary international law.[148] It specifically stated that,

> "(…) in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardize excessively the lives and assets of civilians, contrary to the demands of humanity."[149]

Understood this way, the application of the principle of proportionality could have the somewhat surprising effect that single attacks, each of which when taken individually, would be in line with international law, would then, when considered as a whole, suddenly, constitute an

---

145 Sandoz/ Swiniarski/ Zimmermann, see note 138, para 1979.

146 Ibid., para. 1948.

147 ICTY, NATO Final Report, see note 141. The report stated, "It is suggested that the determination of relative values must be that of the 'reasonable military commander'. Although there will be room for argument in close cases, there will be many cases where reasonable military commanders will agree that the injury to non-combatants or the damage to civilian objects was clearly disproportionate to the military advantage gained (…)". Cf. also the judgment of the ICTY in the Kupreskic case, see note 118, para. 254.

148 See M. Bothe/ K.J. Partsch/ W.A. Solf (eds), *New Rules for Victims of Armed Conflicts*, 1982, 677-678.

149 Kupreskic case, see note 118, para. 526.

overall violation of international law.[150] One should therefore rather understand the judgment in the sense, that one has to take into account, when deciding upon the issue of proportionality, the general context of multiple attacks and the military advantages gained there from and weigh them with the civilian collateral damage caused by the whole set of military attacks.[151]

In order to now decide upon the proportionality of the Israeli attacks during the "Second Lebanon War" in light of these considerations, however, one would have to undertake an intensive verification of the relevant facts on the ground as they existed at the time of the individual attacks. At first, one would have to verify to what extent, how often and under what circumstances Hezbollah fighters were seeking shelter in civilian buildings, whether they undertook attacks from such buildings or coordinated such attacks from there, and if so, to what extent civilian infrastructure was, as had been argued and continues to be argued by Israel,[152] used for military purposes. On the other hand, one would also have to verify to what extent the Israeli armed forces were solely taking such military actions by Hezbollah as a possible pretext to destroy whole villages or quarters or infrastructural facilities.

---

150 For a critical view on this judgment cf. also the Final Report to the Office of the prosecutor of the ICTY, see note 141, para. 52,"This formulation in *Kupreskic* can be regarded as a progressive statement of the applicable law with regard to the obligation to protect civilians. Its practical import, however, is somewhat ambiguous and its application far from clear. It is the committee's view that where individual (and legitimate) attacks on military objectives are concerned, the mere *cumulation* of such instances, all of which are deemed to have been lawful, cannot *ipso facto* be said to amount to a crime."

151 Ibid., para. 52, "The committee understands the above formulation, instead, to refer to an *overall* assessment of the totality of civilian victims as against the goals of the military campaign." (emphasis in the original).

152 Israel Ministry of Foreign Affaires, Responding to Hezbollah attacks from Lebanon: Issues of proportionality of 25 July 2006, available at: <http://mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Responding+to+Hezbollah+attacks+from+Lebanon-+Issues+of+proportionality+July+2006.htm> (cf. Report of the Commission of Inquiry, see note 7; Israel Ministry of Foreign Affairs, Israel's War with Hezbollah – Preserving Humanitarian Principles While Combating Terrorism, Diplomatic Notes No. 1 of April 2007, section II, available at: <http://mfa.gov.il/NR/rdonlyres/74D04C9D-FA73-4A54-8CBA-DBCB1152C82E/0/DiplomaticNotes01.pdf>.

The Commission of Inquiry set up by the Human Rights Council, consisting of a Brazilian diplomat, a Greek professor of international law and member of the Fact Finding Commission under article 90 of the First Additional Protocol,[153] as well as a Tanzanian judge,[154] in its report reached the conclusion that Israeli troops had committed significant violations of the principle of proportionality.[155] In particular, the Commission of Inquiry took note of attacks which had taken place not in southern Lebanon, but rather in Lebanon's northern part and, in particular, in the Beirut area. In this regard one must, however, consider that Israel did not cooperate with the Commission of Inquiry, which quite obviously led to the consequence that at least to a certain extent, relevant information was not available. The background of this non-cooperation by Israel was, *inter alia*, the already mentioned fact[156] that the Human Rights Council in its Resolution of 11 August 2006[157] had deliberately limited the mission of the Commission of Inquiry to solely consider alleged violations of international humanitarian law by Israel in Lebanon, and had thereby specifically precluded the Commission of Inquiry from looking into and investigating possible violations of international humanitarian law by Hezbollah.

Moreover, the Human Rights Council had already *ex ante* itself determined that Israel had committed serious violations of international humanitarian law. This in turn had led to the fact that, with the sole exception of Switzerland which abstained, all states members of the Western European and Other Countries group[158] represented in the Human Rights Council, as well as all Eastern European states, with the sole ex-

---

153 As to the mandate and function of the Fact-Finding Commission under article 90 of the First Additional protocol cf. A. Mokhtar, "To be or not to be: The International Humanitarian Factfinding Commission", *Italian Yearbook of International Law* 12 (2002), 69 et seq.

154 The members were João Clemente Baena Soares (Brazil), Stelios Perrakis (Greece), as well as Mohamed Chande Othman (Tanzania).

155 Cf. in particular paras 319–322 of the report, see note 7.

156 See note 8.

157 2nd Special Session of the Human Rights Council, Geneva, 11 August 2006, see note 7.

158 As to the composition of the various geographic groups within the UN system cf. S. v. Schorlemer, "Blocs and Groups of States", in: R. Wolfrum (ed.), *United Nations: Law, Policies and Practice,* Vol. I, 1995, 69 et seq., (71).

ception of Azerbaijan and the Russian Federation,[159] had voted against the setting-up of the Commission of Inquiry as such.

The obvious problem to determine possible violations of the principle of proportionality becomes clear when considering the following specific example.

In paras 111 and 112 of its report,[160] the Commission of Inquiry describes repeated attacks by Israeli forces against a small southern Lebanese town located only a few hundred meters north of the Israeli border. This town had been the scene of intensive combats ever since the beginning of the conflict. Frequently, missiles had been fired into Northern Israeli cities from this location.[161] Despite repeated attempts by Israeli forces to conquer the town, Hezbollah fighters stationed in the village were successful in preventing Israeli troops from gaining control over the village. Apart from approximately one hundred inhabitants, all of the 12,000 inhabitants of the town had left their homes due to Israeli warnings.[162] The Israeli armed forces had initially attempted to destroy the houses with bulldozers, and only after they had been unsuccessful in trying to do so, started shelling the town with artillery and the Israeli air force started flying air raids before each new attack.[163] Due to these shelling and bombardments more than 800 houses were completely and 400 houses were partially demolished.

Without even considering the number of Hezbollah fighters or the duration of the fighting within the town, the report of the Commission of Inquiry reached the somewhat blunt result that the attack was to be considered not to be proportionate and did thus constitute a violation of international humanitarian law. It is the view of this author that, in order to determine the proportionality or non-proportionality of the attack, one would have needed to gain access to much more specific information, including, but not limited to, the following issues, namely to

---

159 At the relevant time the following Eastern European states, apart from Azerbaijan and the Russian Federation, were represented in the Human Rights Council: Czech Republic, Poland, Romania and Ukraine, cf. <http://www.ohchr.org/english/bodies/hrcouncil/groups.htm>.

160 See note 7.

161 As to the (alleged) number of missiles fired into Israel by Hezbollah on a daily basis cf. Israeli Ministry of Foreign Affairs, Israel's War with Hezbollah – Preserving Humanitarian Principles While Combating Terrorism, see note 9, Appendix A.

162 Cf. in particular para. 111 of the report, see note 7.

163 Cf. in particular para. 112 of the report, see note 7.

what extent civilian houses and buildings had really been used for military purposes, to what extent the launching of missiles had taken place from such civilian installations, and whether they had, as was claimed by Israel, been equipped with military bunkers.

Moreover, the Commission of Inquiry should have made an effort to determine to what extent it would have been possible from the *ex ante* view point of a reasonable military commander,[164] to conquer the town without significantly increased risks for his own troops without air support or far-reaching and extensive artillery shelling.

IV. Concluding Remarks

Concluding, one might say that it is quite probable that violations of the principle of proportionality by Israeli armed forces have occurred. On the other hand Hezbollah from the very beginning of the conflict, considering its deliberate missile attacks on Northern Israeli cities which did constitute civilian objects,[165] made no attempt to abide by applicable norms of *jus in bello*.[166] At the end of the day, one might be

---

164 See note 142, para. 37, 50; cf. Henckaerts/ Doswald-Beck, see note 119, 49 et seq.

165 See as to the parallel situation with regard to the attacks on Dubrovnik during the war in Yugoslavia the judgment of the ICTY in Prosecutor v. Pavle Strugar, IT-01-42-T, Judgment of 31 January 2005, para. 277 et seq., text to be found at: <http://www.un.org/icty/strugar/trialc1/judgement/index2.htm>.

166 It has to be noted, however, that any such Hezbollah attacks against civilians or civilian objects may not legitimize, under current rules of international humanitarian law, violations of international humanitarian law by Israel as constituting prohibited reprisals, cf. in that regard the overview in United Kingdom Ministry of Defence, *The Manual of the Law of Armed Conflict*, as well as the recent statement by the ICJ in the Bosnian Genocide case, see note 14, para. 328:
"The Court (…) takes account of the assertion that the Bosnian army may have provoked attacks on civilian areas by Bosnian Serb forces, but does not consider that this, even if true, can provide any justification for attacks on civilian areas." Cf. also S. Darcy, "What future for the doctrine of belligerent reprisals", *Yearbook of International Humanitarian Law* 5 (2002), 107 et seq. As to the jurisprudence of the ICTY see F. Kalshoven, "Reprisals and the protection of civilians – two recent decisions of the Yugoslavia Tribunal", in: L. Vohrah et al. (eds), *Man's Inhumanity to Man – Essays on International Law in Honour of Antonio Cassese*, 2003, 481 et seq.

therefore tempted to agree with the statement made by Knut Ipsen at the very beginning of the conflict, who had then stated:

> "While Israel violates international law, Hezbollah completely disregards it from the very beginning."[167]

Keeping this in mind one cannot but continue attempts to bring about increased respect for international humanitarian law in case future conflicts should arise.

---

167 Frankfurter Rundschau of 1 July 2006, 15.

The Acts of the Security Council: Meaning and Standards of Review

Alexander Orakhelashvili[*]

I. The General Framework of the Security Council's Interference with International Law
II. The Impact of Article 103 of the UN Charter
III. The Interpretation of Security Council Resolutions
  1. The Rules of Treaty Interpretation and their Applicability to Security Council Resolutions
  2. Interpretation Methods as Applied to Resolutions Related to Specific Fields of International Law
    a. *Jus ad bellum* – The Claims of Implicit or Subsequent Validation by the Security Council of the Unilateral Use of Force
    b. *Jus ad bellum* – Claims on the Impact of Security Council Resolutions on the Law of Self-Defence
    c. Anti-Terrorist Measures: Claimed Impact of Security Council Resolutions on Fundamental Human Rights
    d. Anti-Terrorist Measures: Security Council Resolution and Detention Contrary to Human Rights and Humanitarian Law Norms
    e. Measures of Counter-Proliferation: The Possible Impact of Security Council Resolutions on the Law of the Sea

---

[*] This contribution is a revised version of the presentation given at the ILA British Branch Annual Conference in Brighton (UK) on 20 April 2007. See also A. Orakhelashvili, "The Post-War Settlement in Iraq: The UN Security Council Resolution 1483 (2003) and General International Law", *Journal of Conflict and Security Law* 8 (2003), 307-314; id., "The Impact of Peremptory Norms on Interpretation and Application of the UN Security Council Resolutions", *EJIL* 16 (2005), 59 et seq.; id., *Peremptory Norms in International Law*, 2006, Chapters 12-14.

A. von Bogdandy and R. Wolfrum, (eds.),
Max Planck Yearbook of United Nations Law, Volume 11, 2007, p. 143-195.
© 2007 Koninklijke Brill N.V. Printed in The Netherlands.

IV. Standards of Review of Security Council Resolutions
1. The UN Charter Standards
2. *Jus Cogens*
a. The Relevance of *Jus Cogens*
b. Criticisms of the Use of *Jus Cogens* in Yusuf and Kadi
c. The Scope of *Jus Cogens*
d. Human Rights and Humanitarian Law Treaties
V. Remedies
1. Refusal to Carry Out an Illegal Resolution
2. Judicial Review
VI. Conclusion: Legitimacy Means Stability

I. The General Framework of the Security Council's Interference with International Law

The meaning and effect of the UN Security Council decisions can be approached from different perspectives. They can be examined from the perspective of interaction between law and power, "hegemonic international law",[1] or other related doctrines. But to understand the legal merits of this question, it must be approached from the perspective of understanding the ambit and effect of the relevant norms. This means, more specifically, the understanding of the scope of delegated powers of the Security Council, and the ways of discovering the content of the Council decisions through the application of interpretative methods.

The whole problem certainly has a political aspect. However, the interpretation of a treaty or other instrument is an inherently legal, not political, question. As the ICJ affirmed in the case concerning the Conditions of Admission of a State to Membership in the United Nations, the political elements involved in a case cannot deprive it of its legal significance when the purely legal issue of interpretation is involved.[2]

The criteria governing the clarification of meaning and standards of review of Security Council resolutions are important due to the expansion of the activities of the Security Council, especially its interference with the variety of norms and principles of international law, which in its turn constitutes the interference with expectations that international legal actors have in relation to these norms and principles. The need for

---

1 See J. Alvarez, *International Organizations as Law-Makers*, 2005, 211-217.

2 ICJ Reports 1947-48, 57 et seq.

legal certainty requires specifying both the standards of interpretation of Council resolutions, as well as the standards of their review.

The Security Council's interaction with international law can take place in two dimensions. The first dimension is represented by the number of Council resolutions in which the Council confirms its support for the validity and enforcement of the relevant international norms and instruments. There are numerous resolutions in which the Council subscribes to the principle of non-interference in internal affairs of states, respect of human rights and humanitarian law, the prohibition of the use of force, or the right to self-determination. The Council's practice can also be seen as developing certain aspects of international law,[3] and even contributing to the formation of customary norms by providing the elements of state practice or legal conviction that are essential in the process of custom-generation.[4]

The second dimension is represented by resolutions by which the Council either purports to impact, qualify or modify the existing legal position under international law, or is seen to do so, either in diplomatic or academic discourse. It is in this second field that the relevance of interpretation methods and standards of review is most pertinent and pressing.

The Security Council's interference with the established international legal positions involves the dimension of its awareness of the situation and relates to the need of informed decision-making, and also raises the issue of the limits of the Council's powers. The need of the Council's informed decision-making[5] is particularly demonstrated by its involvement with the matter of Kosovo. This matter has been on the Council's agenda since 1998 when S/RES/1160 (1998) of 31 March 1998 has been adopted condemning the activities of the Federal Forces of Yugoslavia against the Kosovo population, as well as the terrorist attacks by the "Kosovo Liberation Army." After the NATO troops undertook the bombardment of Yugoslavia without the approval of the Security Council, as would have been required by Arts 2 (4), 42 and 53 of the UN Charter, the Council adopted S/RES/1244 (1999) of 10 June

---

3 R. Higgins, *The Development of International Law by the Political Organs of the United Nations*, 1963.

4 On the International Court's treatment of the elements of customary law see North Sea Continental Shelf case, ICJ Reports 1969, 3 et seq. (4).

5 F. Kirgis, "Security Council Governance of Postconflict Societies: A Plea for Good Faith and Informed Decision Making, *AJIL* 95 (2001), 579 et seq.

1999 which relates to cease-fire as well as international military and civilian presence in Kosovo.

In 2007 the issue of the final status of Kosovo was brought before the Council, on the basis of the plan submitted by the UN Rapporteur Ahtisaari.[6] At this stage, with the Kosovo situation having been on the Council's agenda for nine years, the Council came to accept in April 2007 that it had no sufficient information on Kosovo and dispatched the delegation to Belgrade and Pristina to enquire into the process of implementation of Resolution 1244.[7] This followed the fact that several members of the Security Council disagreed with the Ahtisaari plan, considering, inter alia, that its adoption could trigger instability in other parts of the world.

Be that as it may, this precedent serves as a reminder, that in addressing a particular situation the Security Council may not always be properly informed of the situation and its interference in such situations can potentially worsen matters, being thus counter-productive to the Council's intentions.

Another issue is that of the limits of the Security Council powers. It has to be asked whether this organ 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 has been ongoing since the United Nations was first established. There is a school of thought which sees the Security Council as unlimited in its powers. As Reisman argues, the UN collective security mechanism was intended to operate according to the will and discretion of the permanent members of the Security Council.[8] According to this school of thought, the powers of the Security Council being based on political as much as legal factors, this organ can effectively legislate on the matter it addresses, despite any otherwise applicable international legal position.

This approach, however, fails to respond to the nature and origins of the Security Council powers. The ICJ gave a clear solution to 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

---

6 Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, Doc. S/2007/168 of 26 March 2007.

7 Report of the Security Council mission on the Kosovo issue, Doc. S/2007/256 of 4 May 2006.

8 M. Reisman, "Peacemaking", *Yale L. J.* 18 (1993), 415 et seq. (418).

which constitute limitations on its powers or criteria for its judgment.[9] As Judge Jennings further observed in the Lockerbie case,

> "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."[10]

Therefore, the key to understanding the powers of the Security Council lies in understanding their delegated nature. When the power of the Council in relation to international law is considered, it must be borne in mind that the task of the Security Council to maintain peace and security derived not from any abstract value, or some sort of *Grundnorm* regarding peace and security, but from the specific and individual legal norms that define the parameters of this process. Peace and security can and shall be maintained only in so far as the relevant legal norms provide for this. Therefore, the Security Council can undertake respective measures only within the limits that are imposed by the law that applies to its decisions, or as the ICJ emphasised, provide criteria of its judgment or constitute limitations on its activities. The entire process of maintenance of peace and security is a legal process and the depiction of dichotomy of peace versus law in this process is conceptually unsound.

The previous attitude towards United Nations activities that the Security Council was exempted from the operation of law coincided with the perception that then it was not envisaged that the United Nations would go too far in purporting to impact applicable international law. To illustrate, in its Advisory Opinion on the International Status of South West Africa, the ICJ addressed the question of observance of the League of Nations mandate in South West Africa.[11] The Court's conclusion was that the change of the status of the South West African territory was permissible only with the assent of the United Nations General Assembly. Thus, the principal point was the Court's opposition to the unilateral solution of this problem.

---

9 See Conditions of Admission of a State to Membership in the United Nations, ICJ Reports 1947-48, 57 et seq. (64).

10 ICJ Reports 1998, 9 et seq. (110).

11 International Status of South West Africa, ICJ Reports 1950, 128 et seq.

One may, however, suppose the General Assembly could have adopted a decision in which it would state that South Africa could take the South West African territory and own it just like any other part of its territory, whatever concerns thus may arise in terms of international law, be it matters of self-determination or individual rights. Obviously such decision seemed impossible at that time and little concern was shown for the likelihood of the United Nations action that could seriously endanger the compliance with international law. The later stages of the Council's practice, especially the post-cold war era, have demonstrated that such concerns are increasingly pressing now. The expansion of the Security Council activities in this period have caused the consolidation of the jurisprudential approach that the Security Council powers are subjected to law, just as this approach was already accepted in the cold war period.

The ICJ in the Namibia Advisory Opinion clearly affirmed that the Security Council powers are bound by the standards of the Charter.[12] The ICTY later has likewise pronounced that the Security Council is,

> "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)."[13]

The interference of the Security Council with international law means, as specified above, interference with the expectations of states that benefit from particular norms. The reactions, actual or potential, may thus vary, and the Council may end up getting itself in situations that do not require its involvement, because it may complicate the situation instead of resolving it and even violate the relevant international law. Therefore, the subsidiarity principle, recognised in several legal systems, should potentially find application within the UN system as well. This means that the Security Council shall not resort to its enforcement Chapter VII powers if the relevant situation can be dealt with without it. The possibility of a veto can always play a useful role in reminding the Council membership of the limits of appropriateness

---

12 Legal Consequences for States of the Continued Presence of South Africa in Namibia, ICJ Reports 1971, 16 et seq.

13 Tadić, Decision by Appeals Chamber (1995) IT-94-1-AR72, paras 28-29.

of the Council's interference in a particular situation. Otherwise, legal guidance is provided by legal standards that bind the Council.

II. The Impact of Article 103 of the UN Charter

Of direct importance in addressing the powers of the Security Council in relation to international law is Article 103 of the Charter which stipulates 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 Charter shall prevail."

The first and most obvious limit on the relevance of Article 103 is that the relevant Council resolution must be compatible with the Charter in the first place, before Article 103 could provide for its primacy. Article 103 cannot make a resolution which is contrary to the Charter to prevail over other rules of international law. As Wilfried Jenks observed, "Article 103 cannot be invoked as giving the United Nations an overriding authority which would be inconsistent with the provisions of the Charter itself." [14]

The classical vision of Article 103 has for decades been that its relevance consists in excusing Member States for their non-compliance with trade and economic agreements with states which are subjected to the mandatory sanctions imposed by the Security Council.[15] There are however doctrinal views, for instance that of Alvarez, according to which Article 103 makes the Council decisions prevail over both treaties and custom.[16] But according to the clear wording of Article 103, the

---

14 W. Jenks, "The Conflict of Law-Making Treaties", *BYIL* 30 (1951), 439 et seq.

15 L. Goodrich/ E. Hambro/ A. Simmons, *The Charter of the United Nations*, 1969, 615-616.

16 Alvarez argues this, referring in this regard to the ICJ's pronouncement in the Nicaragua case, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States), ICJ Reports 1986, 14 et seq., on the interrelated character of treaty and customary law, and seems to suggest on that basis that if the Security Council resolution prevails over the treaty obligations on human rights, it also prevails over their customary counterparts; J. Alvarez, "The Security Council's War on Terrorism: Problems and Policy Options", in: E. De Wet/ A. Nollkaemper (eds), *Review of the Secu-*

Charter is to prevail over international agreements, not over general international law.

Whatever the merits of the above argument, Article 103 could never override the operation of norms that have peremptory status.[17] As Judge Lauterpacht's Separate Opinion in the Bosnia case 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 decisions 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*."[18]

Likewise, the ILA Reports on Accountability of International Organisations state that although Article 103 establishes the primacy of the Charter obligations, the Member States cannot be required to breach peremptory norms of international law.[19]

In judicial practice this approach has been reaffirmed. The EU Court of First Instance in Yusuf and Kadi faced the submission that the legality of the institutional measures adopted pursuant to Security Council resolutions was guaranteed under Article 103 which makes the resolutions prevail over any conflicting norm of international law.[20] The Court, having decided the case on the basis of *jus cogens*, did not treat

---

rity Council by Member States, 2003, 119 et seq. (133). But Alvarez' argument is defective as it neglects the clear distinction between treaty and custom as expounded by the Court in Nicaragua when it expressly emphasised that when treaty and customary norms overlap in their content, they still maintain a separate existence, ICJ Reports 1986, 14 et seq. (94-95). Given that, it is more plausible that if the Council measure were to prevail over treaty obligations, it is unlikely to affect their customary counterparts.

17 See under section IV. 2.

18 Separate Opinion, ICJ Reports 1993, 407 et seq. (440).

19 M. Shaw/ K. Wellens, *Third ILA Report on Accountability of International Organisations*, 2003, 13; M. Shaw/ K. Wellens, *Final Report on Accountability of International Organisations*, 2004, 19.

20 Ahmed Ali Yusuf and Al Barakaat International Foundation, Case T-306/01, 21 September 2005, paras 200-225; Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities, Case T-315/01, 21 September 2005, paras 136-156. The same court reaffirmed this approach in Chafiq Ayadi v Council of the European Union, Case T-253/02, 12 July 2006; Faraj Hassan v Council of the European Union and Commission of the European Communities, Case T-49/04, 12 July 2006.

Article 103 as upsetting the outcome. As the relevant rights were part of *jus cogens*, Article 103 could not help the relevant Council resolutions to prevail over the relevant rights. Similarly, the judgment of the English Court of Appeal in Al-Jedda confirmed that in the field of *jus cogens* Article 103 had no prevailing force.[21] The issue – and the most contestable one – in this case was whether the relevant rights were part of *jus cogens*.

But even within the proper ambit of Article 103, it would only justify the primacy over other relevant norms if the relevant resolution itself intends to displace or qualify the otherwise applicable law. Whether this is the case ultimately depends on the clarification of the meaning of the resolution through the use of the methods of interpretation.

III. The Interpretation of Security Council Resolutions

1. The Rules of Treaty Interpretation and their Applicability to Security Council Resolutions

To clarify whether the relevant Security Council resolution impacts on international law, its intention to do so must be demonstrated. The assumption in jurisprudence, notably by international criminal tribunals, is that the Security Council shall not be taken as acting in disregard of international law, unless its clear intention to that is demonstrated in the expressly stated textual provisions.[22] Therefore, the ultimate source of finding the Council's intention on these issues is the text of the resolutions it adopts, just as with the interpretation of treaties.

The only authoritative provisions on interpretation are included in the 1969 Vienna Convention on the Law of Treaties. The Vienna Convention has consolidated, pursuant to the developments in jurisprudence, the distinction between the General Rule of Interpretation embodied in article 31[23] and the supplementary methods of interpretation

---

21 R (Al-Jedda) v the Secretary of State of Defence, Court of Appeal, [2006] EWCA Civ 327, 29 March 2006, *per* Brooke LJ, paras 63 & 75.

22 See to this effect, Tadić, see note 13, para. 296; Prosecutor v Akayesu, ICTR, Case No. ICTR-96-4-T, 2 September 1998, para. 466.

23 According to article 31,
"1. 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.

embodied under article 32.[24] As Sir Ian Sinclair writes, the distinction between the general rules of interpretation and the supplementary means of interpretation is intended "to ensure that supplementary means do not constitute an alternative, autonomous method for interpretation, divorced from the general rule."[25]

Even within the framework of the General Rule, the interpretative methods are further classified into those which guide the interpretative process (plain meaning, context, object and purpose), and those which "shall be taken into account" together with the context of the treaty (subsequent practice, general rules of international law). This must be understood as a further allocation of priorities. In addition, the Vienna Convention regime no longer allows considering the intention of states as an independent and free-standing factor. Intention must, instead, be ascertained from individual interpretative factors included in the Convention, such as the text, object and purpose or other factors.

The primacy of the text leads to the relevance of the principle of effectiveness. Fitzmaurice defines this principle by stating that,

---

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended."

24 According to article 32,
"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to Article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable."

25 I. Sinclair, *The Vienna Convention on the Law of Treaties*, 1984, 116.

> "treaties are to be interpreted with reference to their declared or apparent objects and purposes; and particular provisions are to be interpreted so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text."[26]

During the ILC codification work, Special Rapporteur Waldock proposed formulating the effectiveness rule as giving effect to the plain meaning and the object and purpose of the treaty. This followed from the recognition of the textual primacy in jurisprudence. The Commission accepted this approach, and reinforced it by placing the relevance of the object and purpose of the treaty just after the treaty's plain meaning.[27] At the final stage of codification, the Commission affirmed that the rule of effectiveness is reflected in the rule that a treaty shall be interpreted in accordance with its plain meaning and its object and purpose. The Commission further stated that "when a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted."[28] Given that the Commission adopted this approach even for the cases where the meaning of the text admits two different interpretations, it should not be difficult to understand how cogent the principle of effectiveness becomes when the meaning of the treaty text is clear and straightforward.

The relevance of the Vienna Convention is universally accepted as the general guide of treaty interpretation, extending to fields from trade and investment to human rights, from bilateral transactions to multilateral "law-making treaties." In the Libya-Chad Boundary Dispute, the ICJ affirmed that article 31 of the Vienna Convention reflects the rules of customary international law on treaty interpretation,[29] and reiterated this conclusion in LaGrand and Kasikili/ Sedudu.[30] Similarly, in Ligitan/ Sipadan, the Court noted that Indonesia was not a party to the 1969 Vienna Convention, and reaffirmed that article 31 thereof, with its

---

26 G. Fitzmaurice, *The Law and Procedure of the International Court*, 1986, 345.

27 ILCYB 1964, 60-61, 199, 201.

28 ILCYB 1966, 219.

29 Libya-Chad Boundary Dispute, ICJ Reports 1994, 6 et seq. (21).

30 LaGrand, ICJ Reports 2001, 466 et seq. (501, para. 99); Kasikili/Sedudu Island, ICJ Reports 1999, 1045 et seq. (1059, para. 18).

priority for textual and teleological interpretation, was part of customary international law.[31]

The similar approach prevails in arbitral practice. According to article 102 (2) of the NAFTA Agreement, it shall be interpreted "in accordance with the applicable rules of international law." As the NAFTA Arbitral Tribunal pointed out in Pope & Talbot, "NAFTA is a treaty, and the principal international law rules on the interpretation of treaties are found in the Vienna Convention on the Law of Treaties."[32] The Tribunal reaffirmed that arts 31 and 32 of the Vienna Convention reflect the generally accepted rules of customary international law.[33] The relevance of the interpretation methods under the Vienna Convention was also affirmed in Metalclad[34] and Waste Management.[35] The Arbitral Tribunals in Thunderbird and SD Myers also maintained that it should construe the terms of Chapter 11 NAFTA in accordance with its plain meaning, context and object and purpose as required by the Vienna Convention.[36]

The same holds true for human rights treaties. In Golder, the European Court of Human Rights examined how the European Convention should be interpreted. The Court stated that it should be guided by the Vienna Convention, because "its Articles 31 to 33 enunciate in essence generally accepted principles of international law."[37] Therefore, even as the interpretation of treaties is undertaken in diverse treaty frameworks regulating different subject-matters, it is the same regime of the Vienna Convention that applies – the regime that refers to multiple interpretative factors that can explain diverse outcomes depending on the character of treaty relations.

---

31 Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/ Malaysia), ICJ Reports 2002, 625 et seq. (645, para. 37).

32 Pope & Talbot Inc and the Government of Canada (Interim Award, NAFTA Chapter 11 Arbitration), 26 June 2000, para. 65.

33 Pope & Talbot (Interim Award), see note 32, para. 66.

34 Metalclad Corporation and the United Mexican States (Award), 30 August 2000, para. 70.

35 Waste Management Inc and United Mexican States (Award), 2 June 2000, para. 9; see also S.D. Myers and Government of Canada (Partial Award, NAFTA Arbitration under the UNCITRAL Rules), 13 November 2000, paras 199-200.

36 International Thunderbird Gaming Corporation and the United Mexican States (Award), 26 January 2006, para. 91; SD Myers, see note 35, para. 202.

37 Golder v UK, 4451/70, Judgment of 21 February 1975, paras 29-30.

Even more significantly for our analysis, the WTO Appellate Body in US-Gambling addressed the interpretation of GATS specific commitments and their legal nature. This legal nature influences the applicability of interpretation rules,

> "In the context of the GATT 1994, the Appellate Body has observed that, although each Member's Schedule represents the tariff commitments that bind *one* Member, Schedules also represent a common agreement among *all* Members. Accordingly, the task of ascertaining the meaning of a concession in a Schedule, like the task of interpreting any other treaty text, involves identifying the *common intention* of Members, and is to be achieved by following the customary rules of interpretation of public international law, codified in Articles 31 and 32 of the Vienna Convention."[38]

The interpretative task consisted therefore in "the meaning of a concession in a GATS Schedule, like the task of interpreting any other treaty text, involves identifying the *common intention* of Members." The Appellate Body considered that,

> "the meaning of the United States' GATS Schedule must be determined according to the rules codified in Article 31 and, to the extent appropriate, Article 32 of the Vienna Convention."[39]

The Appellate Body thus used the relevant Vienna Convention provisions throughout its interpretative exercise,[40] which confirms that the rules applying to treaties and acts possessing a allegedly unilateral nature, are, in principle, similar.

This confirms the thesis that there is simply no alternative and authoritative set of interpretation rules. In the Fisheries Jurisdiction case (Spain/ Canada) the ICJ stated that the Optional Clause declarations of the acceptance of the court's jurisdiction are *sui generis* instruments. However, the actual process of interpretation in this case was conducted in the same way as the faithful application of the 1969 Vienna Convention would require. The Court relied on the textual meaning of

---

38 United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, AB-2005-1, Report of the Appellate Body, Doc. WT/DS285, AB/R, 7 April 2005, para. 159 (emphasis in original).

39 Ibid., para. 160 (emphasis in original).

40 Ibid., paras 161-213.

the Canadian declaration as the crucial factor in the ascertainment of its meaning.[41]

If this approach is applicable to Security Council resolutions, the implication is that the text and plain meaning of the relevant resolution must be taken as the basis for determining what has been agreed upon. Security Council resolutions are, to an important extent, agreements between states being members of the Council. It follows that the text of the relevant resolution has primacy over what is being said during the deliberations, or after the adoption of the resolution. After all, it is the text that embodies the agreement and joint attitude of the Council's membership – all other statements express the view of individual Member States only. If the view of the Member State expressed individually at whichever stage differs from the view it voted for in the resolution, then the view expressed in the resolution prevails in relation to all relevant states.

Obviously, there are situations where there are no direct contradictions between what the text of a Security Council resolution says and how the Member State interprets it. These are cases where the relevant members may claim that the relevant resolution provides for *more* or *less* than what it actually says, among others because the resolution does not say anything about that *more* or *less*, and it does not expressly contradict the assumption that that *more* or *less* is permissible and allowed.

However, if there is to be an impact on the state of applicable international law, or if the legal change is to be initiated, it is critically necessary to know what the precise intention of the Council is. In the law of treaties, the respect for the written word as the dominant interpretative principle is the pre-requisite for legal stability and predictability. If these factors are to be present in the decision-making of the Security Council and not be replaced by mutual distrust and legal chaos, the textual approach must be adhered to in interpreting the resolutions of the Council. It must, again, be borne in mind that the Vienna Convention rules on interpretation are the only set of rules on this subject. There is no other set of rules applicable to interpretation of other instruments,

---

41 Fisheries Jurisdiction (Spain v Canada), ICJ Reports 1998, 432 et seq., see especially paras 61 to 80 of this judgment. For more details see A. Orakhelashvili, "Interpretation of Jurisdictional Instruments in International Dispute Settlement", in: *The Law and Practice of International Courts and Tribunals*, Vol. 6 (1), 2007, 159 et seq.; id., "The Concept of International Judicial Jurisdiction: A Reappraisal", in: *The Law and Practice of International Courts and Tribunals*, Vol. 3, Fall issue, 2003, 501 et seq.

such as unilateral acts, or decisions of international organisations. No set of rules of interpretation formulated by academics, legal advisers or diplomats can have the same authority as the codified set of authoritative rules.

Consequently, the outcome is that whether or not the Vienna Convention formally applies to Security Council resolutions, or whether such application takes place by analogy, the textual principle is still the dominant principle in interpreting these resolutions. Although there are attempts to discredit textualism in a variety of contexts,[42] it remains the principal method of interpretation.

Presumably the resolutions of the Security Council are not identical, though they are similar, to treaties. But it is not enough to say that Security Council resolutions are different to treaties; it is also necessary to emphasise in which way they are different, and what factors cause such difference. On their face, and in terms of the process of their adoption, resolutions, just as treaties, express the agreement between states being members of the Security Council and embody their intention expressed to the attention of all.

Therefore, as far as the process of identification of the original content of a Security Council resolution is concerned, the difference between treaties and Security Council resolutions is not the most crucial question. The identification of the meaning following from the clearly written text can be done with Security Council resolutions in the same way as with treaties.

Consequently, even as the Vienna Convention does not formally apply to Security Council resolutions, its principles of interpretation embody more than those pertinent in the case of the agreements covered by the scope of the Vienna Convention. In particular, given the essence of Security Council resolutions as agreements expressed in the written word on which reliance can be placed, the distinction drawn between the general rule of interpretation and secondary methods of interpretation becomes particularly important. As with the treaties, the general rule of interpretation putting emphasis on the ordinary meaning of the written word is the inevitable precondition for ensuring legal certainty in the process of adoption and implementation of Security Council resolutions.

---

42 See T. Franck, *Recourse to Force*, 2001, and the review on it, *ICLQ* 52 (2003), 827-829.

The relevance of the Vienna Convention principles of interpretation in the case of Security Council resolutions is also explained by the fact that the states being members of the Security Council would not be willing to have held as having consented to something not overlapping with, or going beyond, the written text to which they have given their agreement. The tendency of inferring from the Council resolutions more than they say at face value can operate as a destabilising factor that will hamper the process of achieving the consensus among the members. This can be seen from the fact that, in the aftermath of the repeated tendency to construe from Security Council resolutions more than they mean, the Council resolutions include the safeguard clauses, i.e. additional paragraphs which state that for the adoption of additional Chapter VII measures additional decisions will be required. This has been the case with S/RES/1696 (2006) of 31 July 2006 and S/RES/1737 (2006) of 27 December 2006 adopted in relation to the claims that Iran is enriching nuclear fuel with a view to producing nuclear weapons.

The real difference of Security Council resolutions to treaties relates to its institutional background. Resolutions are adopted within the legal framework that puts constraints on their permissible content and hence their permissible meaning. If these constraints are not respected, the issue of validity of the relevant resolution could arise.[43] These limits on the Security Council powers can in certain cases justify the possible resort to preparatory work and context of resolutions. In some cases the text of the resolution could be unclear to such extent that the choice between its different meanings can be determinative of whether the relevant resolution will deviate from the otherwise applicable international law. To illustrate, S/RES/1483 (2003) of 22 May 2003, adopted in the aftermath of the invasion of Iraq in 2003, and addressing, among other things, the issue of disposal of Iraqi oil, refers to "a properly constituted, internationally recognised, representative government of Iraq."

There is no generally accepted definition of what "a properly constituted, internationally recognised, representative government" means. It is not literally the same as an elected government. Thus, theoretically it is possible that the literal reading could result in Resolution 1483 being used to affirm and mandate the exploring and exploiting of the natural resources of Iraq without the consent of the government representative of the Iraqi people – that is without the respective expression of will by the people of Iraq.

---

43 See for details Orakhelashvili, "Peremptory Norms", see above * note, Chapter 14; see further under section V.

Consequently, if the principle of self-determination and its corollary – the permanent sovereignty over natural resources – are considered, the textual reading is no longer satisfactory. The principle of self-determination is part of the Charter purposes and principles and the Council resolutions could not possibly be taken as overriding it.

Therefore, the context and preparatory work can be looked at to see what "a properly constituted, internationally recognised, representative government" means. This demonstrates that S/RES/1483 does not actually authorise any deal regarding natural resources without the consent of the Iraqi people, because the preparatory work contains plenty of references both to self-determination and the permanent sovereignty over the natural resources.[44]

It must be emphasised that the relevance of preparatory work in this case is dictated not because preparatory work or the attitudes of individual Member States have any inherent relevance, or because they are more important than the text. These factors are relevant for one simple reason: because one of the possible constructions of the textual meaning of the relevant paragraph may lead to a meaning which the Security Council is not allowed to attach to its decisions. Therefore, this process of recourse to factors other than the text of the resolution does not question the validity of Vienna Convention principles, nor their relevance for Security Council resolutions by analogy. What this process does is to emphasise the essence of the Council resolution as the secondary legal instrument – which is not the same as the treaty, that can, subject to public order constraints, have any meaning that parties adduce to it. Apart from these considerations, the text of the relevant resolution must be taken as the basis for ascertaining the Security Council's intention.

In interpreting Security Council resolutions, presumptions directing the interpreter in certain ways have no direct value and authority in in-

---

[44] This point was the most acute in deliberations, and the need to safeguard the permanent sovereignty of Iraq over its natural resources has been explicitly emphasised by representatives of the United Kingdom, Spain, Mexico, the Russian Federation, Guinea, Chile, Angola, and Pakistan, Doc. S/PV.4761, 5-15. The Representatives emphasised that Iraqi people are the owners of their oil resources, and some of them even linked this issue with the right of peoples to self-determination (Guinea, the Russian Federation, Spain), Doc. S/PV.4761, at 6-9. The representative of Mexico was more specific in saying that the resolution 1483 "does not authorise the establishment of long-term commitments that would alienate the sovereignty of the Iraqi people over its petroleum resources." Doc. S/PV.4761, 7.

ternational law. Resolutions arguably combine in themselves the elements of an agreement between states and the elements of "statutory" or regulatory administrative acts. But, as the international norms on interpretation are not related to the requisite standards of national legal systems, these considerations cannot be predominant.

There are, as Frowein elaborates, various ways in which this issue can be approached. While Frowein rejects the relevance of restrictive interpretation in the case of treaties, he considers that in the case of resolutions that include coercive measures against states which is the most severe encroachment upon the sovereignty, the interpretation favourable to the sovereignty is fully justified.[45] But it seems that there could not be legitimate justification for construing restrictively what the Security Council has expressly enacted in the exercise of its mandate to maintain international peace and security under the Charter. Restrictive interpretation of resolutions may in some circumstances obstruct the operation of the collective security mechanism.

As Wood suggests, the judicial authority on the interpretation of Security Council resolutions in the Namibia Advisory Opinion refers to the ascertainment of a binding character of a resolution as opposed to ascertainment of its content.[46] At the same time, the ascertainment of whether the resolution is intended to be binding clarifies the meaning of the resolution, and is thus interpretation, in the same way as any other interpretative exercise. The Namibia case criteria of reference to the resolution's language (plain meaning), context and preparatory work[47] are quite similar to the principles adopted for interpretation of other categories of acts.

The ICTY dealt with the interpretation of Security Council resolutions in respect of its statute as part of S/RES/827 (1993) of 25 May 1993. The Appeals Chamber stated in Tadić that the statute shall be construed literally and logically.[48] For a better understanding of the scope and meaning of the provisions, the Appeals Chamber considered their object and purpose, which in that case was identified as the need

---

45 J.A. Frowein, "Unilateral Interpretation of Security Council Resolutions – A Threat to Collective Security?", in: V. Götz/ P. Selmer/ R. Wolfrum (eds), *Liber Amicorum Günther Jaenicke – Zum 85. Geburtstag*, 1999, 97 et seq. (112).

46 M.C. Wood, "The Interpretation of Security Council Resolutions", in: J.A. Frowein/ R. Wolfrum (eds), *MaxPlanck UNYB 2* (1998), 73 et seq. (75).

47 ICJ Reports 1971, 16 et seq. (53).

48 Tadić, see note 13, paras 83, 87.

to enable the Tribunal to prosecute war crimes both in international and internal conflicts,[49] and this outcome was reaffirmed in Seselj.[50] The preparatory work as represented by the Secretary-General's report on the establishment of the Tribunal was also used in Tadić.[51] Judge Abi-Saab in Tadić also upheld the Tribunal's approach, and observed that the provisions of the statute must be interpreted in a way which preserves their autonomous field of application, that is in accordance with the *effet utile* principle.[52] Therefore, it seems that the above-expressed concerns can be accommodated by the use of the standard principle of interpretation of plain and ordinary meaning of terms, which means that nothing that is expressed can be disregarded and nothing that is not expressed can be implied, unless directly following from an express provision.

2. Interpretation Methods as Applied to Resolutions Related to Specific Fields of International Law

a. *Jus ad bellum* – The Claims of Implicit or Subsequent Validation by the Security Council of the Unilateral Use of Force

The need of the interpretation of Security Council resolutions in accordance with their text becomes clear given the attempts to interpret the relevant resolution as impacting the legal position under *jus ad bellum*, in particular to imply the authorisation or approval of the use of force where nothing similar has been expressed in the resolution. Most notably, this took place in relation to the NATO air campaign against the Federal Republic of Yugoslavia and the war against Iraq in 2003.

The NATO air campaign which had not been authorised by the Security Council nor otherwise justified under the UN Charter, has ended with the adoption of the S/RES/1244 (1999) of 10 June 1999, whereby the Council approved the international security presence in Kosovo. This has been interpreted by some as the retrospective approval of the armed attack on Yugoslavia, although nothing in the text of the resolution confirms this and a resolution approving the war

---

49 Ibid., paras 71, 77.

50 Seselj, IT-03-67-AR72.1, para. 12.

51 Tadić, see note 13, para. 82.

52 Ibid. Separate Opinion, Section IV.

against the FRY would not have been supported by the required majority in the Council.

The authorisation of the use of force by the Council cannot be presumed unless the Council's explicit intention is expressed. This approach is required by the very rationale of the Charter mechanism of collective security. The authorisation of force presupposes a double determination under Arts 39 and 42 of the Charter, namely that there is a threat to, or breach of peace and that the forcible measures are required for the maintenance or restoration of peace and security. The Council cannot be presumed to have passed such a two-stage judgment unless there is a clear evidence of the opposite. All the Council did by adopting resolution 1244 was to address, in prospective terms, the post-conflict situation in Kosovo and approve the international military and civil presence.

The institutional justification of the war against Iraq has been sought in the two Security Council resolutions, S/RES/678 (1990) of 29 November 1990 and S/RES/1441 (2002) of 8 November 2002. Resolution 678 was adopted after the Iraqi invasion of Kuwait in 1990 and provided for the authorisation of the Member States cooperating with the government of Kuwait to use "all necessary means" to ensure the Iraqi withdrawal and the restoration of peace and security in the area. The ensuing campaign against Iraq ended with the liberation of Kuwait and the adoption of S/RES/687 (1991) of 3 April 1991 which laid down the parameters of the settlement in terms of compensation, border demarcation and arms inspections.

In 2003, the US invoked Resolution 678 as one of the bases that justified its invasion of Iraq. This was based on the construction of Resolution 678 as authorising repeated uses of force against Iraq, instead of being restricted in its effect to the situation related to the war in 1990-1991.[53] However, nothing in resolution 678 shows that it was intended as an indefinite, repeatedly invocable authorisation. As Lowe observes, it cannot be argued,

> "that Resolution 678 gave each one of the States in the 1991 coalition, acting either alone or jointly with some or all of the others, the right to take any action, anytime, anywhere, that it considers neces-

---

53 J. Yoo, "International Law and the War in Iraq", *AJIL* 97 (2003), 563 et seq. (569-571); R. Wedgwood, "The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense", *AJIL* 97 (2003), 576 et seq. (578-582).

> sary or desirable in pursuit of the aim of restoring peace and security in the area."[54]

The reference to resolution 1441 was intended to demonstrate that the Security Council had authorised the use of force against Iraq by threatening it with "serious consequences" for the failure to cooperate with the UN inspectors to demonstrate that it did not possess weapons of mass destruction. The reference to "serious consequences" was interpreted as the reference to the authorisation of the use of force.[55] But "serious consequences" can be a much broader notion, not necessarily including the use of force. It is the collective will of the Security Council that matters and the proceedings of the adoption of resolution 1441 do not demonstrate any collective support for the authorisation of the use of force. As Corten observes, if the Security Council had wished to authorise the use of force, it could have done so expressly.[56] As Lowe further suggests,

> "It is simply unacceptable that a step as serious and important as a massive military attack upon a State should be launched on the basis of a legal argument dependent upon dubious inferences drawn from the silences in Resolution 1441 and the muffled echoes of earlier resolutions, unsupported by any contemporary authorisation to use force."[57]

In general, the arguments of implicit previous or subsequent approval of the use of force in the institutional context are the arguments of desperation, raised where no other justification of the relevant use of force can be found. These arguments also undermine the factor of reliability in international dealings, because they force states not to consent to any document, whether a treaty or a Security Council resolution, which does not expressly exclude the outcome they are unwilling to see happening. This can make reaching agreement on many issues impossible because states would be constantly afraid of having their word interpreted as consent to something to which they have never consented. It therefore seems that the strict standards of textual interpretation that

---

54 V. Lowe, "The Iraq Crisis: What Now?", *ICLQ* 52 (2003), 859 et seq. (866).

55 J. Stromseth, "Law and Force After Iraq: A Transitional Moment", *AJIL* 97 (2003), 628 et seq. (630-631).

56 O. Corten, "Opération *Iraqi Freedom*: Peut-on admettre l'argument de l' authorisation implicite du Conseil de Securité?", *RBDI* 36 (2003), 205 et seq. (213).

57 Lowe, see note 54, 866.

take the written word for what it literally means and exclude what could have been said but was never said is the only option to promote the atmosphere in which states would be ready to give their agreement to certain deals, and thus promote international cooperation, without being concerned of their words being twisted afterwards.

That such concerns have become real after the discourse as to the meaning of resolutions 1244, 678 and 1441 was clear in the process of adoption of S/RES/1696 (2006) of 31 July 2006 and 1737 (2006) of 27 December 2006, demanding the termination of Iran's uranium enrichment programme. In the process of adoption, some members of the council supported the resolution that would provide for sanctions against Iran should it refuse to comply. The propensity among some members of the council to read implied authorisations of enforcement measures in resolutions which do not even mention them, led to the insistence of other members to include, *ex abundanti cautela*, the specific provisions in these resolutions stating that a separate decision would need to be taken on any enforcement measures.

b. *Jus ad bellum* – Claims on the Impact of Security Council Resolutions on the Law of Self-Defence

Until recently, in the law of self-defence, the issue of the actor who conducts an armed attack triggering the right to self-defence under Article 51 of the UN Charter had not been raised and it had always been presumed that the source of an armed attack was the state.[58] The emphasis on the possibility of armed attacks by non-state actors entitling states to exercise their right to self-defence first emerged after the September 11 events when the UN Security Council referred in its resolutions S/RES/1368 (2001) of 12 September 2001 and 1373 (2001) of 28 September 2001 to the right to self-defence in the context of terrorist attacks. In the case of the Construction of the Wall in the Occupied Palestinian Territory, Israel claimed that the construction of the wall is consistent with its inherent right to self-defence under Article 51 of the

---

58 Significantly enough, leading treaties on the subject have not touched upon the issue of self-defence against armed attacks ensuing from non-state actors which are not in the final analysis attributable to the state, cf. I. Brownlie, *International Law and the Use of Force*, 1963, 216 et seq.; Y. Dinstein, *War, Aggression and Self-Defence*, 2001, 165 et seq.; C. Gray, *International Law and the Use of Force*, 2004, 108 et seq.

Charter, and Security Council resolutions 1368 and 1373 which recognise that right.[59] The Court responded that,

> "Article 51 of the Charter … recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.
>
> Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence."[60]

This approach was further reaffirmed in the Congo-Uganda case, where Uganda invoked the right to self-defence to justify the actions that were proved as attributable to Uganda. As a starting-point, the court referred to the document of the High Command of Uganda regarding the operation "Safe Haven" that resulted in the use of force on the Congolese territory.[61] "Safe Haven" justified the attacks against the Congo in terms of Uganda's security interests, but failed to refer to the armed attack perpetrated by the Congo against Uganda. Therefore, the Court refused to see this as the instance where the self-defence was claimed in the first place and at the relevant stage by Uganda.[62]

> In terms of the legal aspects of self-defence, the Court observed that,
>
> "while Uganda claimed to have acted in self-defence, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC. The "armed attacks" to which reference was made came rather from the ADF. The Court has found above that there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assem-

---

59 Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, ICJ Reports 2004, 136 et seq. (194, para. 138).

60 Advisory Opinion, ibid., (194, para. 139).

61 Case Concerning the Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), available at <http://www.icj-cij.org/docket/files/116/10455.pdf>, para. 109.

62 Ibid., para. 143.

> bly resolution 3314 (XXIX) on the definition of aggression, adopted on 14 December 1974. The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC."[63]

This mirrors the court's pronouncement regarding self-defence in the Advisory Opinion in the case of the Wall in the Occupied Palestinian Territory. It seems that the reasoning in the Wall case and in Congo-Uganda is similar.

The Wall case involved the claims of self-defence against the armed attack which not only allegedly emanated from non-state actors but also took place within the territory under control of the state that claimed to be the victim. In Congo-Uganda the relevant attacks were alleged to be perpetrated from abroad. Therefore, the Congo-Uganda case rejected the claim of self-defence solely on the basis that the relevant acts were not attributable to the state. This means that the court has reaffirmed and consolidated its previous finding in the Wall case that the attack must emanate from the state in order to trigger the right to self-defence. The legal position regarding the source of attack *ratione personae* that was affirmed in the Wall case in conjunction with other factors was affirmed in Congo-Uganda on its own merits. With this judgment, the legal position on the source of an armed attack seems to be consolidated.

The Court's line of reasoning on self-defence has met some opposition from individual judges in both cases. Judge Koojmans in the Wall case and in Congo-Uganda, as well as Judge Simma in Congo-Uganda argued against the requirement that self-defence can only be exercised against state attacks. Judge Simma argued in particular that this line of reasoning must be revised because of the recent developments in state practice accompanied by *opinio juris*, such as Security Council resolutions 1368 and 1373 related to terrorist threats.[64]

---

63 Ibid., para. 146.

64 Separate Opinion of Judge Koojmans, ibid., paras 26-31; Separate Opinion of Judge Simma, ibid., para. 11. Simma in the Oil Platforms case noted the general need for the court to reaffirm, on policy grounds and via *obiter dicta,* the "legal limits on the use of force at a moment when these limits find themselves under the greatest stress," Separate Opinion, paras 6 et seq., and in the Wall case voted for the Court's opinion. It is also noteworthy that Judges Higgins and Buergenthal who opposed in the Wall case the

The fact that the two Security Council resolutions have been adopted in relation to the terrorist attacks against the US and the use of force in Afghanistan is no evidence that they support the legal position that the source of an armed attack is not limited to states. Nothing in these resolutions states that non-state actors can be the source of armed attacks on their own. On closer look, it appears that the Council resolutions 1368 and 1373 have recognised the inherent right to self-defence in the context of anti-terrorist measures and also reaffirmed the responsibility of state and non-state actors for terrorist acts. This has been, however, an emphasis on two separate principles and the fact that they were mentioned together does not establish the conceptual or normative link between them. The reference to the inherent right to self-defence in accordance with the UN Charter and the simultaneous introduction of certain measures against individuals and groups engaged in terrorism falls short of linking these two factors in a way to make the one an implication of the other.

c. Anti-Terrorist Measures: Claimed Impact of Security Council Resolutions on Fundamental Human Rights

In Yusuf and Kadi the European Court of First Instance identified the intention of the Community institutions to give effect, by enacting the relevant community legislation such as the Common Position 2002/402, to Security Council resolutions 1267 (1999) of 15 October 1999, 1333 (2000) of 19 December 2000, and 1390 (2002) of 18 January 2002, to a number of measures related to the freezing of assets of individuals suspected of terrorist activities.[65] Therefore, in interpreting the relevant Community instruments, the Court of First Instance simultaneously interpreted the relevant resolutions of the Security Council. This is confirmed by the Court's observation that,

> "if the Court were to annul the contested regulation, as the applicant claims it should, although that regulation seems to be imposed by international law, on the ground that that act infringes his fundamental rights which are protected by the Community legal order, such annulment would indirectly mean that the resolutions of the

---

Court's reading of Article 51 of the UN Charter and the limitations on self-defence, have not opposed this outcome in the Congo-Uganda case.

65 Kadi, see note 20, paras 154-155; Yusuf, see note 20, paras 255-256.

> Security Council concerned themselves infringe those fundamental rights."[66]

In the context of the alleged breach of the right to property, the court addressed the issue of "the extent and severity of the freezing of the applicant's funds." Therefore, it fell,

> "to be assessed whether the freezing of funds provided for by the contested regulation, as amended by Regulation No. 561/2003, and, indirectly, by the resolutions of the Security Council put into effect by those regulations, infringes the applicant's fundamental rights."

Measured by the standard of the universal *jus cogens* standard of the right to property, this was not the case. The Regulation as adopted pursuant to S/RES/1452 (2002) of 20 December 2002, did not provide for the blanket measures for freezing assets and funds, but allowed for such freezing being declared inapplicable "to the funds necessary to cover basic expenses, including payments for foodstuffs, rent, medicines and medical treatment, taxes or public utility charges." Therefore, the express clauses in the contested legislation showed that the intention behind them was not to override the right to property in a blanket manner, thereby resulting in inhuman or degrading treatment. The deprivation of property was therefore not arbitrary, which meant that the relevant measures were in accordance with the scope of the right to property as guaranteed under article 17 (1) of the 1948 Universal Declaration of Human Rights.[67] Furthermore, the freezing of the assets was a "temporary precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof."[68] This means that the relevant Community legislation and consequently the Security Council resolutions did not in this case impact upon and override the relevant human right as part of international law. The textual interpreta-

---

66 Kadi, see note 20, para. 217; Yusuf, see note 20, para. 267.

67 Kadi, see note 20, paras 236-237, 239-241; Yusuf, see note 20, paras 290-292; these measures would furthermore be compatible with the right to peaceful enjoyment of possessions under article 1, Protocol 1 of the 1950 European Convention on Human Rights, which allows for the governmental control of the use of property in the public interest. This is further implied in the Court's observation that "it is appropriate to stress the importance of the campaign against international terrorism and the legitimacy of the protection of the United Nations against the actions of terrorist organisations," para. 245.

68 Kadi, see note 20, para. 248; Yusuf, see note 20, para. 299.

tion demonstrated that the Security Council has had no intention to act in conflict with international law.

In terms of the right to be heard in relation to the freezing of the assets, the Court observed that,

> "although the resolutions of the Security Council concerned and the subsequent regulations that put them into effect in the Community do not provide for any right of audience for individual persons, they set up a mechanism for the re-examination of individual cases, by providing that the persons concerned may address a request to the Sanctions Committee, through their national authorities, in order either to be removed from the list of persons affected by the sanctions or to obtain exemption from the freezing of funds."[69]

Consequently, "by adopting those Guidelines, the Security Council intended to take account, so far as possible, of the fundamental rights of the persons entered in the Sanctions Committee's list, and in particular their right to be heard."[70] The interpretation of the Council's resolutions did not reveal the intention to trump the applicable international law in this case either.

In relation to the right to access to a court, the Court emphasised that this right is generally subjected to some inherent limitations, and the implementation in the national legal order of Chapter VII decisions of the Security Council can justify such limitations. This was further reinforced by the significance of the fact that,

---

69 Kadi, see note 20, para. 262; Yusuf, see note 20, para. 309.

70 Kadi, see note 20, para. 265; Yusuf, see note 20, para. 312; furthermore, as the Court stated in para. 266 of its judgement in Kadi and para. 313 in Yusuf, "The importance attached by the Security Council to observance of those rights is, moreover, clearly apparent from its resolution 1526 (2004) of 30 January 2004 which is intended, on the one hand, to improve the implementation of the measures imposed by paragraph 4(b) of Resolution 1267 (1999), paragraph 8(c) of Resolution 1333 (2000), and paragraphs 1 and 2 of Resolution 1390 (2002) and, on the other, to strengthen the mandate of the Sanctions Committee. In accordance with paragraph 18 of Resolution 1526 (2004), the Security Council '[s]trongly encourages all States to inform, to the extent possible, individuals and entities included in the Committee's list of the measures imposed on them, and of the Committee's guidelines and resolution 1452 (2002)'. Paragraph 3 of Resolution 1526 (2004) states that those measures are to be further improved in 18 months, or sooner if necessary." The similar approach was further affirmed in Chafiq Ayadi, see note 20, para. 125.

> "far from providing for measures for an unlimited period of application, the resolutions successively adopted by the Security Council have always provided a mechanism for re-examining whether it is appropriate to maintain those measures after 12 or 18 months at most have elapsed."[71]

The Council did not intend to breach international law in this field either.

The reasoning of the Court of First Instance goes hand in hand with the approach of the European Court of Human Rights in Waite and Kennedy that the access to the Court under article 6 of the European Convention can be set aside in relation to international organisations if these organisations provide the mechanism within which the relevant individuals can argue their case and obtain remedies.[72] The Court of First Instance found no intention of the Security Council to override the relevant human rights: had this been the case, the Court would exercise its power of judicial review.

d. Anti-Terrorist Measures: Security Council Resolution and Detention Contrary to Human Rights and Humanitarian Law Norms

The scope and effect of the provisions of S/RES/1546 (2004) of 8 June 2004, adopted in anticipation of the transfer of the authority of the Coalition Provisional Authority (CPA) to the Iraqi interim government, has been discussed most sharply in the decisions of English courts in the Al-Jedda case, which deals with the power of the US-led Multinational Force to detain individuals suspected of the attempts to undermine stability or commit terrorist attacks. The issue before the Divisional Court was the legality of the power to detain and intern individuals under para. 10 of resolution 1546. The Divisional Court dealt with the situation where an individual detained in Iraq has complained about the illegality of his detention because it was not accompanied by the proper procedure to review the legality of the detention, as required under article 5 (4) of the European Convention on Human Rights. This provision requires that the review must be performed by a court, while article 78 of the IV. Geneva Convention requires that the review must be performed by the competent body set up by the detaining power, and the possibility of appeal must be provided. These requirements

---

71 Kadi, see note 20, para. 289; Yusuf, see note 20, para. 344.

72 See under section IV. 2. d.

were not observed. The detainees in this case were brought before a Divisional Internment Review Committee (DIRC), which is not a court. The Court held that,

> "Although the Commander and the panel [i.e. DIRC] do not have the qualities of independence and impartiality sufficient to meet the requirements of Article 6 ECHR, we do not think that complaint could properly be made of them in the context of Article 78."[73]

The reasoning of both courts accepts that the Security Council could override, and has overridden, the relevant rights of individuals under article 5 of the European Convention as well as article 78 of the IV. Geneva Convention.

The Divisional Court held that this power of detention and internment was conferred pursuant to article 78 of the IV. Geneva Convention, and the Resolution "provides a clear indication of the intention that the powers previously derived from Article 78 of Geneva IV were to be continued."[74] The Court's judgment did not address the question whether the detentions and internments in Iraq were accompanied by the procedure of appeal, as is required under article 78 of the IV. Geneva Convention. This provision confers power to the occupying states on the condition of providing legal venues to verify the propriety of arrests. The Court's failure to address this issue properly renders its judgment of doubtful value. The Court stated that,

> "the procedures applied to the claimant's detention do not strictly meet the requirements of Article 78, since the decision-maker was a single individual rather than an administrative board. On the other hand, the non-compliance is in our view more technical than substantial."

This "technical" non-compliance with the procedural requirements of article 78 did not have the automatic effect of rendering the detention unlawful.[75]

The Court of Appeal's approach is somewhat less straightforward, but it subscribes to the same outcome in relation to the interpretation

---

73 R (Al-Jedda) v the Secretary of State for Defence, Queens Bench Divisional Court, Case No. CO/3673/2005, Judgment of 12 August 2005, paras 128-140; a similar approach is upheld by the Court of Appeal in the same case, though on slightly different grounds, see above under note 21.

74 Al-Jedda (DC), see above, paras 87, 92.

75 Ibid., paras 126, 144.

of Security Council resolutions and their impact on relevant international law. The Court of Appeal proceeded from the assumption that,

> "at the level of international law Article 103 of the UN Charter had the effect that a state's obligations under a Security Council Chapter VII resolution prevailed over any obligation it might have under any other international agreement, such as the ICCPR or the ECHR, in so far as those obligations were in conflict. If and in so far as UNSCR 1546 (2004) obliged member states participating in the MNF to intern people in Iraq for imperative reasons of security in order to fulfil the mandate of the MNF, this obligation prevailed over the 'no loss of liberty without due court process' obligations of a human rights convention or covenant."[76]

Furthermore, the Court of Appeal used the Security Council's qualification of article 78 of the IV. Geneva Convention for further inferring from the Council's action the qualification imposed on the freedom from arbitrary detention under article 9 of the International Covenant on Civil and Political Rights (ICCPR) and article 5 of the European Convention.[77]

It remains to be seen whether in S/RES/1546 (2004) of 8 June 2004 the Security Council had actually intended such outcome as was approved by the two English courts. The purposes of the resolution include, as the preamble states, along the stabilisation of Iraq and combating terrorism, "the importance of the rule of law, national reconciliation, respect for human rights including the rights of women, fundamental freedoms" and "the commitment of all forces promoting the maintenance of security and stability in Iraq to act in accordance with international law, including obligations under international humanitarian law." Therefore, this resolution does not view the fight against terrorism as justification for infringing upon human rights or humanitarian norms.

In terms of specific action and measures, the Council,

> "Decide[d] that the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution expressing, inter alia, the Iraqi request for the continued presence of the multinational force and setting out its tasks, including by preventing and deterring terrorism, so that, inter alia, the

---

76 Al-Jedda (CA), para. 63, see note 21.

77 Al-Jedda (CA), para. 80, see note 21.

> United Nations can fulfil its role in assisting the Iraqi people as outlined in paragraph seven above and the Iraqi people can implement freely and without intimidation the timetable and programme for the political process and benefit from reconstruction and rehabilitation activities."

Broad as it is, the scope of this provision does not specifically refer to, nor inherently implies, the power of the Multinational Force to intern or detain individuals in violation of the applicable human rights and humanitarian law.

The matter presumably does not end here. The letter of the US Secretary of State, by reference to which Resolution 1546 is adopted and which forms part of it, emphasises the need for the Multinational Force to be able to intern individuals,

> "Under the agreed arrangement, the MNF stands ready to continue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure force protection. These include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq's political future through violence. This will include combat operations against members of these groups, internment where this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq's security."

However, the letter of the Secretary of State proceeds to state that,

> "the forces that make up the MNF are and will remain committed at all times to act consistently with their obligations under the law of armed conflict, including the Geneva Conventions."

Therefore, on its face Resolution 1546 does not divulge the intention to depart from the applicable international humanitarian law, whose relevance it expressly affirms, nor from human rights law because it does not contain any indication to that effect. The exchange of letters confirms that the Multinational Force has the power to intern, but at the same time they will be acting in conformity with the Geneva Conventions. Consequently, each and every act of internment must be in accordance with article 78 of the IV. Geneva Convention, and the procedures of review and appeal must be provided.

Therefore, the Court of Appeal decision to see this Resolution as justification, by reference to the primacy of Security Council decisions under Article 103 UN Charter, the deviation from the applicable international law justifying the protection of the individual, is not well-founded.

e. Measures of Counter-Proliferation: The Possible Impact of Security Council Resolutions on the Law of the Sea

The Security Council has, during the last few years, treated the matter of proliferation of weapons of mass destruction as matter that can and should be dealt within Chapter VII of the Charter. In this context, the Council has adopted resolutions dealing both with the general problem of proliferation and the conduct of individual states.

In S/RES/1540 (2004) of 28 April 2004, the Council introduced a number of measures to counter the proliferation of weapons of mass destruction. Most importantly for this analysis, in operative para. 10, the Council,

> "Further to counter that threat, *calls upon* all States, in accordance with their national legal authorities and legislation and consistent with international law, to take cooperative action to prevent illicit trafficking in nuclear, chemical or biological weapons, their means of delivery, and related materials."

The Council's intention to respect the applicable international law is clearly stated and the use of resolution 1540 for undertaking measures such as the stopping and searching of vessels on the high seas is out of question. One has to agree with Joyner's conclusion that the operative para. 10 of resolution 1540 does not bestow any additional authority upon states to enforce the non-proliferation regimes and does not exempt them from obligations otherwise incumbent on them. All it does is to invite states to cooperate in efforts of counter-proliferation in a manner consistent with the existing international law.[78]

A similar reasoning can apply to operative para. 8 (f) of S/RES/1718 (2006) of 14 October 2006 on North Korea, condemning a claimed nuclear test conducted by the country imposing sanctions on it,

> "In order to ensure compliance with the requirements of this paragraph, and thereby preventing illicit trafficking in nuclear, chemical or biological weapons, their means of delivery and related materials, all Member States are called upon to take, in accordance with their national authorities and legislation, and consistent with international law, cooperative action including through inspection of cargo to and from the DPRK, as necessary."

---

78 D. Joyner, "The Proliferation Security Initiative: Nonproliferation, Counterproliferation & International Law", *Yale L. J.* 30 (2005), 507 et seq. (540-541).

This clause is more specific than the relevant clauses of Resolution 1540 in that it directly refers to the inspection of cargoes. Nevertheless, all the Council does is to call upon states to take such measures which fall short of authorising states to undertake such measures. Therefore, the analysis of the text of Resolution 1718 does not discover the Council's intention to impact the applicable international law of the sea.

IV. Standards of Review of Security Council Resolutions

The standards against which the decisions of the Security Council can be reviewed are provided by the very same international law which binds the Council. These are, in the first place, the standards embodied in the UN Charter, and the standards under *jus cogens*, there being a significant overlap in the scope of the two.

1. The UN Charter Standards

The UN Charter standards include the prohibition of the use of force (Article 2 (4)), the right of peoples to self-determination and fundamental human rights (Arts 1 and 55). The Council has on occasions reaffirmed that it conceives its powers as limited by fundamental human rights and humanitarian law norms. For instance, in S/RES/1456 (2003) of 20 January 2003 the Council affirmed, in the context of counter-terrorist measures, that,

> "States must ensure that any measure 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."[79]

This broad statement expressing the Council's attitude in relation to the entire human rights law and humanitarian law is in accordance with seeing the Council bound by the entire human rights law, and furthermore with viewing that law as having peremptory status.[80] This furthermore constitutes the stated policy whereby the Security Council manifests its intention not to override fundamental human rights,

---

79 S/RES/1456, operative para. 6.

80 See under section IV. 2.

which are, in turn, relevant to the process of interpretation of Security Council resolutions.

The relevance of the UN purposes and principles as normative standards has been emphasised by the ICJ in the Tehran Hostages case, where the Court observed that,

> "Wrongfully to deprive human beings of their 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."[81]

The Court of Appeal in Al-Jedda notes this passage, but then proceeds to dismiss its relevance by contending that,

> "this very general comment on the lawlessness of the Iranian treatment of the US diplomatic and consular staff in 1979-80 does not afford any great assistance in the present case,"[82]

even though the two contexts were similar. If the purposes and principles of the United Nations in their human rights aspect are relevant for the legality of detention of the US diplomats in Iran, it is difficult to see how they are irrelevant for the detention of terrorist suspects in Iraq. Surely, if the UN purposes and principles can outlaw the action by the Member State, they can likewise preclude the legality of similar action undertaken under the alleged authorisation by one of the organs of the UN. The organisation is bound to act in compliance with its own purposes and principles if it expects such compliance from its members.

This follows not least from the principles enunciated in the ICJ's opinion in the Effect of Awards case. As the court pointed out, the establishment of the UN Administrative Tribunal, in order to deal with the employment claims of the UN personnel, was required by broader UN purposes to promote justice and individual rights.[83] This reasoning confirms that if an organisation aims at higher objectives of justice, it has to guarantee that the same standards are observed in the process of its own activities.

---

81 ICJ Reports 1980, 3 et seq. (42).

82 Al-Jedda (CA), para. 78, see note 21.

83 ICJ Reports 1954, 47 et seq. (57).

2. *Jus Cogens*

a. The Relevance of *Jus Cogens*

The basic essence of *jus cogens* is its non-derogability. Peremptory norms bind the Security Council as the organ which is based on a treaty instrument, as treaties cannot delegate to the institutions powers contrary to *jus cogens*, since this would trigger article 53 of the 1969 Vienna Convention. This has been affirmed on several occasions by national and international tribunals, in the reports of the Vienna Conference on the Law of Treaties, and the ILA Report on the Accountability of International Organisations.[84]

Another recent recognition that international institutional acts are bound by *jus cogens* is contained in the award of the NAFTA Arbitral Tribunal in Methanex v US. The Tribunal was dealing with the propriety and legality of the interpretation by the Free Trade Commission (FTC) of NAFTA Chapter 11 provisions regarding the standard of treatment of foreign investors, and observed that,

> "as a matter of international constitutional law a tribunal has an independent duty to apply imperative principles of law or *jus cogens* and not to give effect to parties' choices of law that are inconsistent with such principles. Yet even assuming that the USA errs in its argument for an approach to minimum standards that does not prohibit discrimination, this is not a situation in which there is a violation of a *jus cogens* rule. Critically, the FTC interpretation does not exclude non-discrimination from NAFTA Chapter 11, an initiative which would, arguably, violate a *jus cogens* and thus be void under Article 53 of the Vienna Convention on the Law of Treaties. All the FTC's interpretation of Article 1105 does, in this regard, is to confine claims based on alleged discrimination to Article 1102, which offers full play for a principle of non-discrimination."[85]

In Yusuf and Kadi, the Court of First Instance acknowledged that due to the nature of the powers of the Security Council, the *jus cogens*

---

84 A/CONF. 129/16/Add. 1 (Vol. 1), article 53. See also M. Shaw/ K. Wellens, *Third ILA Report on Accountability of International Organisations*, 2003, 11, affirming that if the members transfer to an international organisation the power to impose coercive economic measures, their obligation to comply with peremptory norms is not affected.

85 Methanex Corporation and the United States of America, Final Award on Jurisdiction and Merits, 9 August 2005, Part IV, para. 24.

standard is the yardstick against which the Council's resolutions can and shall be tested. As the Court emphasised, the European institutions are bound to implement Security Council resolutions in the EC legal system, and,

> "It is in principle by the sole criterion of the standard of universal protection of the fundamental rights of the human person falling within the ambit of *jus cogens* that the applicant's claims may appropriately be examined."[86]

This line of reasoning emphasises the independent, and original, relevance of *jus cogens*, which includes human rights and humanitarian law, as an aspect of the hierarchy of norms in the international legal system. In relation to judicial review of Security Council acts, *jus cogens* can achieve the result that other concepts and categories arguably cannot. The reason why *jus cogens* binds the Security Council and justifies the judicial review relates to its hierarchical superiority over the powers of the treaty-based organ. If *jus cogens* prevails over treaties, then it also sets limits to the validity of the acts adopted by treaty-based organs. The function of international tribunals is not to uphold invalid acts and the decision of the Court of First Instance confirms just this.

Presumably, to review Security Council decisions may be inappropriate for the EC courts as the UN Charter enjoys the hierarchically higher status and, as soon as this is the case, the EC legal system must follow. The key to judicial review is the normative standard that puts constraints on the validity of the acts adopted by the Security Council and is *also* the part of the law that imperatively binds the EC as the treaty-based institution. This is the distinguishing feature of *jus cogens* which is relevant in both fields and this makes it crucially relevant.

b. Criticisms of the Use of *Jus Cogens* in Yusuf and Kadi

The reference to *jus cogens* as the basis of judicial review has been criticised in academic writings on different grounds. First and foremost, it has been submitted that these cases could be decided on more straightforward or "orthodox" grounds. Parallel to this goes the doctrinal argument that as the EC/EU is not a member of the United Nations, it is not bound by the sanctions ordered by the Security Council in the same way as the Member States are. Therefore, so the argument goes, the Court of First Instance ought to have reviewed the Security Council

---

86 Kadi, see note 20, para. 235.

measures directly in terms of the primary EC law, that is the constituent treaties and fundamental rights enshrined in the European Convention on Human Rights.[87] Instead of the reference to *jus cogens*, the Community legislation could possibly have been annulled for lack of competence, and in any event, nothing in either international law or Community law prevented the Court of First Instance from assessing its compatibility with fundamental rights on the basis of the general principles of Community law.[88] It is also suggested that the use of the Community fundamental human rights standard could have carried with it the more stringent standard of judicial review of Security Council resolutions.[89]

This could well be an alternative argument to that which the Court of First Instance has articulated. However, this approach fails to consider the real nature of the relevant powers of European institutions and the inherent link between EC law and international law.[90] These criticisms of the court's reasoning also misunderstand the normative basis of the delegated powers of international organisations.

As can be seen from the Court's reasoning, the basis for the European institutions being bound by Security Council measures is the delegated nature of institutional power both with regard to the United Nations and European institutions. The latter are bound by the UN sanctions precisely because the Member States have accepted the prevailing legal force of those sanctions by virtue of Article 103 of the UN Charter and thus they cannot be considered as having delegated to European institutions the powers that would justify them acting in disregard of UN sanctions.

As the Court observed,

---

87 N. Lavranos, "UN Sanctions and Judicial Review", *Nord. J. Int'l L.* 76 (2007), 1 et seq. (10-14).

88 A. Garde, "Is it really for the European Community to implement Anti-Terrorism UN Security Council Resolutions?" *CLJ* 65 (2006), 281 et seq. (284); see also R. Higgins, "A Babel of Judicial Voices? Ruminations From the Bench, *ICLQ* 55 (2006), 791 et seq. (802-803).

89 R. Brown, "Kadi v Council of the European Union and Commission of the European Communities: Executive Power and Judicial Supervision at European Level", *European Human Rights Law Review* 11 (2006), 456 et seq. (463-464).

90 On this see, among others, A. Orakhelashvili, "The Idea of European International Law", *EJIL* 17 (2006), 315 et seq. (343-347).

> "Resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations are thus binding on all the Member States of the Community which must therefore, in that capacity, take all measures necessary to ensure that those resolutions are put into effect."[91]
>
> The Court emphasised that,
>
> "unlike its Member States, the Community as such is not directly bound by the Charter of the United Nations and that it is not therefore required, as an obligation of general public international law, to accept and carry out the decisions of the Security Council in accordance with Article 25 of that Charter." Nevertheless, the Court observed that "the Community must be considered to be bound by the obligations under the Charter of the United Nations in the same way as its Member States, by virtue of the Treaty establishing it."[92]

This reasoning confirms that the Court views this process as an implication of the delegated nature of the powers both of the United Nations organs and the European Union bodies. The starting-point in terms of the powers of both institutions is the delegation of powers by Member States on the basis of the relevant treaties. In other words, these powers derive from state will as opposed to some institutional *Grundnorm*. The European institutions have to bear in mind that their powers are delegated to them by the same states which have also delegated more high-ranking powers to the United Nations organs, especially the Security Council, and have expressly specified this. Thus, the reason why the European institutions could refuse to comply with Security Council resolutions could never be provided from within the legal framework of the European Union. Such reason could only be found in the limits governing the use of the powers delegated to the Security Council. Unless the relevant action falls outside the powers of the Security Council, the European institutions have to follow it, in order to avoid putting the Member States in breach of their higher-ranking obligations. Any other perspective would be based on viewing the powers of the European institutions as operating in isolation from

---

91 Kadi, see note 20, para. 189; Yusuf, see note 20. para. 239.

92 Kadi, see note 20, paras 192-193; Yusuf, see note 20, paras 242-243; further referring to the relevance of Article 48 para. 2 of the UN Charter, according to which the Security Council decisions "shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members."

the rest of international law and deriving from a *Grundnorm* that does not exist in reality.

Thus, *jus cogens* is the most suitable tool – in the context of the delegated nature of institutional powers – for conceiving the limits on how far the European Union institutions can go in implementing UN Security Council decisions. This concept which imposes limits on what can be delegated through the treaty also provides the indispensable tool for assessing how far the delegated powers can be taken. If the Court of First Instance had not used *jus cogens*, it would be difficult to see how, as a matter of international law, it could judge the actions of the Security Council in the context of human rights. The alternative would have been to exempt the Security Council from review and leave the relevant rights unprotected.

c. The Scope of *Jus Cogens*

There are hardly any objections to international organisations in general, and the United Nations in particular, being bound by *jus cogens*, and therefore the debate regarding this issue is practically over. For instance, the real question in the Al-Jedda case was whether the relevant right was peremptory. Both the Divisional Court and the Court of Appeal seem to have accepted that the Security Council resolution cannot displace the human rights norm if it is part of *jus cogens*.[93] The most dubious element in the reasoning of the two English courts is that they did not attempt to clarify whether the relevant human right was part of *jus cogens* and found it sufficient to note that the party did not press this issue.[94] This seems to imply the outcome that had the relevant party pressed and proved the peremptory status of the relevant norm, the Court's decision would have been radically different. But in any case, such ambiguity in reasoning makes these decisions dubious and controversial.

The scope of peremptory law is therefore the issue that attracts the heaviest debate, and this involves addressing the criteria of identification of peremptory norms. In the first place, it has to be accepted that

---

93 Al-Jedda (CA), para. 63, see note 21.

94 The Court of Appeal asserted that the reason why it was not concerned with the involvement in the case of *jus cogens* was that "in the present case Mr Starmer [the barrister representing the Appelant] did not suggest that the rights conferred by Article 9 of the ICCPR or Article 5 of the ECHR constituted *ius cogens*," Al-Jedda (CA), para. 68, see note 21.

the existence of the norm is not the same as its peremptory status. The two issues have to be separated from each other. The existence of a norm is demonstrated by reference to the evidence that demonstrates that the relevant consent or acceptance has been given to the norm. The normative status of the rule is a different question. Whether the norm is part of *jus cogens* no longer depends on consensual evidence, for the simple reason that international law requires such evidence only for the existence of the norm. For clarifying the peremptory status of the norm, its character and the values it protects have to be addressed.

The approach based on the substantive nature of norms is predominant both in practice and doctrine. Even though some may oppose this approach for its alleged uncertainty or open-endedness, it has to be accepted that no alternative approach has been developed that would both respond to the essence of peremptory law and command the necessary level of acceptance. The ILC, while drafting what became article 53 of the Vienna Convention, determined that it is the importance of the subject-matter of a rule which makes it peremptory and proposed only substantive norms as examples of *jus cogens*, such as prohibitions of aggression, genocide, slavery, as well as basic human rights and self-determination.[95] The ICTY has emphasised that norms are peremptory because of the values they protect.[96] Such substantive value must be the value which is not at the disposal of individual states.[97] Otherwise it would be unclear why the given norm is non-derogable.

The purpose of *jus cogens* is to safeguard the predominant and overriding interests and values of the international community as a whole as distinct from the interests of individual states.[98] *Jus cogens* embodies "a

---

95 ILCYB 1966 (II), 248.

96 Furundzija, Judgment of 10 December 1998, Case No. IT-95-17/I-T, *ILM* 38 (1999), 349 et seq.

97 K. Zemanek, "New Trends in the Enforcement of *erga omnes* Obligations", *Max Plank UNYB* 4 (2000), 1 et seq. (8).

98 A. Verdross, "Jus Dispositivum and Jus Cogens in International Law", *AJIL* 60 (1966), 55 et seq. (58); C. Rozakis, *The Concept of* Jus Cogens *in the Law of Treaties*, 1976, 2; L. Hannikainen, *Peremptory Norms in International Law*, 1988, 2-5, 261; G. Abi-Saab, "The Concept of *Jus Cogens* in International Law", *Lagonissi Conference: Papers and Proceedings*, Vol. II, Geneva, Carnegie Endowment for International Peace, 1967, 7 et seq. (13); M. Virally, "Reflexions sur le 'jus cogens'", *A.F.D.I.* 12 (1966), 5 et seq. (21); D. Klein, "A Theory of the Application of the Customary International Law of Human Rights by Domestic Courts", *Yale J. Int'l L.* 13 (1988), 332 et seq. (351).

transcendent common good of the international community, while *jus dispositivum* is customary law that embodies a fusion of self-regarding national interests."[99] Furthermore, "there is virtually no disagreement that the purpose of international peremptory law is to protect overriding interests and values of the international community of States."[100] Most importantly, *jus cogens* protects not common interests of a random group of states but the basic values of the entire international community.[101]

It is generally acknowledged that the prohibition of the use of force forms part of *jus cogens*. The ICJ reaffirmed the peremptory status of the prohibition of the use of force in the Nicaragua case, where it pronounced on peremptory law for the first time.[102] Although there are repeated doctrinal attempts to deny this,[103] the careful reading of the Nicaragua case conveys the opposite message. The Court pointed to the ILC's qualification of the relevant norm as peremptory and then used this factor as evidence of the relevant norm's customary character. Once the Court drew consequences from the peremptory status of the norm, it subscribed to the view that the prohibition of the use of force is part of peremptory law.

The scope of human rights is doctrinally contested in human rights law as well. It has been asserted that the relevant rights the Court of First Instance referred to in Kadi and Yusuf, such as the right to property, to judicial hearing and access to a court are not proved to be *jus cogens* rights.[104]

---

99 A. Brundner, "The Domestic Enforcement of International Covenants on Human Rights", *University of Toronto Law Journal* 35 (1985), 219 et seq. (249-250).

100 Hannikainen, see note 98, 4.

101 Zemanek, see note 97, 6.

102 ICJ Reports 1986, 14 et seq. (100-101). The UK House of Lords has also affirmed the peremptory status of the prohibition of the use of force following the acknowledgement of such affirmation in the Nicaragua case, see *R v Jones*, [2006] UKHL 16, 29 March 2006, para. 18 (per Lord Bingham).

103 D. Shelton, "Righting Wrongs: Reparations in the Articles on State Responsibility", *AJIL* 96 (2002), 833 et seq. (843); more recently id., "Normative Hierarchy in International Law", *AJIL* 100 (2006), 291 et seq. (304); id., "International Law and 'Relative Normativity'", in: M. Evans (ed.), *International Law*, 2006, 159 at 167.

104 Brown, see note 89, 467.

In general, there is a serious misconception regarding the scope of *jus cogens* in human rights law, which consists in the assumption that for being part of *jus cogens*, the relevant right must be absolute in its scope and content, thus admitting no exceptions or qualifications. This assumption contradicts the conceptual and normative basis of *jus cogens* which relates not to the scope of the relevant right or its content, but to its non-derogability; in other words, the peremptory status of the right depends not on its content but on whether it can be derogated from by agreement. In addition, the assumption that the right can be peremptory only if its content is absolute is rejected in practice. The catalogue of peremptory rights goes far beyond the catalogue of rights that are denoted as non-derogable under emergency clauses of human rights treaties, article 4 of the ICCPR, or article 15 of the European Convention on Human Rights. In clarifying whether the relevant human right is part of *jus cogens*, it is immaterial whether that right can be derogated from under the emergency clauses of the relevant treaty, or whether the content of the relevant human right allows for some qualifications or exceptions. It is rather material whether the relevant human right, as its content stands, can be derogated from at the bilateral level through the treaty without raising the issue under article 53 of the 1969 Vienna Convention on the Law of Treaties.

It has been repeatedly affirmed that potentially all fundamental human rights can be part of *jus cogens*. As Judge Tanaka put forward,

> "if we can introduce in the international field a category of law, namely *jus cogens* ... a kind of imperative law which constitutes the contrast to *jus dispositivum*, capable of being changed by way of agreement between States, surely the law of human rights may be considered to belong to the *jus cogens*."[105]

Verdross also considered that "a very important group of norms having the character of *jus cogens* are all rules of general international law created for a humanitarian purpose."[106]

This approach is conceptually coherent. Rights to personal liberty, fair trial and due process, private or family life, freedom of expression and religion, although "derogable" in emergency situations under some human rights instruments, certainly protect the community interest going beyond individual interests of states and it seems doubtful whether

---

105 ICJ Reports 1966, 6 et seq. (298).

106 A. Verdross, "*Jus Dispositivum* and *Jus Cogens* in International Law", *AJIL* 60 (1966), 59 et seq.

the mere fact of their derogability under human rights treaties precludes their peremptory nature. These rights are so fundamental that it is impossible to envisage a treaty that would derogate from them and establish a regime incompatible with them.

The approach of the UN Human Rights Committee accepts this principle. According to General Comment No. 29 (2001),

> "The enumeration of non-derogable provisions in article 4 [ICCPR] is related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms of international law. ... the category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2 [ICCPR]. States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence."

The instances of recognition of the peremptory status of the right to a fair trial in particular include, apart from General Comment No. 29, the ICTY decision in the Tadić case, and the decision of the Special Court for Sierra Leone in Sam Hinga Norman.[107] Similarly, the Court of First Instance acknowledged in Kadi and Yusuf that the right to access to a court as acknowledged in article 8 of the Universal Declaration of Human Rights and article 14 of the ICCPR, being part of *jus cogens*, is not absolute in terms of its scope and content.[108]

In terms of the right to property, the Court of First Instance noted that,

> "in so far as respect for the right to property must be regarded as forming part of the mandatory rules of general international law, it

---

[107] In Tadić (Allegations of Contempt), 27 February 2001, it was suggested that article 14 ICCPR reflects *jus cogens*. The Special Court for Sierra Leone held that the right to have the criminal conviction against oneself reviewed by the higher tribunal as enshrined in article 14 (5) ICCPR is part of *jus cogens*, Prosecutor v Sam Hinga Norman, Case No. SCSL-2003-08-PT, para. 19.

[108] Kadi, see note 20, para. 287; Yusuf, see note 20, para. 342.

> is only an arbitrary deprivation of that right that might, in any case, be regarded as contrary to *jus cogens*."[109]

The approach of the Court of First Instance also confirms that for being peremptory, the right does not have to have an absolute content, but it may as well be subjected to limitations, arguably on the basis of the margin of appreciation doctrine. In Chafiq Ayadi, the Court found no breach of the relevant *jus cogens* right, because,

> "the contested regulation and the Security Council resolutions implemented by that regulation do not prevent the applicant from leading a satisfactory personal, family and social life, given the circumstances. Thus, according to the interpretation given at the hearing by the Council, which is to be approved, the use for strictly private ends of the frozen economic resources, such as a house to live in or a car, is not forbidden *per se* by those measures. That is all the more true where everyday consumer goods are concerned."[110]

Thus, the key seems to be that *jus cogens* will be violated if the Security Council measures were to invade the core of the relevant human right.

Similarly, although the Security Council decisions *prima facie* interfered with the right to the access to a court,

> "the setting-up of a body such as the Sanctions Committee and the opportunity, provided for by the legislation, of applying at any time to that committee in order to have any individual case re-examined, by means of a procedure involving both the 'petitioned government' and the 'designating government', constitute another reasonable method of affording adequate protection of the applicant's fundamental rights as recognised by *jus cogens*."[111]

These pronouncements are in line with the thesis that there is nothing in the concept of *jus cogens* requiring that norms having this status must necessarily be those that are unqualified in terms of their content or being immune from emergency derogation. Whenever the peremptory right has a qualified scope because of inclusive exceptions, emergency derogation or the margin of appreciation, it is its core that is peremptory in the sense that it cannot be derogated from through the inter-state agreement without triggering article 53 of the 1969 Vienna Convention.

---

109 Kadi, see note 20, para. 242; Yusuf, see note 20, para. 293.

110 Chafiq Ayadi, see note 20, para. 126.

111 Kadi, see note 20, para. 290; Yusuf, see note 20, 21 para. 345.

d. Human Rights and Humanitarian Law Treaties

It is allegedly a separate argument as to what should be the outcome when the decision of the Security Council conflicts with a provision embodied in a human rights or humanitarian law treaty as a treaty provision. It may be arguable that Article 103 UN Charter, which refers to conventional obligations of Member States, justifies the primacy of the Council resolutions over such treaties. The part of the reasoning in the Al-Jedda case is based on examining the decisions related to the application of human rights treaties and dismissing the relevance of these decisions, by suggesting that in those decisions Article 103 was not involved,[112] and by circumventing the *jus cogens* nature of the rights involved in Al-Jedda. The Court of Appeal further claimed that "There is no room here for any argument that human rights treaties fall into some special category."[113]

However, there is consistent practice of international tribunals treating humanitarian treaties as superior to other treaty clauses (and Article 103 too is a treaty clause). The European Commission on Human Rights has affirmed the general principle that states parties to the European Convention are responsible for the violation of the Convention, even if the act or omission in question is a consequence of the necessity to comply with international obligations, and especially noted that this limits the effect of obligations assumed within an international organisation.[114] Otherwise, the Commission continued, "the guarantees of the Convention could wantonly be limited or excluded and thus be deprived of their peremptory character." Therefore, the transfer of powers to an international organisation is effective only to the extent fundamental human rights are adequately protected within that international organisation.[115]

In Waite & Kennedy the European Court of Human Rights further affirmed the primacy of the obligations under the European Conven-

---

112 Al-Jedda (CA), paras 65-66, see note 21.

113 Ibid., para. 72.

114 M & Co v FRG, Application No. 13258/87, 9 February 1999, *Yearbook of the European Convention on Human Rights* 33 (1990), 51-52.

115 Ibid., 52; for the repeated emphasis on the peremptory character of the convention obligations in the context of the powers of international organisations, see the case Bosphorus Hava Yollari Turizm v Ireland, ECtHR, Case No. 45036/98 of 30 June 2005, para. 154.

tion over the obligations under the treaties establishing international organisations,

> "Where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution."[116]

The reference to the object and purpose of the Convention is the further evidence that the primacy of human rights treaties follows from the non-bilateral character of the obligations they embody.

In the Bosphorus case, the European Court of Human Rights, addressing the issue of compliance with article 1 Protocol 1 of the European Convention in terms of the margin of appreciations doctrine, emphasised "the growing importance of international co-operation and of the consequent need to secure the proper functioning of international organisations." Such considerations are arguably critical for supranational organisations like the EC, and consequently the "compliance with EC law by a Contracting Party constitutes a legitimate general interest objective within the meaning of Article 1 of Protocol No. 1." While the delegation of sovereign powers to international organisations was not prohibited under the Convention, the state party still remained responsible for the consequent violations of the convention. Otherwise, the Court emphasised reiterating the approach of M & Co, that "such a transfer would be incompatible with the purpose and object of the Convention: the guarantees of the Convention could be limited or excluded at will thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards." The state action taken pursuant to the obligations assumed within the international organisation,

> "is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a man-

---

116 Waite & Kennedy v Germany, Case No. 26083/94, 18 February 1999, para. 67.

ner which can be considered at least equivalent to that for which the Convention provides."[117]

If this was not the case, the interest of international cooperation would be outweighed by the convention's public order character.[118]

In the law of the European Convention, the compatibility of the state action pursuant to the compliance with the exercise of delegated powers by an international organisation is in some cases addressed in terms of the margin of appreciation doctrine, under which certain convention rights can be limited by pursuing the public interest aims (such as arts 8 to 11; article 1 Protocol 1), as was the case in Bosphorus; this issue is also addressed in terms of the doctrine of inherent limitations if those rights are at stake which do not provide for the margin of appreciation (article 6), as was the case in Waite & Kennedy. But the need for the activities of international organisations to comply with the requirements of human rights treaties is always emphasised and maintained.

Thus, the position is, at least *prima facie*, that a treaty such as the European Convention on Human Rights (and *a fortiori* other treaties of a humanitarian character), does not tolerate the actions by international organisations that conflict with the rights provided for in these treaties. The allegedly conflicting consideration follows from Article 103 UN Charter which gives the Security Council measures primacy over other treaty provisions. But it is also material that human rights and humanitarian law treaties go beyond providing merely treaty obligations and lay down the obligations of a public order profile.

There is at least the *prima facie* case for viewing human rights and humanitarian law treaties as embodying *jus cogens*. Since the International Court's 1951 decision on the Genocide Convention, several judicial and quasi-judicial organs have unanimously affirmed, by the example of treaties such as the ICCPR, humanitarian law treaties, European and Inter-American Conventions on Human Rights, that these treaties contain objective obligations that apply uniformly to all parties and hence cannot be split in bilateral treaty relations.[119] As Fitzmaurice specifies, such treaties bind states parties without regard to reciprocity

---

117 Bosphorus, see note 115, paras 150-155.

118 Bosphorus, see note 115, paras 155-156.

119 ICJ Reports 1951, 15 et seq. (23); *Austria v Italy*, *Yearbook of the European Convention on Human Rights* 4 (1961), 140; *Ireland v UK*, *ILR* 58 (1980), 188 et seq. (291); *Effect of Reservations*, para. 27, *ILR* 67 (1984), 568; *Kuprsekic*, ICTY, IT-95-16-T, Judgment of 14 January 2000, para. 518; UN Human Rights Committee General Comment No. 24, 52, para. 17.

and to whether other states parties are actually complying with their terms. The code of obligations in humanitarian treaties is "absolute and admits of no derogations."[120] In his capacity as the ILC Special Rapporteur on the Law of Treaties, Fitzmaurice placed such treaties on the same footing as *jus cogens* under what has later become article 53 of the Vienna Convention.[121] Likewise, Special Rapporteur Waldock clearly emphasised that treaties like the Genocide Convention and the Geneva Conventions fall under the regime to avoid treaties conflicting with *jus cogens*.[122]

It is not feasible for treaties of a humanitarian nature to be split into bilateral legal relations conceptually and normatively similar to the non-derogability of peremptory norms of general international law in the sense of article 53 of the 1969 Vienna Convention. Therefore, the reference to Article 103 UN Charter seems irrelevant in this context and the Security Council would not be entitled to set aside the rights under human rights treaties, because they go far beyond being merely treaty obligations.

The decision of the Court of Appeal in Al-Jedda overlooks this point. Another concern Al-Jedda raises in this context is that S/RES/1546 (2004) of 8 June 2004 could potentially be seen as an approval of the agreement concluded between the US and Iraq through the exchange of letters appended to that resolution. The hypothetical question deriving from the *jus cogens* status of the essential Geneva Convention provisions arises and consists in whether it is open to the two governments to agree and withdraw the Geneva Convention guarantees from the individuals. This question is also important not least because the Al-Jedda Court of Appeal judgment, although not expressly basing its decision on article 78 of the IV. Geneva Convention, being disposed of the US-Iraqi agreement, still quotes the paragraphs of Resolution 1546 which refer to the consent of the Iraqi government as the basis of the presence and powers of the Multinational Force in Iraq. It is clear that this exchange of letters does not entail any intention to override the operation of article 78 and if it revealed such intention, the issue of validity of such agreement would arise.

---

120 G. Fitzmaurice, "Judicial Innovation: Its Uses and Its Perils", *Cambridge Essays in International Law* 1965, 24 et seq. (33-34).

121 Second Report, ILCYB 1957 (II), 54.

122 ILCYB 1963 (II), 59.

V. Remedies

1. Refusal to Carry Out an Illegal Resolution

If the Security Council resolution exceeds its powers by offending the Charter or *jus cogens*, it is open to states to refuse to obey it. The refusal to carry out can be manifested by individual states or their groups. For instance, in the case of sanctions against Libya on the basis of S/RES/748 (1992) of 31 March 1992, several regional organisations such as the League of Arab States, the Organisation of the Islamic Conference and the Non-Aligned Movement deplored these sanctions.[123] The OAU declared that its membership which includes more than fifty states would no longer obey these sanctions, "owing to the fact that the said resolutions violate Article 27 paragraph 3, Article 33 and Article 36 paragraph 3 of the United Nations Charter, and the considerable human and economic losses suffered by Libya and a number of other African peoples as a result of the sanctions."[124]

The right to refuse to carry out illegal resolutions of the Security Council is reinforced by the pronouncement of the Court of First Instance in Kadi and Yusuf that,

> "International law thus permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of *jus cogens*. If they fail to do so, however improbable that may be, they would bind neither the Member States of the United Nations nor, in consequence, the Community."[125]

Controversially enough, the Al-Jedda case states, by reference to academic writings only, that national courts cannot judge the Security Council resolutions.[126] But there is, as a matter of international law, no limitation as to which organs of the state are competent to judge the legality of the Security Council decisions and there is moreover no spe-

---

123 T. Kalala, "La décision de l'OUA de ne plus respecter les sanctions décrétées par l'ONU contre la Lybie: désobéissance civile des états Africains a l'égard de l'ONU", *RBDI* 32 (1999), 545 et seq. (549-553).

124 The Crisis between the Great Socialist People's Libyan Arab Jamahiriya and the United States of America and the United Kingdom, AHG/DEC 127 (XXXIV), 8-10 June 1998, *African Yearbook of International Law* 6 (1998), 390-391.

125 Kadi, see note 20, para. 230; Yusuf, see note 20, para. 281.

126 Al-Jedda (CA), see note 21, para. 74.

cific requirement that this cannot be national courts. The thesis that national courts cannot judge the legality of Security Council resolutions is a mere premise that is justified neither by any considerations of legal principle nor by any evidence.

There is also a policy objection advanced that the refusal of states to implement Security Council resolutions can undermine the collective security mechanism under the Charter. This objection misunderstands, however, that the very foundation of the collective security system is based on the Charter of the United Nations, that is the treaty whereby states delegate the powers to the Council. Every delegated power is by definition a limited power and the argument that the Council's acts cannot be reviewed leaves open the question as to what is to happen when these acts are *ultra vires*. In the absence of a regular judicial review, the reaction by individual states remains the only regular remedy that can be used against the decisions that are made *ultra vires*. This does take place in practice and this disproves the suggestion that the refusal to comply will undermine the Charters' collective security mechanism.

2. Judicial Review

The ICJ has never ruled out the possibility of judicial review of decisions of other principal organs of the United Nations. One is expected to indicate to the dictum of the ICJ in the Namibia case, according to which "the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned". But this passage does not rule out the power of judicial review by the Court for at least two reasons. First, the court indicated that its attitude was based on the limited scope of the request for an Advisory Opinion by the General Assembly. Secondly, the Court has indeed scrutinised certain resolutions in order to respond to the objections put before it.[127] In the Certain Expenses case,[128] as well as later in the Lockerbie case[129] the Court, while dealing with the effect of decisions of UN bodies, used the language of presumption of validity of those decisions and did not suggest that such decisions enjoy absolute validity and are immune from judicial review. Such approach perhaps evidences the

---

127 ICJ Reports 1971, 16 et seq. (45).

128 ICJ Reports 1962, 151 et seq. (167).

129 ICJ Reports 1992, 3 et seq. (15).

readiness of the Court to examine the findings of the Security Council in the appropriate cases where a party to those proceedings challenges their legitimacy.

The decision of the Appeals Chamber of the ICTY in the Tadić case may provide for a useful guidance. Having concluded that "neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law)", the tribunal went on to examine the issue which falls directly within the ambit of the Council's powers under Article 39 UN Charter. The Tribunal examined the determination of a "threat to the peace" by the Council, questioned whether the concrete situation dealt with by the Council indeed was a "threat to the peace", and passed its own judgment on all of these issues.[130] The judgement of the tribunal is unambiguous on these issues and this makes it unclear how one could be serious in suggesting that the ICJ which is the principal judicial organ of the United Nations does not possess the powers which have been exercised by a tribunal established as a subsidiary organ of the Security Council.

The EC Court of First Instance directly linked the exercise of judicial review to *jus cogens*. In Yusuf and Kadi, the Court confronted the submission of the EU institutions that once the Security Council decision is enacted, it prevails by virtue of Article 103 UN Charter over both conventional and customary law and hence the court was obliged to implement these resolutions, and EU instruments based on them, even if they infringe the relevant human rights.[131] The Court affirmed that it "is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations."[132]

The conceptual basis of judicial review was identified by the Court by asking "whether there exist any structural limits, imposed by general international law or by the EC Treaty itself, on the judicial review which falls to the Court of First Instance to carry it out with regard to that regulation."[133] It was affirmed by the Court, that if a peremptory norm is breached by the action of the EC or the Security Council, judicial review will follow,

---

130 Tadić, see note 13, paras 28-30.

131 Kadi, see note 20, paras 156, 164; Yusuf, see note 20, paras 207, 216.

132 Kadi, see note 20, para. 225; Yusuf, see note 20, para. 276.

133 Kadi, see note 20, para. 212; Yusuf, see note 20, para. 263.

> "In this action for annulment, the Court has moreover held that it has jurisdiction to review the lawfulness of the contested regulation and, indirectly, the lawfulness of the resolutions of the Security Council at issue, in the light of the higher rules of international law falling within the ambit of *jus cogens*, in particular the mandatory prescriptions concerning the universal protection of the rights of the human person."[134]

Therefore, judicial review in this case is a procedural enforcement of the substantive legal principle that *jus cogens* binds the UN Security Council and puts constraints on the validity and operation of its decisions.

VI. Conclusion: Legitimacy Means Stability

The principal point and incidence of the above analysis is that legal certainty is an inevitable requirement for the operation of the UN collective security mechanism.

The need for compliance with the legal framework governing the Security Council's competence requires a consistent approach to the issues of interpretation and standards of review, which is necessary to ensure the legitimacy of the Council's actions. The Council, however powerful and however broad its competences, works on the basis of consensual delegation, and on the assumption that the required degree of confidence and trust exist between the members as to how the resolutions will be adopted and implemented. Similarly, the delegation element implies that the membership of the United Nations expects the Council to deliver in terms of what has been delegated – that is decisions that are in accordance with the governing legal framework.

If it were to become a firmly established trend that the Council is used to breach international law, or council resolutions are seen as affecting the legal position under fundamental norms of international law and the relevant expectations of states, this would cause a whole set of problems in the long term of even medium term. First of all, states being members of the Council would realise that the consensus they achieved in the Council would be used in a different way from what was originally said and this would make the adoption of further decisions more difficult and the Council would become increasingly para-

---

134 Yusuf, see note 20, para. 337; Kadi, see note 20, para. 282.

lysed. Secondly, in cases where the decisions were adopted, non-compliance, protest and disobedience would be practised both at individual state level and regional group level.

To avoid this, there are two things that must be done: methods of interpretation must be used consistently and transparently, and standards of review must be respected.

The United Nations Facing the Challenges of the "Information Society"

Stefanie Schmahl

"Young people are among the most prolific and knowledgeable users of information and communication technology. But the digital revolution is out of the reach for many of them, ... I therefore urge policymakers and industry leaders to put their minds together, and to work cooperatively with children and youth to produce suitable technologies, applications and services to facilitate access to information and communications technology."

UN Secretary-General, Ban Ki-moon,
World Telecommunication and Information Society Day,
17 May 2007

A. von Bogdandy and R. Wolfrum, (eds.),
Max Planck Yearbook of United Nations Law, Volume 11, 2007, p. 197-231.
© 2007 Koninklijke Brill N.V. Printed in The Netherlands.

I. Introduction
II. The United Nations Politically Confronting Modern Communication Media
III. The United Nations Specialised Agencies Facing the Technical Challenges of Modern Communication Media
1. The Universal Postal Union
2. The International Telecommunication Union
a. The Beginning: Telegraphy and Telephony
b. The Second Step: Radiocommunication Services
c. The Space Era: Satellite Broadcasting
d. The Internet Revolution and "Cyberspace" – A Shared Domain or Chaos?
aa. The Decisive Works of the Internet Society, the Internet Assigned Numbers Authority and the Internet Corporation for Assigned Names and Numbers
bb. The ITU's Participation in the Information Society: The World Summit on the Information Society (WSIS)
IV. Conclusion

I. Introduction

Communication media have a long history.[1] The beginning of human communication through artificial channels, i.e. not vocalisation or gestures, goes back to cave paintings, drawn maps, and writing. The Ancient Romans devised what might be described as the first postal system in order to centralise control of the Roman Empire. This allowed for personal letters to be sent and for Rome to gather knowledge about events in its many widespread provinces. The rudimentary organisation of postal services, half official and half private, lasted from the Ancient World until the end of the Middle Ages.[2] But with the advent of printing, communication steadily increased. Under the pressure of those needs, the post inevitably developed. During the 16th century, due to the impetus given to it by Franz von Taxis, who for the first time created a postal service operating in several European states, it began to extend beyond national frontiers.

In the last century, a revolution in telecommunication has greatly altered communication by providing new media for long distance com-

---

1 As to the history see the comprehensive analysis by J. Wilke, *Grundzüge der Medien- und Kommunikationsgeschichte*, 2000.

2 Cf. L. Weber, "Postal Communications, International Regulation", in: R. Bernhardt (ed.), *EPIL* Vol. III, 1997, 1080 et seq.

munication. The first transatlantic two-way radio broadcast that occurred in 1920 paved the way for communication via analogue telecommunications media such as telephony, radio and TV broadcasts.[3] Only a few decades later, in the 1970s, space technology and the use of satellites introduced a new era of telecommunications with a global dimension. Today, space facilities provide on a competitive basis many services which formerly used terrestrial communication systems. Satellite technology has been incorporated into an effective, universally accessible, global communication network with a sustainable expansion of telecommunications offering a broad variety of new services over even very long distances.[4] Due to the advanced integration of computer and telecommunication technologies into the more unified concept of "information systems", the modern digital telecommunications even allow for computer-mediated communication, telegraphy, and inter-connected computer networks.[5]

Driven by this rapid technological development, the importance of coordination and cooperation between states, other subjects of international law and even non-state actors cannot be overestimated. There are few fields, primarily for technical reasons, where the need for international coordination and cooperation is as apparent as in telecommunications.

In the modern world in which societies largely rely on internet, satellite television, convenient telephone services and connections, universal standards are inevitable as their absence would lead to chaos.[6] Furthermore, telecommunication technologies are not only important for private actors but also play a vital role especially with regard to a state's economic, political and military activities.[7] For both reasons states, which generally defend their sovereignty and domestic jurisdiction (cf. Article 1 para. 2, Article 2 paras 1 and 7 of the UN Charter), are argua-

---

3 A. Noll, "The International Telecommunication Union: Its Inception, Evolution and Innate, Constant Reform Process", *Multimedia und Recht* 8 (1999), 465 et seq.

4 P. Malanczuk, "Telecommunications, International Regulation", in: R. Bernhardt (ed.), *EPIL* Vol. IV, 2000, 791 et seq.

5 K.W. Grewlich, *Konflikt und Ordnung in der globalen Kommunikation*, 1997, 17 et seq.

6 F. Lyall, "Posts and Telecommunications", in: O. Schachter/ Ch. Joyner (eds), *United Nations Legal Order*, Vol. 2, 1995, 789 et seq.

7 Malanczuk, see note 4, 792; S. v. Welck, *Satelliten in der internationalen Politik*, 1989, 10 et seq.

bly less reluctant to transfer substantial control to an international body than in other areas.

There are many international and regional organisations which are concerned in one way or another with telecommunications including, *inter alia*, the Organisation for Economic Cooperation and Development (OECD), the World Trade Organization (WTO) and the Council of Europe as well as the European Union.[8] Furthermore, civil society, represented, in particular, by private corporations and non-governmental organisations with growing competences in this field, is nowadays highly involved in establishing standards in the field of telecommunications.[9] Nevertheless, because of their universal character, the United Nations could be considered as being the organisation *par excellence* to confront and resolve the challenges of the modern "Information Society" which includes all forms and media of communication. In the following, it will be analysed whether and to what extent the United Nations system actually plays, or could play, a decisive role in facilitating and regulating global communication.

II. The United Nations Politically Confronting Modern Communication Media

The main body responsible for the telecommunication sector within the United Nations is – besides the ECOSOC which *in praxi*, merely has a quite weak position[10] – the General Assembly (cf. Arts 13 para. 1 lit. b and 60 of the UN Charter). The best-known and most important General Assembly resolutions in the area of telecommunication media date

---

8 See C. Tietje, "Grundzüge und rechtliche Probleme einer internationalen Medienordnung", in: Hans-Bredow-Institut (ed.), *Internationales Handbuch Medien*, 2002/2003, 15 et seq. (18). Further see K.W. Grewlich, "Access to Global Networks – European Telecommunications Law and Policy", *GYIL* 41 (1998), 9 et seq.

9 S. Hobe/ O. Kimminich, *Einführung in das Völkerrecht*, 8th edition 2004, 457.

10 Even if the ECOSOC disposes of several functions with respect to international economic, social, cultural, educational, health, and related matters according to Arts 62 and 63 of the UN Charter, it is widely deemed as being the "permanent ill" of the UN, see E. Klein, "Die Internationalen und Supranationalen Organisationen", in: W. Graf Vitzthum (ed.), *Völkerrecht*, 3rd edition, 2004, 312 and 344.

back to the time when direct broadcasting by satellite was developing technically. Before that period, broadcasting transmissions by the emitting state were made through terrestrial stations placed in the receiving state.[11] This so-called "point-to-point-transmission" did not cause major problems to state sovereignty.[12] Fixed installation services always required the collaboration of the states concerned in order to install a service line (i.e. cables) and to establish and operate the service. It followed from the established right of states to regulate and control their national telecommunication systems that international transmissions needed the prior agreement of the states involved.[13] Such agreements were constantly made on an individual or a general basis, as under the Convention of the International Telecommunication Union (ITU).[14] Hence, there was no need to intensively discuss this matter at the United Nations' level.

This arguably "comfortable" situation essentially changed when satellites could be used to transmit programmes by direct satellite broadcast.

The new technique of direct emission of electromagnetic waves on the one hand, and of reception by radiation of the satellite signal on the other could not be limited technically to the prior agreement of the states concerned.[15] Whether and to what extent the traditional principle of freedom of broadcasting also applied to the method of direct television broadcasting via satellite was therefore highly controversial.[16] On

---

11 Cf. W. Rudolf/ K. Abmeier, "Satellitendirektfunk und Informationsfreiheit", *AVR* 21 (1988), 1 et seq. (2); S. Magiera, "Direct Broadcasting by Satellite and a New International Information Order", *GYIL* 24 (1981), 288 et seq.

12 B. Simma, "Grenzüberschreitender Informationsfluß und domaine réservé der Staaten", in: *Berichte der Deutschen Gesellschaft für Völkerrecht* 19 (1979), 39 et seq. (73).

13 Ch. Engel, "Das Völkerrecht des Telekommunikationsvorgangs", *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 49 (1985), 90 et seq. (91); Malanczuk, see note 4, 792.

14 Cf. T. Stein/ T. Marauhn, "Völkerrechtliche Aspekte von Informationsoperationen", *ZaöRV* 60 (2000), 1 et seq. (15).

15 H. Engelhard, *Satellitendirektfernsehen – neue Technologie für einen besseren internationalen Informationsfluß?*, 1978, 8 et seq.

16 As to this controversy see for example S. Courteix, *Télévision sans frontières*, 1975; M. Dauses, "Neuere Fragen des Weltraumrechts", *AVR* 17 (1976), 46 et seq.; A. Gottlieb/ Ch. Dalfen/ K. Katz, "The Transborder Transfer of Information by Communications and Computer Systems: Is-

9 November 1972, the General Assembly decided, unanimously against the United States, that the matter of direct satellite broadcasting should be regulated by treaties and that a committee (the then already created Committee on the Peaceful Uses of the Outer Space, COPUOS[17]) should elaborate principles to avoid international conflicts and protect the sovereignty of states against external interference.[18] At that time, the great majority of states was of the opinion that such use of broadcasting could interfere with state sovereignty and the principle of non-intervention.[19] They feared, in particular, that the newly achieved technical possibility of direct broadcast would violate their domestic jurisdiction including their political and cultural affairs. These fears were clearly demonstrated in article IX of the UNESCO Declaration concerning satellite broadcasting which was enacted only a few days later. According to that Declaration programmes should be essentially "apolitical", the sovereignty of states should be respected and their prior consent should be obtained before directing broadcasts to their territory.[20]

The issue whether there existed a principle of "free flow of information" also permitting broadcasting from satellites to whoever may have the possibility to receive, or whether states had to be asked and give their prior consent, became, hence, the crucial matter of the discussions

---

sues and Approaches to Guiding Principles", *AJIL* 68 (1974), 227 et seq.; W. Kleinwächter, "Völkerrechtliche Aspekte eines direkten Satellitenfernsehens", *Theorie und Praxis (DDR)* 61 (1976), 60 et seq.; J.B. Münch, *Aspects juridiques de la radiodiffusion directe par satellite*, 1975; K.M. Queeny, *Direct Broadcasting Satellites and the United Nations*, 1978; G. Gornig, *Äußerungsfreiheit und Informationsfreiheit als Menschenrechte*, 1988, 225 et seq.

17 See A/RES/1472 (XIV) of 12 December 1959.

18 A/RES/2916 (XXVII) of 9 November 1972.

19 J.A. Frowein, "Satellite Broadcasting", in: R. Bernhardt (ed.), *EPIL* Vol. IV, 2000, 317 et seq. (318). – According to the definition given by the ICJ in its Nicaragua judgment, ICJ Reports 1986, 14 et seq. (106 para. 202), the "principle of non-intervention involves the right of every sovereign state to conduct its affairs without outside interference …" See also the Friendly-Relations-Declaration, A/RES/2625 (XXV) of 24 October 1970.

20 UNESCO Declaration No. 4111 on "Guiding Principles on the Use of Satellite Broadcasting for the Free Flow of Information, the Spread of Education and Greater Cultural Exchange", of 15 November 1972, reprinted in: UNESCO, Final Acts of the General Conference, 17th Sess. 1972, Vol. 1, No. 4111.

in the UN, particularly within the frame of COPUOS.[21] Even if a consensus on a draft Convention could not be reached, the General Assembly adopted A/RES/37/92 on the "Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting"[22] by 107 to 13 votes with 13 abstentions.[23] All Western states either voted against or abstained,[24] except for Turkey and Cyprus which voted with the majority.

The main reason for this negative attitude of the Western states were paras 13 to 15 of the Annex of the Resolution which established a prior consent procedure. According to para. 13, a state which intended to establish an international direct television broadcasting satellite service should without delay notify the proposed receiving states of such intention and should promptly enter into consultation with any of those states which so requested. Only after these conditions had been met on the basis of agreements and/or arrangements in conformity with the relevant instruments of the ITU and in accordance with these principles could, an international direct television broadcasting satellite service be established (para. 14). Moreover, the inevitable "overspill" of the radiation of the satellite signal, i.e. the side-effect of broadcasting activities prepared for the territory of the emitting state,[25] could not in itself be objected to by the receiving state (para. 15). The reasons for this exception were the rules of international neighbourhood-law[26] as well as, in particular, the fact that obviously the ITU was deemed to be exclusively competent on the matter of the "overspill".[27]

---

21 Cf. D.M. Polter, "Bericht über die 15. Sitzung des Rechtsausschusses des Weltraumausschusses der Vereinten Nationen vom 3. bis 28. Mai 1976 in Genf", *Zeitschrift für Luft und Weltraumrecht* 25 (1976), 345 et seq.; P. Malanczuk, "Das Satellitendirektfernsehen und die Vereinten Nationen", *ZaöRV* 44 (1984), 257 et seq. (273).

22 A/RES/37/92 of 10 December 1982.

23 As to the long-lasting genesis of this Resolution see J. Schönbeck, "Die Resolution der Vereinten Nationen vom 10. Dezember 1982 über Prinzipien für das direkte Satellitenfernsehen", *Zeitschrift für Luftrecht und Weltraumfragen* 32 (1982), 16 et seq.

24 Abstentions came from France, Portugal and Sweden, see Frowein, see note 19, 318.

25 Tietje, see note 8, 21.

26 See M.E. Bowman, "Is International Law Ready for the Information Age?", *Fordham Int'l L. J.* 19 (1996), 1935 et seq. (1937).

27 Engel, see note 13, 97 et seq.

The Western states have continuously argued that the principle of "free flow of information", recognised in international customary law for radio broadcasting in general,[28] should also be respected for direct satellite broadcasting.[29] Therefore, prior consent or prior arrangements were regarded as being unacceptable. Furthermore, the Western states rightly relied on the freedom of expression and information[30] which was – and still is – protected under the (legally non-binding) Universal Declaration of Human Rights of 1948 as well as under all human rights treaties, particularly under article 19 of the International Covenant on Political and Civil Rights (ICCPR) and under article 10 of the European Convention on Human Rights (ECHR).[31] The formula "regardless of frontiers" is included in most of these instruments. States may only interfere with this freedom when racial hatred or similar behaviour is at stake (cf. article 10 para. 2 ECHR, article 19 para. 3 and article 20 para. 2 ICCPR). Needless to say the existence of various human rights

---

28 The General Assembly adopted, in 1950, several resolutions condemning jamming of foreign radio broadcasts as a denial of freedom of information regardless of frontiers and recommending the limitation of freedom of information only in the most exceptional circumstances, cf. A/RES/424 (V) of 14 December 1950; further see A. Verdross/ B. Simma, *Universelles Völkerrecht*, 3rd edition 1984, para. 1052; P. Malanczuk, "Information and Communication, Freedom of", in: R. Bernhardt (ed.), *EPIL* Vol. II, 1995, 976 et seq. (979).

29 Engelhard, see note 15, 133 et seq.; J. Delbrück, *Direkter Satellitenrundfunk und nationaler Regelungsvorbehalt*, 1982, 21 et seq.

30 Cf. Th. Buergenthal, "The Right to Receive Information Across National Boundaries", in: Aspen Institute (ed.), *Control of the Direct Broadcast Satellite: Values in Conflict*, 1974, 74 et seq.; L. Gross, "International Law Aspects of the Freedom of Information and the Right to Communicate", in: P.C. Horton (ed.), *The Third World and Press Freedom*, 1978, 55 et seq.

31 As to article 19 ICCPR cf. W. Rudolf, "Informationsfreiheit und Satellitenrundfunk im Völkerrecht", in: W. Fürst et al. (eds), *Festschrift für Wolfgang Zeidler*, Vol. 2, 1987, 1869 et seq. (1876). – The European Court of Human Rights, for instance, decided on 22 May 1990 that article 10 ECHR also covered the reception of television programmes addressed to the public even if they were broadcast by so-called telecommunication satellites, cf. ECHR, judgment of 22 May 1990, *Autronic AG*, Series A No. 178; see also ECHR, judgment of 28 March 1990, *Groppera Radio AG*, Series A No. 173. The Committee of Ministers of the Council of Europe recently stated that all rights enshrined in the ECHR remain fully valid in the "Information Age" and should continue to be protected regardless of new technological developments, see CM (2005) 56 final of 13 May 2005.

treaties has, in the meantime, dramatically reduced states' domestic jurisdiction also in matters of telecommunication.[32]

Even though neither General Assembly Resolutions nor UNESCO Declarations are as such legally binding,[33] they may, as a rule, reflect a common *opinio juris* of the "international community" in cases where they are supported by the majority of states.[34] Nevertheless, the preceding gives a clear example of a situation where a fundamental dispute existed between states as to the legal rules applicable or appropriate. Whereas the Socialist states and – for different reasons, but in a similar manner – the developing countries (especially the Group of 77) feared that the "free flow of information" would be a destabilising factor on their territories and maintenance of power,[35] the Western states put emphasis on democracy and the liberty of the individual.[36] Therefore, both General Assembly Resolution 37/92 and the UNESCO Declaration were not able to create international customary law.[37] Against this background, the relevance of the United Nations in facing the problems of the "Telecommunication Society" remains questionable. This is true at least in times where, as it was the case during the "Cold War", the world was politically and ideologically split up. The question, whether

---

32 Cf. J.A. Frowein, "Das Problem des grenzüberschreitenden Informationsflusses und des domaine réservé", in: *Berichte der Deutschen Gesellschaft für Völkerrecht* 19 (1979), 1 et seq. (18); Stein/ Marauhn, see note 14, 24.

33 Cf. Verdross/ Simma, see note 28, para. 128, and Engel, see note 13, 93.

34 Hobe/ Kimminich, see note 9, 458; Verdross/ Simma, see note 28, paras 634 et seq.

35 Detailed analysis by Malanczuk, see note 21, 263 et seq.; G. Gornig, "Satellitenrundfunk und Völkerrecht", *Zeitschrift für Urheber- und Medienrecht* 36 (1992), 174 et seq. (182).

36 R. Dolzer, "International Co-operation in Outer Space", *ZaöRV* 45 (1985), 527 et seq. (529). – Nevertheless, there were also some Western states, like Canada, which feared the massive influence of U.S. media on their territory, cf. G. Warren, "A Canadian Perspective on Direct Broadcast Satellites and the New World Information and Communication Order", *Syracuse Journal of International Law & Commerce* 8 (1981), 391 et seq. Further see E.F. Scholz, "Bericht über die Jahresversammlung des International Institute of Communications", *AVR* 21 (1983), 113 et seq.

37 This is nearly undisputed, see Engel, see note 13, 103; Frowein, see note 19, 318; H. Fischer, "Weltraumrecht", in: K. Ipsen, *Völkerrecht*, 5th edition 2004, para. 56 No. 59; M. Benkö, "Outer Space, Law of", in: R. Wolfrum (ed.), *United Nations: Law, Policies and Practice*, Vol. 2, 1995, 947 et seq. (952).

this statement has to be revised regarding the today's "world information order", will be addressed later.

III. The United Nations Specialised Agencies Facing the Technical Challenges of Modern Communication Media

A different result, however, may be found regarding the UN specialised agencies. In contrast to the UN, these agencies were created with the conceptual idea of decentralism and functionalism (cf. Arts 1 para. 3, 55 of the UN Charter).[38] Functionalism rests on the assumption that areas of activity relatively free from political controversy can be identified and that cooperation in technical areas may gradually spread over to other fields.[39] These agencies could therefore play a decisive role in facing the challenges of the modern "Telecommunication and Information Society". The most prominent specialised agencies in these fields are UPU which is focused on the postal exchange and, particularly, ITU the main actor in the area of telecommunication regulation.

1. The Universal Postal Union

The creation of UPU goes back to the 19th century. Already at the beginning of the 19th century, after steam navigation and the railway had been invented, the postal service definitely became a public service. Nevertheless, international postal communications were still governed by bilateral agreements which answered the particular sovereign needs of each state.[40] This system, involving a great variety of rates calculated in different currencies and according to different units of weight and different scales, made the operation of the postal service complicated. In order to overcome this unsatisfactory state of affairs, a first international conference was convened in Paris in 1863. The conference

---

38 See Verdross/ Simma, see note 28, paras 295 et seq.

39 However, this concept has been called into question, see E. Klein, "United Nations Specialized Agencies", in: R. Bernhardt (ed.), *EPIL* Vol. IV, 2000, 1172 et seq. (1189).

40 W. Swindler, *Phases of International Law Affecting the Flow of International News Communications*, 1942, 41 et seq.

adopted a number of general principles for international postal services, to be observed by national postal administrations.[41] These principles did not bind states, but they were subsequently included in a number of bilateral and multilateral agreements. The following rapid development of international relations, however, prompted Heinrich von Stephan, a senior official in the postal administration of the North German Confederation, to draw up the outline of a plan for a postal union in 1868.[42] On the basis of his plan a conference was organised by the Swiss Government in 1874. The Congress resulted in the signing of the 1874 Treaty of Berne which established the first Convention governing the international postal service and founded the "General Postal Union" between the then 21 European states and the United States of America. The Convention, signed on 9 October 1874,[43] entered into force on 1 July 1875. Three years later, in view of numerous accessions which had taken place since then, the name was changed to "Universal Postal Union".[44] After having concluded the relationship agreement with the United Nations according to Arts 57 and 63 of the UN Charter,[45] the UPU, with headquarters in Berne, finally became a specialised agency on 1 July 1948.

The current version of the Treaty goes back to the 1964 Vienna Congress, even though it has been amended and revised several times during the last decades.[46] The Constitution of the UPU has remained, since then, the fundamental act containing the organic rules of the Union.[47] The common rules applicable to the international postal service and the provisions concerning the letter-post and postal parcels services are laid down in the Universal Postal Convention and its regulations. Both acts, the Constitution and the Convention, are binding on all

---

41 L. Weber, "Universal Postal Union", in: R. Bernhardt (ed.), *EPIL* Vol. IV, 2000, 1235 et seq.

42 UPU, *Constitution. General Regulations with the International Bureau of the UPU, 2005, Part I – General: The Universal Postal Union, its Creation and Development*, VIII.

43 CTS Vol. 147 No. 136.

44 H. Volger, "Universal Postal Union", in: id. (ed.), *A Concise Encyclopedia of the United Nations*, 2002, 643.

45 UNTS Vol. 19 No. 116.

46 Cf. Weber, see note 41, 1236.

47 Cf. article 22 para. 1 of the Constitution. Further see UPU, *Constitution, General Regulations. With commentary by the International Bureau of the UPU, 2005, Part II – Commentary to the Constitution of the Union*, A.4.

states parties.[48] Other branches of the international postal service are governed by special agreements and their regulations. They are binding only on states that are parties to the agreements.[49]

Since its establishment, the UPU has pursued its work with a high degree of continuity. It has, to a large extent, managed to prevent undue politicisation of its organs and to ensure efficiency of its work.[50] The most important achievements of the Union have perhaps been the continuous elaboration and successful updating of the acts and regulations. In particular, the 1994 Seoul Congress introduced the first important changes by transferring to the Postal Operations Council[51] the power of enacting and amending the regulations concerning the operational, economic and commercial aspects of the international postal service. Since that date, the Postal Operations Council promotes, *inter alia*, the introduction of new postal products. During recent years, growing customer expectations, privatisations of national postal services, increased competition and progress in communication technologies have caused the UPU to review its role again.

Created in 2004 as a result of changing focuses, the Consultative Committee[52] now gives postal stakeholders other than public postal operators and regulators a voice in the organisation's deliberations in order to provide an increasingly global forum for its members and its (private) external partners.

With its 191 Member States,[53] the UPU is, without doubt, useful in building the "Information Society". Even if modern telecommunication media have gained much ground during the last decade, the "good old"

---

48 Cf. article 22 paras 2 and 3 of the Constitution.

49 Cf. article 22 para. 4 of the Constitution.

50 Weber, see note 41, 1239. However, political controversies could not always be kept away from the UPU, as has been demonstrated by the exclusion of South Africa in 1979 because of its apartheid system, see S. Magiera, "Universal Postal Union", in: Wolfrum, see note 37, 1382 et seq. (1385).

51 The Postal Operations Council is the technical and operational body of the UPU and consists of 40 elected Member States, see article 18 of the Constitution.

52 See article 104bis of the General Regulations of the UPU introduced by the 23rd Universal Postal Congress in Bucharest. The Consultative Committee consists of non-governmental organisations representing customers, delivery service providers, worker's organisations, suppliers of goods and services to the postal sector and other interested organisations.

53 The last accession was made by Montenegro on 26 July 2006.

mail system has still a significant market share.[54] The organisation fulfils an important advisory, mediating and liaison role between Member States, non-governmental organisations and private stakeholders. It sets the rules for international mail exchanges and makes recommendations to stimulate growth in mail volumes and to ensure efficiency in international postal communications. Universally applied for more than a hundred years, the principal rules of the postal system arguably have become customary international law.[55] Since administrations do not distinguish between international and domestic mail in their day-to-day operations, the system has further set the terms not only for international but also for domestic services.[56] In addition, the opening up of the UPU to all postal sector partners (including private ones) coincides with the organisation of a cycle of increasingly successful annual conferences. The most recent conference, organised in cooperation with the ITU, took place on 8 June 2007 and featured the role of the postal sector in the information society.[57]

2. The International Telecommunication Union

It is often said that the most important work in the areas of telephony, information technology and broadcasting, including direct broadcast by satellite, is done by the International Telecommunication Union, which is the leading UN specialised agency for information and communication technology.[58] Indeed, the ITU bears the principal responsibility for all types of telecommunication at least as far as technical regulation on the international plane is concerned. Nevertheless, it is arguable whether the Union may actually be considered an international actor capable of dealing with all the numerous aspects of modern international communication.

---

54 Cf. UPU, *The Postal Sector: Your Partner in Delivering the Information Society*, 2006 (brochure available at: <www.upu.int>).

55 Cf. C.H. Alecandrowicz, *The Law of Global Communications*, 1971, 37 et seq.

56 Weber, see note 2, 1084. – However, the UPU does not legally interfere in matters that fall within the domestic domain of national postal services. National posts still set their own postage rates and decide on how to manage their postal operations and staff.

57 See <http://www.upu.int/conferences/en/2007-06-08_programme_en.pdf>.

58 Cf. J. Fawcett, "Broadcasting, International Regulation", in: R. Bernhardt (ed.), *EPIL* Vol. I, 1992, 506 et seq. (507).

a. The Beginning: Telegraphy and Telephony

Similar to the UPU, the creation of the ITU also dates back to the 19th century. After the invention of the first electric telegraph in 1837 and the first public message sent over a telegraph line by Samuel Morse in 1844, telegraphy was, barely ten years later, available as a service to the general public.[59] In those days, however, telegraph lines did not cross national borders. Since each country used a different system, messages had to be transcribed, translated and handed over at frontiers, then retransmitted over the telegraph network of the neighbouring country. Given the slow nature of this system, many of the then European states felt the need for establishing international telecommunication arrangements through numerous bilateral and multilateral treaties in order to facilitate interconnection of their national networks.[60] Very quickly, in the 1860s, they saw the necessity for a unification of such diverse treaty laws into one single legal instrument.[61] On the initiative of France, 20 European states met in Paris in March 1865 in order to elaborate such a treaty.

Their work was concluded with the first International Telegraph Convention and Regulations of 17 May 1865,[62] this date being generally considered as the birthday of the ITU, which was – under the name of the "International Telegraph Union" – the first International Administrative Union worldwide. The subsequent, 1868 Vienna Conference decided to establish the Union's seat in Berne, Switzerland, where it remained until 1947.[63] Nevertheless, during this époque, states still had complete control over their respective territorial sovereignty. The sovereign right of each country to regulate its own telecommunication was fully recognised; the Convention's object was merely to facilitate relations between the peoples by means of efficient telecommunication services. Furthermore, article 31 of the Telegraph Convention of 1865

---

59 A. Noll, "International Telecommunication Union", in: R. Bernhardt (ed.), *EPIL* Vol. II, 1995, 1379 et seq. (1380).

60 As to the development see M. Kloepfer, *Technik und Recht im wechselseitigen Werden. Kommunikationsrecht in der Technikgeschichte*, 2002, 119 et seq.

61 For an overview of the ITU's history and its activities until the early 1950s see G.A. Codding, *The International Telecommunication Union – An Experiment in International Cooperation*, 1952.

62 CTS Vol. 130 No. 198.

63 Noll, see note 59, 1380.

stated that states may hinder or at least suspend any communication by telegraph for reasons of public order. Further exceptions were laid down in public interest clauses granting states broad discretion.[64]

Following the patent registration of the telephone invented in 1876 and the subsequent expansion of telephony, the ITU began, at the 1885 Berlin Telegraph Conference, to draw up international legislation governing telephony.[65] With the invention of wireless telegraphy in 1896 – the first type of radiocommunication –, and following the first radio transmission of the human voice in 1902, the 1906 Berlin Radiotelegraph Conference included the first provisions for regulating international radio services. These regulations governing wireless telegraphy are now known as Radio Regulations and have, since then, been expanded, renewed and revised by numerous conferences. However, the early Radio Regulations – very similar to the provisions regarding the telegraph communication – also provided for a series of exceptions in cases where a state's public order was considered to be endangered. Political and technical conditions were, at that time, strictly separated.[66]

b. The Second Step: Radiocommunication Services

After the birth of sound broadcasting in 1920 and the creation of two independent International Consultative Committees on Telephone (1924) and Telegraph (1925), the 1927 Washington D.C. Plenipotentiary Conference established an additional International Radio Consultative Committee.[67] Furthermore, the 1927 Conference allocated, for the first time, frequency bands to the then existing radio services in order to ensure greater efficiency of operation in view of the increase in the number of radiocommunication services (broadcasting, maritime mobile and fixed) and their respective technical peculiarities. The assignment of individual radio channels to stations, however, was still left to states,

---

64 Cf. W. Kleinwächter, "The Search for a World Communication Order – Hundred Years of Global Negotiations on Communication Technology", in: W. Kleinwächter/ K. Nordenstreng (eds), *International Security and Humanitarian Cooperation in the Reunited Europe*, 1991, 5 et seq.

65 Noll, see note 3, 465.

66 Cf. J. Evensen, "Aspects of International Law relating to Modern Radio Communications", *RdC* 115 (1965), 471 et seq. (482).

67 The committees were made responsible for coordinating technical studies, tests and measurements being carried out in the various fields of telecommunications, as well as for drawing up international standards.

which could acquire a right of non-interference for the station by informing the International Bureau of the International Telegraph Union. Under this regime, the basic scheme of which remains effective today, the plenary bodies of the ITU met periodically to amend the Table of Frequency Allocations, define new classes of services and agree upon necessary technical constraints upon services.[68] This regime worked on the "first come, first served" principle and was in favour of national sovereignty, too, because it did not transfer substantive powers to the ITU administrative bodies. Nevertheless, the "first come, first served" principle was later, starting with the period of decolonialisation in the 1960s, heavily criticised by the developing countries because it obviously favoured nations with advanced telecommunication systems.[69]

The evolution in the radiotelegraph sector during the late 1920s demanded for a profound revision of the ITU rulings. The 1932 Madrid Plenipotentiary Conference reacted by merging the Telegraph and Radiotelegraph Conventions into one single instrument, the International Telecommunication Convention, which was supplemented by new radio, telegraph and telephone regulations.[70] It was also decided to change the name of the Union into "International Telecommunication Union". The new name, which came into effect on 1 January 1934, was chosen to properly reflect the full scope of the Union's responsibilities in all the areas of wireline and wireless communication. The new term "telecommunication" was, hence, defined as "any telegraph or telephone communication of signs, signals, writings, images, and sounds of any nature, by wire, radio, or other systems or processes of electric or visual (semaphore) signalling".[71]

---

68 Ch. Kennedy/ V. Pastor, *An Introduction to International Telecommunication Law*, 1996, 33. For instance, subsequent conferences progressively raised the upper limit for radio broadcasting frequency, cf. Malanczuk, see note 4, 793.

69 As to this critique and the reactions hereto see under III. 2. c.

70 Noll, see note 3, 466; H. Volger, "International Telecommunication Union", in: id., see note 44, 349.

71 See Codding, see note 61, 140. Following the dramatic technological evolution during the second half of the 20th century, this definition was revised fifty years later by the 1982 Nairobi Conference stating that telecommunication covers "any transmission, emission or reception of signs, signals, writings, images and sounds or intelligence of any nature by wire, radio, optical or other electromagnetic systems", see Annex 2, 1012 of the Convention available at: <http://www.austlii.edu.au/au/other/dfat/treaties/1994/28.html>.

After World War II, during which the Berne Bureau had continued to work, the 1947 Atlantic City Conference took place with the aim of developing and modernising the organisation. It set up the Union's Administrative Council, created the International Frequency Registration Board and revised the Convention accordingly, which was subsequently – due to ever-increasing technical developments and requirements – further refined and partly revised by several conferences (Buenos Aires 1952, Geneva 1959, Montreux 1965, Málaga-Torremolinos 1973, Nairobi 1982).[72]

The International Frequency Registration Board was established to coordinate the increasingly complicated task of managing the radio-frequency spectrum.[73] With the ITU having become a specialised agency on 15 November 1947,[74] the headquarters of the organisation were finally and definitely transferred from Berne to Geneva in 1948.

After the launching of the first artificial satellite, "*Sputnik-1*" in 1957,[75] the Radio Regulations were entirely revised first in 1959, and then completely restructured in 1979, whereas the Telegraph and Telephone Regulations were, at Melbourne in 1988, combined into one single instrument entitled "International Telecommunications Regulations".[76] Step by step, the ITU, which formerly fully respected state sovereignty, began to interfere modestly with national telecommunication rulings. In this respect it is worth noticing that ITU membership consists not only of states but also "sector members", private or public companies and organisations with an interest in telecommunications, being entitled to participate, with specific rights and obligations, in the work of one or more sectors of the ITU.

c. The Space Era: Satellite Broadcasting

The real revolution of ITU's work and structure happened, however, following the launching of the first active satellite "*Telstar*" into an el-

---

72 As to the details of this development cf. Noll, see note 59, 1380.

73 Fawcett, see note 58, 507.

74 The agreement entered into force on 1 January 1949, UNTS Vol. 30 No. 175.

75 The Soviet satellite "*Sputnik-1*" was launched on 4 October 1957 and directly followed by the American satellite "*Explorer-1*" on 31 January 1958.

76 R. Wolfrum, "Regelungen für einzelne Nutzungsformen", in: G. Dahm/ J. Delbrück/ R. Wolfrum (eds), *Völkerrecht*, Vol. I/2, 2nd edition 2002, 466 et seq.

liptical orbit in 1962,[77] which marked the beginning of the space age. Only one year later, the first geostationary communication satellite (geosynchronous earth orbit satellite, GEOs) covering one third of the planet by using an orbit of about 36.000 km above the equator – the geostationary orbit – provided uninterrupted links.[78]

From a technical point of view, broadcasting services do not require any special coordination or prior agreement between sending and receiving states. This obviously did not conform with the concept of sovereignty of states at that period, and thus led to the, already mentioned, political controversy within the UN regarding the so called "prior consent" procedure.[79] Nevertheless, even at that time it was not disputed among the states that technical coordination and cooperation were needed both with regard to frequency and, in the case of satellite telecommunication, also with regard to orbital positions in outer space in order to avoid harmful interference of radio signals.[80] Although the legal power of the ITU to regulate space telecommunications and the positioning of satellites in outer space was initially questionable,[81] it has meanwhile been widely accepted in state practice for technical reasons and convenience. Those equatorial states which had signed the Bogotá Declaration of 3 December 1976[82] were an exception to this practice with regard to their claims of sovereignty – baseless in international law[83] – as including the segments of the geostationary orbit over their respective territories.

---

77 The elliptical orbit is at 963-9685 km of height.

78 Ch. Koenig/ A. Neumann, "Rechtliches und organisatorisches Umfeld der Satellitenkommunikation", *Multimedia und Recht* 10 (2000), 151 et seq.; Kennedy/ Pastor, see note 68, 51.

79 See under II.

80 E. Dahinden, *Die rechtlichen Aspekte des Satellitenrundfunks*, 1990, 185 et seq.

81 See Doc. A/AC.105/271, Annex I, and A. Bueckling, "Grenzüberschreitendes Direktfernsehen durch Satelliten – rechtlich gesehen", *NJW* 44 (1981), 1113 et seq. (1118).

82 Reprinted in: *RBDI* 15 (1980), 48 et seq. See also the proposals made by equatorial states within the frame of COPUOS that they shall have preferential rights to the segment of the geostationary orbit superjacent to the territory under their jurisdiction, Doc. A/AC.105/C.2/L.147 of 29 March 1984.

83 This is almost undisputed, cf. W. Graf Vitzthum, "Raum und Umwelt im Völkerrecht", in: id. (ed.), *Völkerrecht*, 3rd ed. 2004, 409; Fischer, see note

Hence, already in 1959 (shortly after the launching of "*Sputnik-1*"), the ITU took the initial step to regulate the use of the radio frequency spectrum for space activities. In addition, an Extraordinary Administrative Conference for space communications was held in 1963 in Geneva to allocate frequencies to the various space services.[84] Subsequent conferences made further allocations and put in place regulations governing the use, by satellites, of the radio-frequency spectrum and associated orbital slots.[85] Through the World Broadcasting Satellite Administrative Radio Conference of 1977 (WARC-1977), the ITU finally regulated the frequencies to be used by, as well as the geostationary orbit positions available for, satellites of the different countries.[86]

WARC-1977 became a prominent and contentious event in the Union's history. The main problem was that the Conference did not restrain itself to administering and regulating the geostationary orbit positions but expressly stressed that the positions reserved to states were limited to their proper economical utilisation and that – besides the technically unavoidable "overspill" – a radiation of other states was, in principle, prohibited.[87] This was the first time that the ITU, whose purposes were limited to safeguarding and promoting the technical facilities of telecommunication, extended its competences to matters of broad political significance.

The Union's action was thus heavily criticised by the legal doctrine as being *ultra vires*.[88] State practice, in contrast, was not consistent with this issue. On the one hand, the majority of states (including the Western democracies) recognised that the Final Acts of WARC-1977 were

---

37, para. 56 No. 15 et seq.; R. Wolfrum, "Sonderprobleme des Weltraums", in: Dahm/ Delbrück/ Wolfrum, see note 76, 453 et seq.

84 Magiera, see note 11, 295.

85 Cf. Malanczuk, see note 4, 794.

86 Cf. ITU, *Final Acts of the World Administrative Radio Conference for the Planning of the Broadcasting Satellite Service in Frequency Bands 11.7-12.2 GHz (in Regions 2 and 3) and 11.7-12.5 GHz (in Region 1)*, 1977. See further ITU, *Twenty-first Report by the International Telecommunication Union on Telecommunication and the Peaceful Uses of Outer Space*, 1982, 8.

87 Cf. Malanczuk, see note 21, 260 et seq.; Rudolf/ Abmeier, see note 11, 4 et seq.

88 Cf. N.M. Matte, "Aerospace Law: Telecommunication Satellites", *RdC* 166 (1980), 119 et seq. (163); Rudolf, see note 31, 1871; Gornig, see note 35, 180.

legally binding for a period of 15 years.[89] On the other hand, even though the ITU's attitude fully reflected the opinion of the former Socialist states there was the tendency in the UN to regard the Final Acts of the ITU only as technical regulations coordinating the establishment of the direct broadcast by satellite systems which did not eliminate the need for further legal regulations to govern the relations of states in this area.[90] This led to further discussions within the UN (i.e. the COPUOS) and finally to the above-mentioned Resolution 37/92 of the General Assembly which basically upheld the views given at WARC-1977.

Further problems on the occasion of WARC-1977 arose in view of the subdivision of the orbital positions according to the "first come, first served" principle that obviously favoured the states with advanced telecommunication systems.[91] Advocates of the developing nations therefore called for specialised administrative conferences to subdivide and allot radio channels or satellite orbital positions to states in advance, regardless of present need or capacity to use them. The idea behind this was to prevent the pre-emption of the spectrum by industrialised countries.[92] This approach met the opposition, in particular, from the United States, which argued that it would waste valuable resources and hamper future technological development. Nevertheless, an "*a priori* plan" had already been adopted in 1974 by an Administrative Conference of the ITU dealing with maritime services,[93] and the World Administrative Radio Conferences from 1985 to 1988 subsequently laid down a planning regime providing for the allocation of orbital slots and radio frequencies for all states.[94] In this way, the "first come, first

---

89 See Rudolf/ Abmeier, see note 11, 6; Bueckling, see note 81, 1117. – The Western states signed the Final Acts of the Conference merely with a declaration that the prior consent procedure should not be applied but without making an explicit reservation, cf. Gornig, see note 35, 182.

90 N. Jasentuliyana, "Regulations Governing Space Telecommunication", in: N. Jasentuliyana/ R.S.K. Lee (eds), *Manual on Space Law*, Vol. I, 1979, 220; B.H. Dickson, "Effects of 1977 ITU World Administrative Conference on the Formulation of UN Draft Principles on Direct Broadcast Satellites", *Annals of Air and Space Law* 2 (1977), 260 et seq.

91 Fischer, see note 37, para. 56 No. 15 et seq.

92 A. Bueckling, "Orbitnahmen im Weltraum", *Bayerische Verwaltungsblätter* 1987, 296 (298); Benkö, see note 37, 955.

93 Malanczuk, see note 4, 793.

94 See M.L. Smith, "Space Law/Space WARC: An Analysis of the Space Law Issues Raised at the 1985 ITU World Administrative Radio Conference on

served" principle was only basically retained in the interests of an efficient use of the geostationary orbit, but it was, at the same time, modified by a new approach of "equitable access" to those of limited resources in order to meet the concerns of developing countries.[95] As a result, the freedom of the states to use the geostationary orbit for telecommunication purposes was limited by reserving for each state a certain segment of the orbital positions in advance.[96] The principal idea of a "New World Information and Communication Order", which was presented in the late 1970s by the developing countries as an integral part of their (controversial) demand for a "New World Economic Order"[97] based on the principle of transnational solidarity, was thus partly realised.[98]

During the last two decades the above mentioned disputes have, to a large extent, shifted away from the aspects of (almost absolute) state sovereignty to the question of how to secure equitable access for all countries to these limited and economically valuable resources in outer space. Even though neither the status of the geostationary orbit nor the utilisation of satellites are codified in international conventions,[99] it can be assumed that the "prior consent" principle increasingly loses ground in favour of the "free flow of information" regime. This change is mainly due to the situation of political catharsis between the West and the East after the end of the "Cold War" as well as to various modern technical innovations.[100] Therefore, it is not surprising that the ITU's work also underwent noticeable changes after 1989/1990. In 1992, allocations were made for the first time to serve the needs of a new kind of space service using non-geostationary satellites, known as Global Mobile Personal Communications by Satellite. The same year, the ITU de-

---

the Geostationary Orbit", *Houston Journal of International Law* 8 (1986), 227 et seq.; id., "The Space WARC Concludes", *AJIL* 83 (1989), 569 et seq.

95 M. Will, *Solar Power Satellites und Völkerrecht*, 2000, 170 et seq.; R. Wolfrum, "Einzelne Formen der Nutzung des Weltraums", in: K.H. Böckstiegel (ed.), *Handbuch des Weltraumrechts*, 1991, 351 et seq. (379).

96 J. Delbrück, "World Information and Communication Order", in: Wolfrum, see note 37, 1466 et seq. (1473); Magiera, see note 11, 298 et seq.

97 Delbrück, see note 96, 1479 et seq.

98 Malanczuk, see note 28, 978; Wolfrum, see note 76, 469.

99 Wolfrum, see note 83, 452.

100 Graf Vitzthum, see note 83, 412, at footnote 237.

veloped the next generation global standard for digital mobile telephones.[101]

In view of these modern satellite technologies, the structure and the role of the Union were modified in order to correspond in a more efficient way to the new challenges of the then emerging "Information Society". In 1982 the Nairobi Plenipotentiary Conference had already given the mandate for the separation of the provisions of the, until then, applicable International Telecommunication Convention into two future instruments: a Constitution and a Convention of the ITU. Whereas the Constitution should be the basic and more stable instrument, which should be amended less frequently, the provisions of the Convention should complement those of the Constitution as a second and more easily amendable instrument.[102] Both instruments were finally adopted at the 1992 Geneva Conference, revised at Kyoto in 1994 and last amended in 2001.[103]

As a further result of this reorganisation, the Union was streamlined into three sectors, corresponding to its three main areas of activity – Telecommunication Standardisation (ITU-T), Radiocommunication (ITU-R) and Telecommunication Development (ITU-D).[104] The new system also introduced a regular cycle of conferences in order to help the Union to respond rapidly to new technological advances. This reform process of the new functions of the ITU actually started with the 1989 Nice Plenipotentiary Conference where the Development Sector, which had the aim of giving technical assistance to developing countries, was recognised as deserving to be on the same level of importance as the traditional Radiocommunication and Standardisation bodies.[105] The 1994 Kyoto Conference adopted the first-ever strategic plan for the ITU in order to establish the organisation as the international focus for

---

101 Hobe/ Kimminich, see note 9, 461.

102 K.U. Schrogl, "Die Strukturreform der ITU", *Zeitschrift für Luft und Weltraumrecht* 42 (1993), 182 et seq. (184); A. Tegge, *Die Internationale Telekommunikations-Union. Organisation und Funktion einer Weltorganisation im Wandel*, 1994; Noll, see note 3, 466.

103 See at: <http://www.itu.int/aboutitu/basic-texts/constitution.html> and <http://www.itu.int/aboutitu/basic-texts/convention.html>. As to the legal framework of operation and law-making of ITU cf. the detailed analysis by J. Hinricher, "The Law-Making of the International Telecommunication Union (ITU) – Providing a New Source of International Law?", *ZaöRV* 64 (2004), 489 et seq.

104 Schrogl, see note 102, 190; Hinricher, see note 103, 490 et seq.

105 Tietje, see note 8, 18.

all matters relating to telecommunications in the global information society in the next century, advocating, at the same time, a more client-orientated approach. In addition, the 1992 Torremolinos Conference had already prepared the way for the introduction of personal communication services provided by mobile satellite and terrestrial networks, as well as for high definition television and digital audio broadcasting, finally addressed at the 1995 Geneva World Radiocommunications Conference. Further Conferences (1994 Kyoto, 1998 Valletta, 1999 Minneapolis) were dedicated to specific telecommunication development projects, primarily in the least developed countries,[106] and to the implications that the WTO Agreement on Basic Telecommunications would have on ITU Member States. While the international regulatory framework for telecommunications is still predominantly formulated by the ITU, the commercial and trade aspects of telecommunications fall within the competence of the WTO.[107]

All in all, satellite communication may seem to represent only a small part of the telecommunication sector, but it plays an important role within the global information system. The present phase is characterised by the commercialisation of outer space activities, involving the emergence of private actors, especially in the field of satellite telecommunications – where former telecommunications operators like INTELSAT, INMARSAT and EUTELSAT have been subjected to privatisation[108] –, and, to a lesser extent, in the field of remote sensing, i.e. the collection of information about the earth from mechanisms placed in the space.[109] Within this area, a new legal regime emerged pertaining to

---

106 For instance, for the period 1997-2001, 17.5 million Swiss Francs were earmarked for development projects, see Malanczuk, see note 4, 802.

107 The regime applicable to the telecommunications industry in the framework of the WTO is the General Agreement on Trade in Services (GATS) and the WTO Agreement on Basic Telecommunication Services, annexed to the GATS, see Tietje, see note 8, 18.

108 As to the privatisation of these operators Koenig/ Neumann, see note 78, 156; and particularly; I. Polley, *INTELSAT – Restrukturierung einer internationalen Telekommunikationsorganisation*, 2002.

109 As to the still not definitely regulated matter of the remote sensing technique see P. Malanczuk, "Satelliten-Fernerkundung der Erde: Politische und rechtliche Aspekte", in: K. Kaiser/ S.F. Welck (eds), *Weltraum und Internationale Politik*, 1987, 57 et seq.; T. Klinner, *Satellitenfernerkundung im Völkerrecht*, 1989; Wolfrum, see note 83, 456 et seq. – Further see the General Assembly Resolution on Principles Relating to Remote Sensing of the

global air navigation by satellite.[110] Furthermore, the World Radiocommunication Conferences since 1995 have given special attention to the use of low-Earth orbits satellites (LEOs) which are operating at centrimetric waves and on non-geostationary satellite systems in the fixed-satellite service as well as on broadcasting satellite service.[111] One particular problem arising from the increasing use of outer space by satellite projects is the production of space debris.[112] This refers to the increasing population of dysfunctional satellites and other components of man-made space objects remaining in circulation around the earth, endangering the use of the advantageous earth orbits in the future, and also causing dismay among astronomers.[113] The matter requires international regulation and is currently being studied not only by the ITU but also in the technical sub-committee of COPUOS.[114] Here again, it is evident that today's telecommunication issues need both, the technical standards regulated by the ITU on the one hand, and a political agreement on the "free flow of information" and on the principle of "equitable access" reached within the UN bodies on the other.

d. The Internet Revolution and "Cyberspace" – A Shared Domain or Chaos?

In parallel to the development of the direct broadcast by satellite, the development of digital and computer technologies made its first steps. At the beginning of the 1970s, however, the Internet[115] was mainly used

---

Earth From Outer Space, A/RES/41/65 of 3 December 1986, which establishes principles for remote sensing activities.

110 Malanczuk, see note 4, 803.

111 See A. Noll, "The extraterrestrials are coming", *Telecommunication Policy* 1996, 79 et seq.; Koenig/ Neumann, see note 78, 151.

112 See Status Report Submitted by the Committee on Space Research, Doc. A/AC.105/403 of 6 January 1988, 5.

113 P. Malanczuk, "Legal and Policy Aspects of Controlling Space Debris", *Zeitschrift für Luft und Weltraumrecht* 45 (1996), 37 et seq.

114 See Doc. A/AC.105/C.2/SR.446 of 22 April 1986 on the one hand, and Doc. A/AC.105/707 of 14 December 1998, Doc. A/AC.105/C.2/L.246 of 1 April 2003, on the other.

115 The Internet is an international computer network that connects individual computer networks worldwide, cf. the characterisation given by the U.S. Supreme Court, in: *ACLU v. Reno*, 117 S.Ct. 2329, 2334 (1997).

by U.S. academics[116] who established quasi-legal rules called the "netiquette".[117] At that time, probably no one could anticipate the digital cross-border revolution which has fundamentally changed societies worldwide since approximately 1995. By the so-called "cyberspace" the world of today has become a "global village", and the number of the Internet users is constantly growing. Whereas in 2000 only 200 million people used the Internet, there are currently more than 1 billion Internet users.[118]

The regulation of the Internet poses a number of complicated legal problems that are not yet adequately resolved on the international level.[119] The problems range from the administration of Internet domain names to the regulation of the commercial use of the Internet.[120] From a trade perspective, a number of policy and regulatory issues arise from the electronic commerce. They include, *inter alia*, the legal and regulatory framework for Internet transactions, security and privacy issues, taxation, access to the Internet, market access for suppliers over the Internet, trade facilities, public procurement, intellectual property questions, and regulation of content. Most of these issues should be dealt with by the system of the WTO and not primarily by the UN. For instance, products purchased and paid for over the Internet but delivered physically are likely to be subject to the existing GATT rules, whereas products delivered as digitalised information via the Internet

---

116 In principle, the Internet was developed in order to have ways of communication in times of an atomic war, see R. Werle, "The Impact of Information Networks on the Structure of Political Systems", in: C. Engel et al. (eds), *Understanding the Impact of Global Networks on Local, Social, Political and Cultural Values*, 2000, 159 et seq. (161).

117 L. Lessig, "Constitution and Code", *Cumberland Law Review* 27 (1997), 1 et seq.; W. Kleinwächter, "ICANN als United Nations der Informationsgesellschaft? Der lange Weg zur Selbstregulierung des Internet", *Multimedia und Recht* 8 (1999), 452 et seq. (453).

118 W. Kleinwächter, "Globalisierung und Cyberspace", *Zeitschrift Vereinte Nationen* 54 (2006), 41 et seq.

119 See J.H. Kaiser, "Das Recht im Cyberspace. Eine spontane Ordnung noch ohne Hierarchie", in: *Festschrift für Günther Winkler*, 1997, 397 et seq.; K.W. Grewlich, *Governance in Cyberspace: Access and Public Interest in Global Communications*, 1999.

120 P.T. Stoll/ B. Goller, "Electronic Commerce and the Internet", *GYIL* 41 (1998), 128 et seq.; V. Röben, "International Internet Governance", *GYIL* 42 (1999), 400 et seq.

raise a variety of questions relating to the GATS and TRIPs.[121] Nevertheless, some issues – for example the administration of the "Internet Domain Name System", the equitable access for all human beings to computer systems, or the establishment of safeguarding standards against attacks by cybercriminals – could be tackled within the UN or its specialised agencies. As communication between peoples might help to resolve conflicts, access to information and knowledge is a prerequisite of achieving the UN Millennium Development goals in 2015.[122]

aa. The Decisive Works of the Internet Society, the Internet Assigned Numbers Authority and the Internet Corporation for Assigned Names and Numbers

But reality shows that the UN system was, at least for a long time, more or less absent in (technically, legally and politically) accompanying Internet development.[123] The first general discussions regarding the Internet[124] took place at the Internet Society (ISOC), which is a non-governmental non-profit educational organisation that, since 1992, has promoted Internet use and access in order to assure the open development, availability and use of the Internet for the benefit of all people throughout the world.[125] On the other hand, the administration of Internet domain names was in the hands of the Internet Assigned Numbers Authority (IANA), an informal body financed by the U.S. Defence Department and research grants.[126]

A proposal submitted by IANA and ISOC at the end of the 1990s, comprising representatives from industry, service providers and users, to legally establish an institutionalised system on a regional and priva-

---

121 Cf. K.P. Leier, "Elektronischer Handel in der Welthandelsorganisation", *Multmedia und Recht* 12 (2002), 781 et seq.; Tietje, see note 8, 24 et seq.

122 See UN Millennium Declaration, A/RES/55/2 of 8 September 2000.

123 As to minor UN actions that were useful to the Internet regulation see C. Engel, "Das Internet und der Nationalstaat", *Berichte der Deutschen Gesellschaft für Völkerrecht* 39 (2000), 353 et seq. (404).

124 As to previous bodies of decision-making and standard-setting regarding the Internet see Röben, see note 120, 402 et seq.

125 ISOC is governed by its Board of Trustees, maintains joint offices in the United States and in Geneva and acts on a world-wide basis through several "National Chapters". Further information on ISOC is available at <www.isoc.org>.

126 See at: <www.iana.org>.

tised basis with the settlement of disputes on domain names through special arbitral committees of WIPO was not accepted.[127] The U.S. government succeeded in having its alternative model adopted which has put the administration of the Internet address system as well as the root server system under the control of a non-profit organisation established in 1998, under the law of California. This company, the Internet Corporation for Assigned Names and Numbers (ICANN), was created in order to oversee a number of Internet-related tasks previously performed directly on behalf of the U.S. government and by other organisations, notably IANA and ISOC.[128] Acting globally and by periodic public meetings and, particularly, by a very well functioning Internet network and organisation,[129] ICANN is largely outside the control of international organisations or states. The U.S. sector alone controls about 85 per cent of the Internet's underlying infrastructure, which does confront the U.S. with criticism (especially from the EU) in view of its competition advantages.[130] It therefore has been suggested that ICANN should be internationalised and historical contractual links to the U.S. government should be removed in order to find a more appropriate basis of legal and political legitimacy at least in those matters which are of existential interest of common welfare.[131]

---

127 Malanczuk, see note 4, 804.

128 Cf. F.C. Mayer, "The Internet and Public International Law – Worlds Apart?", *EJIL* 12 (2001), 617 et seq. (621); Kleinwächter, see note 117, 456 et seq.; Röben, see note 120, 414 et seq.

129 ICANN represents the worldwide society of Internet users and of stakeholders. It is managed by a Board of Directors, which is composed of six representatives of the supporting organisations and sub-groups which deal with specific sections of the policies under ICANN's purview, eight independent representatives of the general public interest, selected through a Nominating Committee in which all the constituencies of ICANN are represented, and the President. Further information about the structure of ICANN is available at: <www.icann.org>.

130 See, for example, the Communication of the European Commission in: COM (2000) 202 final of 7 February 2000, 6.

131 A.M. Froomkin, "Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution", *Duke Law Journal* 50 (2000), 17 et seq.; J. Weinberg, "ICANN and the Problem of Legitimacy", *Duke Law Journal* 50 (2000), 187 et seq. (213 et seq.). See further A. Segura-Serrano, "Internet Regulation and the Role of International Law", *Max Planck UNYB* 10 (2006), 191 et seq. (254), basing its proposals on the concept of the "common heritage of mankind".

bb. The ITU's Participation in the Information Society: The World Summit on the Information Society (WSIS)

Against this background, the UN family, especially the ITU, in the late 1990s, became aware of the necessity to initiate worldwide regulations of the Internet in order to facilitate an equitable, non-discriminatory access for all citizens and to guarantee an equitable balance of interests of all stakeholders.[132] The UN finally realised that, while the digital revolution has extended the frontiers of the "global village", the vast majority of the world remains unhooked from this phenomenon, and that equitable access to scientific and technical knowledge, telecommunication facilities, and the distribution of valuable limited communication resources are essential to the development and economic independence of the developing countries and to the fight against poverty.[133] It has therefore become imperative for the world to bridge the "digital divide" between the North and the South, i.e. between the developed and the developing world.[134]

Recognising that these aspects require global discussion and new groundbreaking results, the ITU, following a proposal by the government of Tunisia, resolved at its Plenipotentiary Conference in Minneapolis by Resolution 73 (1998) to hold a World Summit on the Information Society (WSIS). After several consultations between the relevant UN committee,[135] the UN Secretary-General and the ITU Council, it was finally decided in 1999 that the summit would be held under the high patronage of the UN Secretary-General. It was planned that the ITU should assume the leading role in the summit and its preparation, assisted by contributions from all relevant UN bodies and other intergovernmental organisations, non-governmental organisations, civil society and the private sector. In 2001, the ITU Council decided to hold the summit on the Information Society in two phases, the first from 10 to 12 December 2003, in Geneva, and the second from 16 to 18 No-

---

132 Cf. the first strategic plan set up by the 1994 ITU Kyoto Conference, which was amended and revised in the 2002 ITU Marrakesh Conference.

133 Malanczuk, see note 28, 983; S. Johnson, "The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information through the Internet", *Administrative Law Review* 50 (1998), 277 et seq. (305).

134 Kleinwächter, see note 118, 39; Tietje, see note 8, 20, at footnote 42.

135 The initially competent UN Administrative Committee on Coordination was renamed the United Nations System Chief Executive Board pursuant to ECOSOC Decision 2001/321 of 24 October 2001.

vember 2005 in Tunis.[136] With A/RES/56/183 of 21 December 2001 the UN General Assembly fully endorsed the framework for the summit adopted by the ITU Council.[137]

As already mentioned, the World Summit aimed at bridging the digital divide and turning it into digital opportunity for all. The objective of the first phase was, hence, to develop and foster a clear statement of political will and take concrete steps to establish the foundations for an Information Society for all. Several heads of states and ministers from 175 countries as well as high-level representatives from international organisations, private sectors, and civil society attended the Geneva Phase of the WSIS and gave political support to the Geneva Declaration of Principles[138] and the Geneva Plan of Action[139] that were adopted on 12 December 2003.[140] According to both documents, one of the most outstanding challenges of the Information Society lies in guaranteeing universal, ubiquitous, equitable and affordable access to information and communication technologies infrastructure and services, and this should therefore be an objective of all stakeholders involved in building it. To that aim, the Geneva Declaration – which since then has been known as the Constitution of the "information era" – includes several key principles:

(1) access to information and knowledge enhanced by removing barriers; (2) capacity building in all stages of education, training and human resource development; (3) building confidence and security in the use of information and communication technologies, including information and network security, authentication, intellectual and consumer protection; (4) enabling the information and communication environment by coordination, standardisation, stability and fair competition rules as well as by secure, safe and healthy working environment; (5) guaranteeing and stimulating cultural diversity and identity, linguistic diversity and local content; (6) commitment to the principles of freedom of the

---

136 ITU Council Resolution 1179 (2001).

137 A/RES/56/183 of 21 December 2001, para. 1. See also A/RES/57/238 of 20 December 2002.

138 Declaration of Principles, Building the Information Society: a Global Challenge in the New Millennium, World Summit on the Information Society, Geneva 2003, 12 December 2003, Doc. WSIS-03/GENEVA/DOC/4-E.

139 Plan of Action, Building the Information Society: a Global Challenge in the New Millennium, World Summit on the Information Society, Geneva 2003, 12 December 2003, Doc. WSIS-03/GENEVA/DOC/5-E.

140 See Doc. A/C.2/59/3.

press and freedom of information, as well as those of the independence, pluralism and diversity of media; (7) acknowledging the importance of ethics for the Information Society especially regarding dignity and worth of the human person; and (8) effective international and regional cooperation among governments, the private sector, civil society and other stakeholders, including the international financial institutions.

All these guiding principles were translated in the Geneva Plan of Action into concrete action lines to advance the achievement of the internationally-agreed development goals and endorsed by the UN General Assembly.[141]

The objective of the second phase which took place in Tunis in November 2005 was to monitor and to evaluate progress on the Geneva Plan of Action as well as to find solutions and reach agreements in the fields of Internet governance, financing mechanisms, and implementation of the Geneva and Tunis documents and, in general, of the UN Millennium Development goals. Again, a large number of states and non-state actors from all parts of the world attended the Tunis Phase of WSIS and gave support to the Tunis Commitment[142] and Tunis Agenda for the Information Society[143] that were adopted on 18 November 2005. As a main requirement[144] the international finance institutions like the World Bank should give priority to the financing of the Internet development in developing countries. Furthermore, a "Digital Solidarity Fund" has been established as an innovative financial mechanism open to interested stakeholders with the objective of seeking new voluntary sources of "solidarity" financing. Finally, the summit invited the UN Secretary-General to convene a new forum for multi-stakeholder policy dialogue called the Internet Governance Forum (IGF).[145] After reaching a common understanding, the UN Secretary-General has cor-

---

141 See A/RES/59/220 of 22 December 2004.

142 Tunis Commitment, World Summit on the Information Society, Geneva 2003-Tunis 2005, 18 November 2005, Doc. WSIS-05/TUNIS/DOC/7-E.

143 Tunis Agenda for the Information Society, World Summit on the Information Society, Geneva 2003-Tunis 2005, 18 November 2005, Doc. WSIS-05/TUNIS/DOC/6(Rev. 1)-E.

144 No consent could be reached regarding the administration of the Internet which was proposed to be changed by several developing countries and the European Union but could not find the consent of the U.S. Government.

145 Tunis Agenda, see note 143, para. 72.

respondingly established, in 2006, a small secretariat in Geneva with the objective to initiate and to coordinate this dialogue.[146]

As the next conference is not scheduled until 2015, it seemed necessary to install WSIS follow-up in between times. A/RES/60/252 therefore recognised that the implementation and follow-up of the major decisions of the Geneva and Tunis Summits should be an integral part of the general follow-up system of the UN conferences.[147] Thus, the General Assembly urged the Member States, the relevant UN bodies and other governmental and non-governmental organisations as well as the private sector to actively contribute to the implementation of the WSIS principles. It especially addressed the ECOSOC and the UN Secretary-General to remain seized of the matter. Against this background, ECOSOC indicated, in its Resolution 2006/46, that the Commission on Science and Technology for Development (CSTD) would assist the Council in its annual considerations of the follow-up of the summit outcomes.[148] While preserving the inter-governmental nature of the Commission, ECOSOC decided that CSTD should make use of the successful multi-stakeholder approach that was pioneered by WSIS. During the next two sessions (2007 and 2008), the deliberations of CSTD will therefore be open not only to non-governmental organisations in consultative status with ECOSOC, but also, after approval by ECOSOC, to other interested organisations and civil society entities which were accredited to WSIS.

In sum, it may be concluded that, in the meantime, the UN system does consider that there is a reason to try to set up a coordinated system for "international Internet governance".[149] This not only includes Internet names and addresses, as dealt with by ICANN, but also other important policy issues such as access to Internet resources. In this regard, both the Geneva and the Tunis Agenda have built on the idea that policy authority for Internet-related public policy issues is the sovereign right of all states, and has therefore called for the requisite legitimacy of Internet governance, based on the full participation of all stakeholders, be they public or private, from both developed and developing countries.[150]

---

146 Further information on IGF available at: <www.intgovforum.org>.

147 A/RES/60/252 of 27 March 2006, para. 12, endorsing ITU Council Resolution 1244 (2005).

148 E/RES/2006/46 of 28 July 2006, paras 4 et seq.

149 Segura-Serrano, see note 131, 255 et seq.

150 Tunis Agenda, see note 143, paras 31 and 35.

In other words, today the common management of the Internet's core resources is not only regarded as being a mere technical matter but is also treated as a strong political question.[151] Furthermore, as stated by Principle No. 2 of the Geneva Declaration of Principles of the WSIS "connectivity is a central enabling agent in building the Information Society".[152] Telecommunications and the Internet therefore have the potential not only to ensure the human right to information and the freedom of communication but also to ensure the economic, educational, and social parity necessary to attain equality for each member of the society.[153]

IV. Conclusion

Already this short outline on the tasks and functions of and the actions taken by the UN system *vis-à-vis* the challenges of the "Telecommunication and Information Society" allows for several conclusions:

Firstly, it has become evident that both the UPU and the ITU have constantly been in a permanent reform process, the milestones of which have been set by various technical inventions in the telecommunication field.[154] It is probably the fate of international law on the "Information Society" that it must always keep pace with ever accelerating technological advances.[155] This also marks the limits of the possibilities of the UN system. Only after the invention or technological progress has been made, can the UPU and the ITU reasonably decide on what and how a certain subject matter should be internationally regulated or legislated upon.[156] However, different to the UN organisation itself – whose reform process has, for a long time, been politically paralysed –,

---

151 Segura-Serrano, see note 131, 258.

152 Geneva Declaration of Principles, see note 138, para. 21.

153 P.M. Worthy, "Racial Minorities and the Quest to Narrow the Digital Divide: Redefining the Concept of Universal Service, *Hastings Communication & Entertainment Law Journal* 26 (2003), 1 et seq. (3). However, it is to be stressed that a "right to Internet" or a "right to communicate" has not (yet) emerged in international human rights law, see Grewlich, see note 119, 84.

154 Volger, see note 70, 350.

155 A similar situation exists regarding the relationship between technical development and national law, see Kloepfer, see note 60, 268 et seq.

156 Noll, see note 3, 466.

the UPU and the ITU are capable of reacting to the new challenges. In this context it is interesting to note that both organisations are starting to closely work together. The already-mentioned conference on the postal sector and the information society of 8 June 2007[157] is a good example of the new cooperation between those two specialised agencies.

Secondly, and this is probably the most important conclusion, the reason for the uniqueness of the UPU and the ITU among international organisations lies in the fact that both were originally founded on the principle of cooperation between governments and were continuously opened to processes that include the private sector. This development is due to the constant deprivation of state powers within the telecommunication sector which is nowadays largely dominated by private actors.[158] Governments more and more reach the limit of effective lawmaking and law enforcement in the domestic and international communication systems, and the involvement of private actors is becoming an increasingly important aspect of effective and flexible management of societies' needs. Private actors are of great importance, in particular, for Internet administration. They have more creative potential in governing this new area than states. Furthermore, government-set standards may prove hard to adapt to rapidly changing circumstances.[159] This situation has already led to new public-private cooperative administrative actions on the international level,[160] and might lead, in the future, to new forms of decisions, and thus, perhaps, to new sources of international law.[161]

Nevertheless, the whole system of international telecommunication – even if it might be described by the modern term of "global governance"[162] – still essentially depends upon states recognising the effects of failure to behave in a responsible manner. The problems which might arise from a failure to comply with standards and rules set up by the

---

157 See note 57.

158 S. Hobe, *Der offene Verfassungsstaat zwischen Souveränität und Interdependenz*, 1998, 286 et seq.; Engel see note 123, 398.

159 Röben, see note 120, 404 et seq.

160 C. Tietje, *Internationalisiertes Verwaltungshandeln*, 2001, 447 et seq.; Engel, see note 123, 419.

161 Hinricher, see note 103, 490; Noll, see note 3, 467.

162 C. Tietje, "The Changing Legal Structure of International Treaties as an Aspect of an Emerging Global Governance Architecture", *GYIL* 42 (1999), 26 et seq. (35); S. Hobe, "Global Challenges to Statehood: The Increasingly Important Role of Non-Governmental Organizations", *Ind. J. Global Legal Stud.* 5 (1997), 191 et seq.

ITU are easily imaginable. Not only the private sector, but also governments depend on being able to communicate their messages via cable or satellite. Common standards in all fields of communication are evidently not merely a goal that has to be achieved *per se*, but they are the basis on which political cooperation can work.[163] Therefore, even simple recommendations and other legally non-binding decisions are practically turning into powerful and authoritative law, which must be almost universally followed.[164] Against this background, there is no doubt that the ITU does play a prominent role within the UN system in administering and regulating the emerging problems, compensating in part the weak position of the ECOSOC and the UN General Assembly in the telecommunication sector. Or in other words: the ITU is plainly indispensable for a transnational administrative standard-setting and for the emergence of an "international administrative law".[165]

Thirdly, the core competences of the ITU in the fields of information and communication technologies – international and regional cooperation, radio spectrum management, standards development and the dissemination of information – are of crucial importance for building the "Information Society". Being a UN specialised agency and an international organisation of an almost universal character including the interests of the developing nations,[166] the ITU should be the organisation which, at least in part is, in charge of running the Internet. This would be, of course, a dramatic departure from the current system, managed largely by U.S. interests. In order to find a compromise, one could think of establishing a new model according to which the ITU could address Internet access, security and financing, but would leave control over the Internet's addressing and root server system to ICANN.

Needless to say that this proposal, as well as the general evolution and regulation of all the modern forms of communication, will probably be a long-, if not an ever-lasting, challenge. In recognition of this dynamic, it is worth noting that the WSIS, endorsed by General Assembly Resolution 60/252 of 2006, stated that 17 May henceforth will be celebrated as "World Telecommunication and Information Society

---

163 Tietje, see note 8, 16 et seq.

164 Hinricher, see note 103, 495. Similar S. Magiera, "International Telecommunication Union", in: Wolfrum, see note 37, 821 et seq. (824).

165 Tietje, see note 160, 101. As to the legitimacy of this transnational cooperation see C. Möllers, "Transnationale Behördenkooperation", *ZaöRV* 65 (2005), 351 et seq. (378).

166 Currently (as of June 2007), the ITU has 191 Member States.

Day".[167] The main objective of this day, which took place for the first time on 17 May 2006, is to raise global awareness of societal changes brought about by the Internet and new technologies.[168] It also aims to help to reduce the "digital divide" and to look for stable solutions especially concerning Africa.[169] Whether and to what extent the UN family really will be capable politically to resolve these challenges remains to be seen.

---

167 A/RES/60/252 of 27 March 2006, para. 13.

168 See the messages of UN Secretary-General Kofi Annan and of the Secretary-General of ITU Yoshio Utsumi, available at: <http://www.itu.int/wisd/2006/unsg-message.html>.

169 On 17 May 2007 the ITU announced, by Resolution 68 (Rev. Antalya 2006) the launching of "Connect Africa", a programme which has the aim to accelerate partnerships and the roll-out of technology infrastructure in order to boost social and economic development in the African region.

The Protection of Minorities and Indigenous Peoples Respecting Cultural Diversity

Dieter Kugelmann

I. Introduction
II. The Framework of the Protection of Groups
III. Notions
    1. The Lack of Definition of a Minority
    2. National Minorities and New Minorities
    3. Indigenous Peoples
    4. Cultural Diversity
IV. The Universal Protection of Minority Rights
    1. Specific Treaty Provisions
    2. The Declaration 47/135 and the Commentary
    3. Article 27 ICCPR and the General Comment
    4. Fundamental Elements of the International Protection of Minorities
V. The Protection of Minorities in Europe
    1. The OSCE and the High Commissioner on National Minorities
    2. The Council of Europe and the European Court of Human Rights
    3. The Framework Convention
    4. Fundamental Elements of Minority Protection in Europe
VI. The Protection of the Rights of Indigenous Peoples
    1. Selected Legal Instruments
    2. UN Activities and the Draft Declaration
    3. Fundamental Elements of the Protection of Indigenous Peoples
VII. Cultural Diversity of Groups
VIII. Conclusion

A. von Bogdandy and R. Wolfrum, (eds.),
Max Planck Yearbook of United Nations Law, Volume 11, 2007, p. 233-263.
© 2007 Koninklijke Brill N.V. Printed in The Netherlands.

I. Introduction

There have been recent developments in international law and politics which have influenced the legal protection of groups and under the auspices of the United Nations, the protection of indigenous peoples has made some progress.

The *Declaration on the Rights of Indigenous Peoples*,[1] drafted in 1993, was adopted by the Human Rights Council in its first session in June 2006 and was forwarded to the General Assembly for adoption.[2] This may also give rise to a further strengthening of the rights of indigenous peoples in treaty law. Compared to this development, the instruments for the protection of minorities have not changed much the last decade. The *Framework Convention for the Protection of National Minorities of the Council of Europe*[3] is still the most detailed legal instrument on the international level with the most effective system of implementation and monitoring.

Another development influencing the situation of groups is the growing importance of cultural diversity in international law. The notion plays a role in the debates on migration and pluralistic societies and in the debates on the relation between culture and trade. In treaty law, the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* of 2005[4] paves the way for, at least, a change of interpretation of existing rules.[5] The preamble affirms that "cultural diversity is a defining characteristic of humanity". Acknowledging cultural diversity between states or within a state encourages a different view on the protection of groups.

---

1 Docs E/CN.4/1995/2; E/CN.4/Sub.2/1994/56, reprinted in: *ILM* 34 (1995), 541 et seq.

2 Resolution 2006/2 of 29 June 2006.

3 ETS No. 157. See also under V. 3.

4 Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 20 October 2005; C.B. Graber, "The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?", *Journal of International Economic Law* 9 (2006), 553 et seq.; R.J. Neuwirth, "United in Divergency: A Commentary on the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions", *ZaöRV* 66 (2006), 819 et seq.

5 See G. Nolte, "Kulturelle Vielfalt als Herausforderung für das Völkerrecht", *Berichte der Deutschen Gesellschaft für Völkerrecht* 2007, These 19 (forthcoming).

II. The Framework of the Protection of Groups

When the nation state developed, the human beings living in a state were seen under political criteria as a nation. In some state traditions the term "nation" carries connotations of a community shaped by common descent, culture and history and often by a common language as well. If cultural and ethnic criteria are applied, the nation is understood as a homogenous social group shaped by solidarity and attached to a specific territorial homeland.[6] Nation can also be understood as a political community[7] especially in states where the creation of the modern state developed in parallel to the building of a nation and where, therefore, the founding myth forced people together.[8] In a nation state, different groups may exist but they are unified as a nation. The criteria of inclusion and exclusion enables the state to implement a differentiated legal order versus different persons. This view of the nation made the difference between majority and minorities possible and entailed the need to protect vulnerable groups.

As a consequence, the protection of minorities was for centuries an important challenge for domestic and international law.[9] Many international conflicts arose because different groups fought each other on behalf of ethnic or religious differences. After World War I, specific minority regimes of international law were implemented by the League of Nations. The peace treaties created new frontiers and new states and therefore new minorities. The protection of these minorities was guar-

---

6 M. Borri, "European Citizenship and National Identities", *Rechtstheorie*, 1997, Beiheft 17, *Rule of Law*, edited by W. Krawietz/ E. Pattari/ A. Erh-Soon Tay, 226 et seq.

7 E.W. Böckenförde, "Die Nation – Identität in Differenz", in: id. (ed.), *Staat – Nation – Europa*, 2. Auflage 2000, 34 et seq. (34 - 35).

8 R. Brubaker, *Citizenship and Nationhood in France and Germany*, 1992, 43 – 48. This book is reviewed by E.W. Böckenförde, "Staatsbürgerschaft und Nationalitätskonzept", in: see note 7, 59 – 67.

9 F. Capotorti, "Minorities", in: R. Bernhardt (ed.), *EPIL* Vol. 8, 1985, 386 et seq.; see already G. Jellinek, *Das Recht der Minoritäten*, 1898, 30 et seq.; O. Kimminich, "Regelungen der Minderheiten- und Volksgruppenprobleme in der Vergangenheit", in: *Volksgruppenrecht, Ein Beitrag zur Friedenssicherung,* 1980, 37 et seq.

anteed by the League of Nations but it failed because of external political developments.[10]

Within the United Nations, the protection of minorities aims at fostering peace and security as well as the protection of human rights.[11] In the last 30 years, the protection of indigenous peoples made its way onto the international agenda. As a matter of fact, the problems of indigenous peoples were part of the discussions on minority rights. Therefore, the related matter of minority rights was the starting point for a legal analysis of the rights of indigenous peoples.

From the point of view of international law, indigenous people were a phenomenon for which specific legal criteria had not yet developed. However, the status of indigenous peoples cannot be treated as part of the protection of minorities[12] because indigenous populations may even constitute the majority in a state[13] and the developments in treaty law point clearly in the direction of a specific legal regime for indigenous peoples. Nowadays, the rights of minorities and the rights of indigenous peoples should be seen as different legal subjects with overlapping aspects. Certain problems of protection are identical and some legal rules apply to both subjects. Both members of minorities or indigenous populations, may be especially vulnerable under the general human rights system, which entails specific legal regimes for the protection of children or the fight against gender discrimination.[14] But the evolution of the relevant legal instruments points in different directions as the protection of indigenous peoples seems to be more dynamic than the protection of minorities in international law. In order to identify differ-

---

10 N. Lerner, "Peoples and Minorities in International Law", in: C. Brölmann/ R. Lefeber/ M. Zieck (eds), *Peoples and Minorities in International Law*, 1993, 77, 82, 85.

11 F. Ermacora, "The Protection of Minorities before the United Nations", *RdC* 182 (1983), 250 et seq.

12 This was proposed by I. Brownlie, "The Rights of Peoples in Modern International Law", in: J. Crawford (ed.), *The Rights of Peoples,* 1988, 16 et seq.

13 As a non-dominant majority as in Bolivia or a dominant majority as in Fiji or in former times in South-Africa; S. Wiessner, "Demographic Change and the Protection of Minorities", in: E. Klein (ed.), *Globaler demographischer Wandel und Menschenrechte*, 2005, 155 et seq. (159).

14 F. Banda/ C. Chinkin, *Gender, Minorities and Indigenous Peoples*, 2004, 5-6; A. Gupta, *Human Rights of Indigenous Peoples*, 2 volumes, 2005, Vol. 1, 94 et seq.

ences in the legal instruments, some fundamental notions will be analysed.

III. Notions

1. The Lack of Definition of a Minority

First of all, it should be clear which group in a state has the status of a minority. If a treaty confers a right to a minority, other kinds of groups cannot assume this right. Because of the very different points of view of states, there is no accepted definition of minorities in international law.[15] The former Special Rapporteur of the United Nations, Francesco Capotorti, developed a definition in 1979 which is the most prominent concept and the starting point of any discussion.[16] According to his definition a minority is a group which is numerically inferior to the rest of the population of a state and in a non dominant position, whose members possess ethnic, religious or linguistic characteristics which differ from those of the rest of the population, and who if only implicitly, maintain a sense of solidarity directed towards preserving their culture, traditions, religion or language. As Capotorti developed his definition for a sub-commission of the former Commission on Human Rights of the United Nations, it is linked to article 27 of the International Covenant on Civil and Political Rights (ICCPR), the most prominent provision in international law concerning minorities. The beneficiaries of the rights under article 27 are persons belonging to "ethnic, religious or linguistic minorities".

---

15 K. Doehring, *Völkerrecht*, 2nd edition, 2005, note 1017; R. Hofmann, "Die völkerrechtlichen Rahmenbedingungen des Minderheitenschutzes", in: G. Brunner/ B. Meissner (eds), *Das Recht der nationalen Minderheiten in Osteuropa*, 1999, 9 et seq. (11); R. Wolfrum, "The Emergence of 'New Minorities' as a Result of Migration", in: Brölmann/ Lefeber/ Zieck, see note 10, 153 et seq.

16 Ermacora, see note 11, 287 et seq.; P. Thornberry, *The International Law of Minorities*, 1991, 7.

2. National Minorities and New Minorities

The notion of national minorities is necessarily discussed in the context of the above mentioned Framework Convention, which is applicable only to national minorities. The government of the Federal Republic of Germany considers national minorities to be groups of the population which meet five criteria:[17] their members are German nationals; they differ from the majority population insofar as they have their own language, culture and history, meaning their own identity; they wish to maintain this identity; they are traditionally resident in Germany and they live in the traditional settlement areas. National minorities are identified by the institutions of the nation state and they are defined by citizenship. However, any national minority has ethnic or linguistic characteristics differing from the majority.

It is an open question if the so called "new" minorities can be understood as minorities and if they are protected under international law. Because of world-wide migration there are asylum seekers, refugees or people looking for work in a state. If a large number of them share tradition or religion they may try to be accepted as a minority in the state they immigrated to. There are nearly three million people from Turkey who live in the Federal Republic of Germany. In Estonia there is a large group of people with ethnic roots in Russia. If these kinds of groups were seen as a minority, they could claim minority rights versus the host state. Recent developments in the United Nations point in the direction of an application of minority rights to "new" minorities, but with restrictions and modifications concerning the concrete contents of those rights. However, state practice on a large-scale cannot yet be observed.

3. Indigenous Peoples

Indigenous peoples are peoples who inhabited a land before it was conquered by other peoples or societies during colonisation by force or by treaty and they consider themselves distinct from the society currently governing those territories.[18] More generally, indigenous peoples are,

---

17 Cf. M. Hoffmann, "The Right to Self-Determination: The Case of Germany", in: E. Riedel (ed.), *Constitutionalism – Old Concepts, New Worlds*, 2005, 89 et seq. (97).

18 Gupta, see note 14, vii.

> "composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons from a different culture or ethnic origin arrived there from other parts of the world."[19]

Still there is no generally accepted definition. However, the importance of historical and cultural traditions and the crucial character of the element of distinctiveness can hardly been contested. The Indian communities in the United States of America, the Inuit in Canada or the Aborigines in Australia are seen as indigenous peoples in this sense. Those peoples often were prosecuted by the invaders and some of them still have to face prosecution and discrimination. An indigenous people may be a minority, but it is not necessarily a national minority because the territory of settlement may not be identical with state frontiers. As a consequence, an indigenous people can only rely on minority rights if its role as a minority is accepted.

4. Cultural Diversity

Cultural diversity generally means the situation where different societies or parts of a society have different cultural traditions and values.[20] In a narrow meaning it is understood as a counterpart to economic globalisation in the context of culture and trade.[21] Using the notion of "culture" implies a multi-level approach reflecting sociological, economic, historical, political and legal aspects.[22] From the legal point of view, this makes a definition and the application of the notion difficult. The maintenance of cultural differences as such is not a new phenomenon in international law. UNESCO pursues the purpose to disseminate knowledge about and among the civilisations of the world.[23] In this

---

19 Commission on Human Rights, Preliminary Report on the Study of the Problem of Discrimination Against Indigenous Populations, Doc. E/CN.4/Sub. 2/L.566 [1972], Chapter II, para. 34.

20 Overview by B. Oomen/ S. Tempelman, "The Power of Definition", in: Y. Donders et. al. (ed.), *Law and Cultural Diversity*, 1999, 7 et seq.

21 C. Germann, "Culture in Times of Cholera: A Vision for a New Legal Framework Promoting Cultural Diversity", in: *Culture et Marché*, ERA-Forum 1 (2005), 109 et seq.

22 W. Schmale (ed.), *Human Rights and Cultural Diversity*, 1993.

23 A. Verdross/ B. Simma, *Universelles Völkerrecht*, 3rd edition 1984, para. 315.

context the organisation seeks to preserve the cultural heritage of all nations as part of its general tasks and article 1 (3) of its Constitution refers to the "fruitful diversity of the cultures".[24] According to its preamble, the *Framework Convention for the Protection of National Minorities of the Council of Europe* understands cultural diversity as a "source and a factor, not of division, but of enrichment for each society". Also on the regional level, the *European Charter for Regional or Minority Languages of the Council of Europe*[25] in its preamble mentions cultural diversity as a crucial element for Europe, but stresses in the same sentence that national sovereignty provides for the frame of this diversity.

In this general meaning, the notion of cultural diversity, having a more or less positive connotation, aims to preserve a situation and to achieve a goal; therefore the promotion of cultural diversity implies legal and political consequences. From the point of view of diversity, developments of convergence of cultures are seen from a critical perspective. Nevertheless, cultural homogeneity may also have positive aspects connected to the problem of self-determination and the question of conflicts and the reasons for them.[26] As a consequence of personal mobility and technical devices like satellite broadcasting and Internet, allowing easy access to information world-wide,[27] the wish to preserve cultural traditions as part of a certain identity entails the need to take measures for the maintaining of cultural diversity. Diversity may exist between states, because culture is part of state identity. However, cultural diversity may also exist within a state, because culture is never of a monolithic character. Legal questions especially arise if the cultural diversity within a state is linked with ethnic, linguistic or religious diversity because then cultural diversity influences the protection of minorities or indigenous peoples.[28]

---

24 Graber, see note 4, 556. As to the Constitution see under <http://www.icomos.org/unesco/unesco_constitution.html>.

25 ETS No. 148.

26 Cf. M.J. Glennon, "Self-determination and Cultural Diversity", *Fletcher Forum of World Affairs* 27 (2002), 2 et seq. (75), who defends "genuine" cultural diversity in a situation of American hegemony.

27 See in this respect the contribution of S. Schmahl in this Volume.

28 J. Firestone/ J. Lilley/ I. Torres de Noronha, "Cultural Diversity, Human Rights, and the Emergence of Indigenous Peoples in International and Comparative Environmental Law", *Am. U. Int'l L. Rev.* 20 (2004), 219 et seq.

These questions are taken into account by article 27 ICCPR which enshrines the right of minorities to enjoy their own culture. The *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* of 2005,[29] based on previous works within the organisation,[30] is the most prominent expression of the developments to promote cultural diversity on the international level. In the preamble, cultural diversity is seen as "a defining characteristic of humanity" but in the provisions of the treaty it comes down primarily to diversity in the audio-visual sector. The so-called definition in article 4 of the Convention refers to "the manifold ways in which the cultures of groups and societies find expression" and can be qualified as a general description of the problem. It is not even a definition useful for the purposes of the Convention. In the text of the Convention, the term "cultural expression" is used whereas "cultural diversity" is barely mentioned. There even seem to be differences between the states concerning the meaning and backgrounds of the notions and the relationship between culture and economy.[31]

IV. The Universal Protection of Minority Rights

In history, the protection of minorities was closely linked to the self-determination of peoples.[32] States are reluctant to acknowledge rights of minorities because they try to avoid risks for their territorial integrity. The fight of minorities for their rights has given rise to armed conflicts. These dangers and experiences made minority protection one of the most complicated subjects of international law. There have been many political discussions in different international organisations especially in the United Nations. As a result, different treaties and institutions have been created in order to organise the protection of minorities. In modern international law the protection of minorities is part of the protec-

---

29 See note 4.

30 UNESCO Universal Declaration on Cultural Diversity, adopted by the 31st Sess. of the General Conference of UNESCO, Paris, 2 November 2001, UNESCO Doc. CLT2002/WS/09, Paris 2002.

31 On the culture and trade conflict behind the Convention Neuwirth, see note 4.

32 T. Musgrave, *Self-Determination and National Minorities*, 1997.

tion of human rights.[33] The fight for individual human rights also concerns the fight for the individual rights of persons belonging to a minority. The very special approach of minority protection is linked with the more general problem of the right of groups.[34] The Permanent Court of International Justice has already identified the two crucial points of minority protection in its Advisory Opinion on minority schools in Albania,[35]

> "The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State.
>
> The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics".[36]

The second aspect can be seen nowadays as part of the discussion on autonomy and diversity in a society. The growing importance of the subject of cultural diversity is linked to the status and role of groups in a state and those groups may be minorities.[37] The law of minority protection is intertwined with the historical and sociological backgrounds of each situation. Demographic change influences as one factor the protection of minorities because a minority may become a majority or migration may be accelerated.[38] Therefore anthropological, philosophical and sociological reasons are part of the legal reasoning in cases of minority protection. An interdisciplinary approach is necessary, otherwise

---

33 D. Kugelmann, "Minderheitenschutz als Menschenrechtsschutz – Die Zuordnung kollektiver und individueller Gehalte des Minderheitenschutzes", *AVR* 39 (2001), 233 et seq.

34 E. Riedel, "Gruppenrechte und kollektive Aspekte individueller Menschenrechte", in: *Aktuelle Probleme des Menschenrechtsschutzes*, *Berichte der Deutschen Gesellschaft für Völkerrecht*, Band 33, 1994, 49 et seq.

35 PCIJ, Minority Schools in Albania, Advisory Opinion of 6 April 1935, Series A/B, Judgements, Orders and Advisory Opinions, No. 64, 1935, 4 et seq. (17).

36 See PCIJ above, 17.

37 Cf. F. Palermo/ J. Woelk, "From Minority Protection to a Law of Diversity? Reflections on the Evolution of Minority Rights", *European Yearbook of Minority Issues* 3 (2003/4), 5 et seq., who tend to integrate the plurality of instruments.

38 Wiessner, see note 13, 175, 178.

conflicts arising because of the diversity of cultures and nations cannot be solved.[39]

1. Specific Treaty Provisions

The core of the human rights of minorities is the principle of non-discrimination. It was strengthened by the *International Convention on the Elimination of All Forms of Racial Discrimination* of 1965 (CERD).[40] The rules of the Convention are applicable to all members of ethnic minorities. However, the Convention also admits that special measures may be necessary to secure adequate advancement of certain racial or ethnic groups.

The *International Convention on the Rights of the Child* (CRC),[41] has been ratified so far by 193 states. Its article 28 guarantees the right to education, based on the equality of chances. This may be understood in a way to enhance the position of children, who are members of a minority, namely because article 29 of this Convention stipulates that one aim of education should include the respect of cultural identity. A specific provision of minority protection is article 30 CRC which is similar to article 27 ICCPR.

2. The Declaration 47/135 and the Commentary

The General Assembly adopted the *Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities* in 1992.[42] The Declaration puts an emphasis on state obligations versus minorities. Although the Declaration does not define a minority, it acknowledges a difference between "National or Ethnic, Religious and Linguistic Minorities". The notion of "national minority" is important in the European instruments, namely the mentioned Framework

---

39 M. Bommes/ E. Morawska, *International Migration Research, Constructions, Omissions and the Promises of Interdisciplinarity*, 2005.

40 UNTS Vol. 660 No. 9496.

41 *ILM* 28 (1989), 1448 et seq.

42 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, A/RES/47/135 of 18 December 1992; see K. Dicke, "Die UN-Deklaration zum Minderheitenschutz", *EA* 1993 (48), 107 et seq.

Convention, but not in the universal instruments. As a consequence, the question of citizenship does not play a role for the rights of a person belonging to a minority under article 27 ICCPR and the Declaration.

The General Assembly stressed the relationship between minority protection and the protection of human rights. According to the Declaration, the realisation of rights, enjoyed by persons belonging to a minority, contributes to political and social stability in the state they live in. The identity of minorities should be protected. The Declaration claims active measures of a state in favour of the protection of minorities. The Declaration is not binding, but it shows that the majority of states accepts that the individual character of minority rights entails duties of the state to protect the group as a whole because the group is formed by persons entitled with minority rights. This may influence the interpretation of article 27 of the ICCPR.

As a guide to the understanding and the application of the Declaration, the Working Group on Minorities the subsidiary organ of the Sub-Commission on the Promotion and Protection of Human Rights prepared a Commentary. It was adopted at its 10th session, being originally drawn up by its former Chairperson Asbjorn Eide.[43] The Commentary on the Declaration was finalised by the Secretary-General after a broad discussion and took into account the comments of governments, intergovernmental and non-governmental organisations and individual experts. Therefore it is an important document reflecting the discussions on the protection of minorities in the United Nations but also relating to the protection of indigenous peoples insofar as they may fall under the provisions on minorities. The text of the Commentary will be part of the United Nations Guide for Minorities.

The Commentary provides for a wide scope of application of the Declaration. It comprises various minorities including new minorities but the strength of the entitlements may vary.

> "Those who *live compactly* together in a part of the State territory may be entitled to rights regarding the use of language, and street and place names which are different from those who are dispersed, and may in some circumstances be entitled to some kind of autonomy. Those who have been established for a long time on the territory may have stronger rights than those who have recently arrived."(Commentary No. 10).

---

43 Doc. E/CN.4/AC.5/2001/2.

This approach paves the way for a differentiated and adequate protection of different minorities respecting culture and tradition.

Respecting the reluctance of states in recognising true collective or group rights, the Commentary holds that the right to self-determination as a group right, guaranteed by common article 1 of the two international Covenants on Human Rights, does not apply to minorities (Commentary No. 15). Minority rights are individual rights. Indigenous peoples have particular concerns (Commentary No. 16). Persons belonging to indigenous peoples may claim the individual rights of minorities, as has been done by persons submitting Communications before the Human Rights Committee. Referring to article 3 of the Declaration, according to which that persons can exercise their human rights both "individually as well as in community with other members of their group", be it through associations, cultural manifestations or educational institutions (Commentary No. 53). This does not concern the individual character of the human rights.

3. Article 27 ICCPR and the General Comment

After World War II the United Nations decided on an obligatory provision as late as 1966. Article 27 of the ICCPR is still the most important obligatory provision on the protection of minorities on an universal level.[44] Although there are some points in the provision which are not totally clear, its mere existence helps to preserve minority rights. The scope of article 27 and its consequences are the object of ongoing discussions.[45] First of all, the definition of a minority is not clear and this lack of clearness reduces the effectiveness of article 27 ICCPR. But the importance of article 27 lies in the fact that social criteria are acknowledged as being part of the concept to define a minority. The Covenant declines the concept of assimilation and grants people, belonging to a minority, individual rights. The crucial point is whether there are collective rights guaranteed by the provision.

---

44 See C. Scherer-Leyendecker, *Minderheiten und sonstige ethnische Gruppen*, 1997, 47.

45 C. Tomuschat, "The Protection of Minorities under Article 27 of the International Covenant on Civil and Political Rights", in: *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte, Festschrift für Hermann Mosler*, 1983, 949 et seq.

The provision of article 27 stresses the criteria of culture, religion and language as the most important criteria for a minority. This is a success for minority protection. During the discussions on this provision in the 1960s, states like Australia, the United States of America and Chile fought for their concept of assimilation because they see themselves as immigration states. The rights of minorities cannot be accepted if a state denies the existence of a minority itself. The Australian delegate in the former Commission on Human Rights stated during the discussion on article 27 that there are no minorities in Australia. He argued,

> "There were, of course the Aborigines, but they had no separate competing culture of their own, for as a group they had only reached the level of food gatherers."

This remark reveals a discriminatory view on certain groups which is contrary to the idea of the prohibition of discrimination in human rights. Nevertheless, there are still states holding the view that there are no minorities on their territory, Turkey being such a case. It denies the character of the Kurds as a minority. Also France does not apply article 27 of the Covenant, because article 1 of the French Constitution declares France as an indivisible Republic.[46] Numerous cases were submitted by French citizens of Breton ethnic origin, but because of the French reservation to the ICCPR that article 27 is not applicable so far as the Republic is concerned, the respective Communications were rejected by the Human Rights Committee as inadmissible.[47] Other cases from Europe concerned the Sami. In Ivan Kitok v. Sweden the Committee affirmed that a traditional economic activity and way of life such as reindeer husbandry falls within the scope of article 27 since it belongs to the culture of the Sami.[48]

In the context of minority rights, a number of the most prominent individual complaints under the Optional Protocol claiming rights under article 27 came from Canada. In the well-known case Lovelace v. Canada[49] the Committee decided that the rights of a woman to access to her native culture and language "in community with the other mem-

---

46 See G. Despeux, *Die Anwendung des völkerrechtlichen Minderheitenrechts in Frankreich*, 1999.

47 G. Alfredsson/ A. de Zayas, "Minority Rights: Protection by the United Nations", *HRLJ* 14 (1993), 1 et seq. (6-7).

48 Communication No. 197/1985, Views of 1988.

49 Communication No. R 6/24 (1977), Views of 30 July 1981, reprinted in: *HRLJ* 2 (1981), 158 et seq.

bers", can only be realised in the community within the Indian reserve and the complainant was attributed a right to residence under article 27. The Communication in the case Mikmaq Tribal Society v. Canada[50] related to the right of self-determination but it was rejected as inadmissible. The Communication submitted by Chief Bernard Ominayak of the Lubicon Lake Band in the famous case Lubicon Lake Band v. Canada[51] led to a decision of the Committee, which held that the rights enshrined in article 27 include the right 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. The threatening of the way of life of the Lubicon Lake Band constituted a violation of article 27. On behalf of the protection of culture and the traditional way of life of indigenous peoples the Committee established in the case Länsman v. Finnland No. 1[52] a combined test of meaningful consultation of the group and sustainability of the indigenous or minority economy.[53]

In 1994, the Human Rights Committee approved General Comment No. 23 (Rights of Minorities) on article 27 ICCPR.[54] First of all, the Committee held that article 27 recognises a right which is conferred to individuals belonging to minority groups (para. 1). However, the Committee did not restrict the rights of minority protection to persons possessing the citizenship of the host state (para. 5.1). Referring especially to indigenous peoples, the Committee noted that the preservation of their use of land resources could become an essential element in the right of persons belonging to such minorities to exercise their cultural rights. The enjoyment of these rights may require positive legal measures of protection (para. 7). Under the regime of article 27, the Committee strives for a wide scope of application. Relating to its jurisdic-

---

50 Communication No. R 19/78 (1980), Views of 20 July 1984.

51 Communication No. 167/1984, Views of 26 March 1990, reprinted in: *HRLJ* 11 (1990), 305 et seq.

52 Communication No. 511/1992, Views of 26 October 1994 – Ilmari Länsman et al. v. Finnland (Länsman No. 1), Report of the Human Rights Committee, Vol. II, GAOR 50th Sess., Suppl. No. 40, Doc. A/50/40, 66 et seq.

53 M. Scheinin, "Indigenous Peoples' Rights under the International Covenant on Civil and Political Rights", in: J. Castellino/ N. Walsh (eds), *International Law and Indigenous Peoples*, 3 et seq. (7).

54 General Comment No. 23 (Rights of Minorities) on article 27 of the Human Rights Committee under article 40 para. 4 of the ICCPR; reprinted in: *HRLJ* 15 (1994), 234 et seq.

tion, collective aspects are closely connected with the rights of indigenous peoples.

4. Fundamental Elements of the International Protection of Minorities

The protection of minorities is part of the protection of human rights. The individual rights of persons belonging to a minority are not doubted. As with human rights in general, there is still much to do to achieve them. The uniformity of human rights protection and the principle of non-discrimination put pressure on the existing differences. Nonetheless, exactly these differences between groups in a society make the difference between majority and minorities. What is doubtful is which groups have which rights as a minority. In spite of the existing treaties on the universal and regional level the protection of minorities is not completely satisfactory. The diversity of minorities and their cultures entails a diversity of problems arising from very different situations. Each situation and each conflict needs an in depth analyse of the historical, political and social background. An interdisciplinary approach may help to find specific solutions for specific problems.

In the cases of the Human Rights Committee concerning Canada, persons belonging to an indigenous people claimed minority rights. The most prominent cases under article 27 which were decided by the Human Rights Committee related to persons specifically belonging to indigenous peoples. The complainants claimed their right of self-determination as a people and were attributed minority rights. They wished to preserve cultural diversity and autonomy. This claim could be realised within the human rights system by applying article 27. Indigenous peoples may rely on article 27 to defend their way of life and the specific characteristics of their group.

The international protection of minorities works on solid grounds. It may be influenced by the concept of "cultural diversity" insofar as the interpretations of notions like "culture" in article 27 ICCPR may undergo a progressive evolution. As the general concept of "cultural diversity" is not yet clear, the protection of minorities should not be subject to far reaching changes as long as the direction of the changes cannot be identified. The instruments on minorities have not been modified but the existing instruments at least grant a safe standard of protection under international law.

Careful modifications may refer to the application of the existing provisions. Recent international documents suggest a system of gradual protection. The Commentary to the above mentioned Declaration on Minorities[55] includes all relevant groups in the international protection of minorities but tends to grant more rights to "old" minorities. However, according to these ideas new minorities fall under the minority protection of international law. This extension of the scope of minority protection works only on the basis of an individual human rights approach. There will be a reluctance of states to accept the concept of conferring rights to further groups if these rights can be interpreted as collective rights for the group. Different minorities have different kinds of needs and claim different rights.

V. The Protection of Minorities in Europe

1. The OSCE and the High Commissioner on National Minorities

At a regional level, protection of minorities is part of the work of the Organisation for Security and Cooperation in Europe (OSCE).[56] In 1992 the OSCE installed a High Commissioner on National Minorities (HCNM).[57] His task is to prevent conflicts.[58] The HCNM is part of the system of cooperation and consultation of the OSCE Member States, dealing with the legal and political situation of national minorities as a whole. In practice the High Commissioner concentrates his work at first on the use of minority languages.[59] In 1994, the Council of the Baltic Sea States (CBSS) created a Commissioner on Democratic Institu-

---

55 See note 43.

56 C. Höhn, *Zwischen Menschenrechten und Konfliktprävention – Der Minderheitenschutz im Rahmen der Organisation für Sicherheit und Zusammenarbeit in Europa (OSZE)*, 2005.

57 On the HCNM and his work see L.A. Thio, "Developing A 'Peace And Security' Approach Towards Minorities' Problems", *ICLQ* 52 (2003), 115 et seq.; S. Kettig, *Europäischer Minderheitenschutz im Wandel*, 2004.

58 M. van der Stoel, "The Role of the OSCE High Commissioner on National Minorities in the Field of Conflict Prevention", *RdC* 296 (2002), 9 et seq.

59 Cf. the Report of 1999 on the Linguistic Rights of Persons Belonging to National Minorities in the OSCE Area available under <www.osce.org/inst/hcnm/docs/lingri/report.html>.

tions and Human Rights including the Rights of Persons belonging to Minorities.[60] Part of his mandate is to examine cases of the violation of individual rights, whereas the HCNM is only entitled to examine the general situation of a minority.[61] The Office of Democratic Institutions and Human Rights in Warsaw (ODIHR) established a Roma Contact Point, whose work is supported for example by the Federal Republic of Germany.

2. The Council of Europe and the European Court of Human Rights

In Europe, there are different legal instruments protecting the rights of minorities and their members.[62] The European Convention on Human Rights (ECHR) is the most effective instrument for the protection of human rights in Europe. As the protection of minority rights is part of the protection of human rights, minorities may refer to human rights granted by the European Convention. A religious minority can claim a violation of the freedom of religion (article 9 ECHR). Persons belonging to a minority can put forward the right to privacy (article 8 ECHR) with the argument that national legislation restricts the use of the minority language.[63] The prohibition of discriminations in article 14 ECHR contains as forbidden criteria, among others, the fact that a person belongs to a national minority.

In 1968, the European Court of Human Rights had to decide on the use of minority languages in Belgium.[64] The Court held that different treatment was possible, but it may amount to a prohibited discrimination when there is no reasonable and objective justification for it. As

---

60 See under <http://www.cbss-commissioner.org>.

61 R. Uerpmann, "Völkerrechtliche Grundlagen des Minderheitenschutzes", in: G. Manssen/ B. Banaszak (eds), *Minderheitenschutz in Mittel- und Osteuropa*, 2001, 9 et seq. (26).

62 R. Hofmann, *Minderheitenschutz in Europa: Völker- und staatsrechtliche Lage im Überblick,* 1995; W. Rudolf, "Über Minderheitenschutz in Europa", in: *Festschrift für Walter Leisner,* 1999, 188 et seq.; R. Wolfrum, "Aspekte des Schutzes von Minderheiten unter dem Europäischen Menschenrechtsschutzsystem", in: Bröhmer et. al. (ed.)*, Internationale Gemeinschaft und Menschenrechte, Festschrift für Georg Ress*, 2005, 1109 et seq.

63 Uerpmann, see note 61, 10-11.

64 Belgian Linguistic case, Judgment of 23 July 1968, Series A, No. 6, 298.

there was no specific provision on minorities, the Court had to tackle minority problems under different legal aspects.[65] In the case Gorzelik and Others v. Poland[66] the Court affirmed that under the ECHR group rights exist. The freedom of association guaranteed by article 11 ECHR is applicable if a group is denied registration as a minority in a state register, but the state enjoys a wide margin of appreciation in deciding if restrictions are necessary to protect national and public order.[67]

Pursuing its general goals, the Council of Europe enacted treaty law on minorities. The *European Charter for Regional or Minority Languages* of 1992 came into force 1998.[68] It has been ratified by 22 states.[69] It claims the acknowledgement of regional or minority languages and contains provisions on measures fostering the use of these languages. The implementation of provisions on language depends on state traditions and proves to be a sensitive matter which explains the small number of ratifications. The French Constitutional Court held in his decision of 15th June 1999 that some provisions of the Charter contradict the French Constitution. In article 1 of the French Constitution it is stated that the language of the Republic is French. The use of other languages in private and public life would violate the Constitution.

A complicated problem is the prohibition of political parties representing a minority.[70] The European Court of Human Rights in Strasbourg had to decide on several Turkish cases. The Turkish government defended the laicistic character of the state against Islamic groups which organised political parties. In this context, the government prohibited the so-called Welfare Party, a political party aiming at the implementation of its view of the Islam in the Turkish society by means of violence. The European Court of Human Rights held that the prohibition of this

---

65 R. Medda-Windischer, "The Jurisprudence of the European Court of Justice", *European Yearbook of Minority Issues* 3 (2003/4), 389 et seq.

66 Application No. 44158/98, Judgment of 17 February 2004.

67 R. Hofmann, "Nationale Minderheiten und der Europäische Gerichtshof für Menschenrechte", in: Bröhmer, see note 62, 1011 et seq. (1021 et seq.).

68 ETS No. 148.

69 Reference of 8 June 2007.

70 D. Kugelmann, "Die streitbare Demokratie nach der EMRK – Politische Parteien und Gottesstaat: Das Urteil des Menschenrechtsgerichtshofes zur Auflösung der Wohlfahrtspartei in der Türkei", *EuGRZ* 30 (2003), 533 et seq.

political party did not violate the ECHR.[71] This case may be the nucleus for the development of a human rights system respecting cultural diversity because it shows limitations of diversity which a state can realise in accordance with human rights.

3. The Framework Convention

The Council of Europe has agreed on a treaty which is the most important one in the protection of minorities in Europe. The *Framework Convention for the Protection of National Minorities* of 1995 came into force in 1998.[72] It was ratified by 39 states.[73] Member States are for example Estonia, Croatia, the Ukraine or the Russian Federation, but not Andorra, France and Turkey. The Member States have declared in the Convention that the protection of national minorities is part of the international protection of human rights. Persons belonging to a national minority are guaranteed individual freedoms like the freedom of opinion and the freedom of religion.[74]

States are obliged to enable persons belonging to national minorities to develop their culture and to uphold essential elements of their identity. Minority languages can be used and the right to have a name in the minority language is granted. Member States have to report on the progress they make in implementing the rights of the Convention. The Convention does not define the notion of national minority. The Member States define it themselves.[75] Germany has declared that there are only two national minorities: the Danes and the Sorbian Nation, and Germany applies the Convention to the German Frisians, Sinti and

---

71 Decision of 3 February 2003 (Grand Chamber) – Applications No. 41340/98, 41242/98, 41343/98 and 41344/98 (of 22 May 1998) – Refah Partisi (Welfare Party) versus Turkish Republic.

72 ETS No. 157.

73 Reference of 8 June 2007.

74 G. Alfredsson, "A Frame with an Incomplete Painting: Comparison of the Framework Convention for the Protection for National Minorities with International Standards and Monitoring Procedures", *International Journal of Minority and Group Rights* 7 (2000), 291 et seq.; F. Steketee, "The Framework Convention: A Piece of Art or a Tool for Action?", *International Journal of Minority and Group Rights* 8 (2001), 1 et seq.

75 J.A. Frowein/ R. Bank, "The Effects of Member States' Declarations defining 'national minorities' upon Signature or Ratification of the Council of Europe's Framework Convention", *ZaöRV* 59 (1999), 649 et seq.

Roma.[76] However, the Convention tries to foster measures of states in favour of minorities and aims at an intercultural dialogue.

According to article 5 of the Framework Convention, the State Parties shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will. The Explanatory Report to the Convention holds that this provision does not exclude measures of integration but aims at ensuring that national minorities develop their culture and preserve their identity (Explanatory Report No. 42). According to article 3 para. 2 of the Framework Convention, persons belonging to national minorities may exercise the rights individually as well as in community with others. Following the concept of article 27 ICCPR, collective rights are not expressly acknowledged. The Explanatory Report states that the possibility of joint exercise of the Conventional rights is recognised "which is distinct from the notion of collective rights" (Explanatory Report No. 37).

4. Fundamental Elements of Minority Protection in Europe

The scope of application of the Framework Convention is restricted to national minorities named by the states. The detailed protection of a specific minority depends on municipal law. Of course, the national regimes on the protection of minorities are different.[77] The state obligations flowing from the Convention are of crucial importance for minorities. The Framework Convention builds a progressive system for the protection of minorities which possesses collective elements. Nevertheless, the underlying concept of the Convention aims at the protection of individual rights. As a consequence of the prohibition of assimilation, minority protection in the Framework Convention is primarily but not exclusively understood as the protection of individuals belonging to a minority. In the monitoring system, collective aspects play an important role. With respect especially to article 5 of the Convention, the Advisory Committee refers in its remarks to the maintaining of the culture of groups. In this context, the Advisory Committee tries to pro-

---

76 On minorities in Germany R. Hoffmann, "Rights, States, Minorities and Indigenous Peoples", in: E. Riedel (ed.), *Constitutionalism – Old Concepts, New Worlds*, 2005, 9 et seq.; M. Pallek, *Der Minderheitenschutz im deutschen Verfassungsrecht*, 2001.

77 See J.A. Frowein/ R. Hofmann/ S. Oeter (eds), *Das Minderheitenrecht europäischer Staaten*, Teil 2, 1994.

tect cultural diversity. However, the relevant remarks concern primarily the traditional way of life of indigenous peoples like the Sami.[78]

VI. The Protection of the Rights of Indigenous Peoples

The protection of indigenous peoples is a rather recent issue of international law but is a fast developing one. The legal regime of indigenous peoples has developed into a specific category, distinct from the protection of minorities.[79] According to the Commentary to the UN Declaration on Minorities, a distinction is drawn between the rights of persons belonging to minorities and those of indigenous peoples.[80] Rights of persons belonging to minorities are individual rights, whereas rights of indigenous peoples can also be collective rights. The difference to minority protection is that indigenous peoples do not primarily fight against discrimination but fight for a high degree of autonomous development. According to their interest of survival as a group, indigenous peoples must not be integrated into the majority society.

Indigenous peoples number roughly some 300 million persons but nevertheless they are vulnerable. They need protection by the international community and by the territorial states. There are many aspects influencing the protection of indigenous peoples like human rights, self-determination, activities of international organisations or the role of non-governmental organisations and of the civil society in law-making and decision-making.[81] A cross-over perspective is necessary, integrating aspects of sociology and history, religion and economy, anthropology and other sciences in order to identify the beneficiaries and addressees of rights or the content of those rights. The right to land or property rights are as fundamental for indigenous peoples as the right to economic and cultural self-determination. Each case or situation ne-

---

78 Hofmann, see note 67, 1016.

79 D. Dörr/ M. Cole, *The Mueller-Wilson Report*, 1999, 47.

80 Supra see note 43, No. 16.

81 Recent monographic works by S.J. Anaya, *Indigenous Peoples in International Law*, 2005; J. Castellino/ N. Walsh (eds), *International Law and Indigenous Peoples*, 2005; Gupta, see note 14.

cessitates a multi-perspective approach to come to concrete legal or political results.[82]

The rights of indigenous peoples have global, regional and national dimensions. In a concrete situation, the applicable rights and their scope depend on the interaction of those dimensions.[83] Specific regimes of the protection of indigenous peoples are installed by the national law of some states.[84] The United States of America relied in its last census on the self-identification of groups which are categorised as six basic races: Whites, Blacks, Asians, American Indian/Alaskan Natives, Native Hawaiians/Other Pacific Islanders and "Some Other Race", adding Hispanics as an ethnic group and conferring specific rights to specific groups.[85] In Canada, the Inuit are granted autonomy and their rights as a group are guaranteed by the Canadian government. These rights also concern the exploitation of resources like oil, gold or similar raw materials. In November 2005, the Canadian Federal Government and the provinces and territories concluded a treaty with the so called First Nations and Inuit, promising them 5 billions Canadian Dollars (about 3.65 billion Euros). The funding is intended to improve the living situation in the reserves.

1. Selected Legal Instruments

Persons belonging to indigenous peoples have the interest of enforcing individual and collective rights.[86] Apart from the general system of hu-

---

82 Exemplified by L.A. Baer, "The Rights of Indigenous Peoples – A Brief Introduction in the Context of the Sámi", *International Journal on Minority and Group Rights* 12 (2005), 245 et seq.

83 W. van Genugten/ C. Perez-Bustillo, "The Emerging International Architecture of Indigenous Rights: The Interaction between Global, Regional, and National Dimensions", *International Journal of Minority and Group Rights* 11 (2004), 379 et seq.

84 Gupta, see note 14, Vol. 1, 5 et seq.; the reports in: Castellino/ Walsh, see note 81, 159 et seq.; the reports on the United States (Frickey), Canada (Benedict), Australia (Schillhorn), New Zealand (Ehrmann) and Latin America (Grote), in: *ZaöRV* 59 (1999), 383 et seq.

85 Wiessner, see note 13, 175.

86 H. Ketley, "Exclusion by Definition: Access to International Tribunals for the Enforcement of the Collective Rights of Indigenous Peoples", *International Journal of Minority and Group Rights* 8 (2001), 331 et seq.

man rights protection of the Covenants and article 27 ICCPR,[87] various legal instruments may effect the rights of indigenous peoples. Those instruments form a body of conventional norms which is joined by developing customary law.[88] On the international law level a measure of protection for indigenous peoples was developed. An early legal instrument concerning indigenous peoples was the ILO Convention No. 107 of 1957 Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries.[89] The Convention was formed by a paternalistic approach which was heavily criticised and this criticism was supported by the process of decolonisation. This first Convention was replaced by ILO Convention No. 169 of 1989 Concerning Indigenous and Tribal Peoples in Independent Countries.[90] Convention Nr. 107 is still the main instrument on the global level relating to indigenous peoples, but it is ratified by only a small number of states.

In the special context of the fight against racial discrimination there are also documents on and guarantees for indigenous peoples.[91] CERD[92] applies to members of indigenous peoples. The treaty-body of this Convention, the Committee on the Elimination of Racial Discrimination adopted a General Recommendation on the rights of indigenous peoples.[93] In this Recommendation the Committee condemned any discrimination against indigenous peoples and called, in particular, upon states to respect the distinct culture and to ensure that indigenous peoples could exercise their rights in order to practise and revitalise their cultural traditions and customs. The focus lay on the prohibition of unequal treatment but also gave states obligations to enable indigenous peoples to preserve their own language and culture.

---

87 See above.

88 Anaya, see note 81, 289.

89 ILO Convention No. 107 of 26 June 1957, UNTS Vol. 328 No. 247.

90 Published in: *ILM* 28 (1989), 1382 et seq.

91 P. Thornberry, "The Convention on the Elimination of Racial Discrimination, Indigenous Peoples and Caste/ Descent-Based Discrimination", in: Castellino/ Walsh, see note 81, 17 et seq.

92 See note 40

93 General Recommendation XXIII (51) concerning Indigenous Peoples of August 18, 1997, CERD/C/51/Misc.13/Rev.4, reprinted in: *ZaöRV* 59 (1999), 573 et seq.

2. UN Activities and the Draft Declaration

Within the frame of the United Nations numerous activities in favour of indigenous peoples were put into place.[94] In 1990, the General Assembly proclaimed 1993 as International Year for the World's Indigenous People and decided on a first draft of a Universal Declaration on the Rights of Indigenous Peoples.[95] An important result of this year was the awareness for the necessity of an ongoing process of discussion. By A/RES/48/163 of 20 December 1993 the General Assembly declared the Decade of the World's Indigenous People. With A/RES/50/157 of 21 December 1995 a working programme was approved. The Decade was closed in December 2004.

A Permanent Forum on Indigenous Issues was established[96] to provide for a forum for discussion where the indigenous peoples themselves could adequately present their interests.[97] Its 16 members are independent experts including eight indigenous experts.[98] In fact, the main task of the Forum is to analyse whether states live up to the Declaration on the Rights of Indigenous Peoples.[99] The General Assembly also established a Voluntary Fund for Indigenous Populations.[100] The purpose of the Fund is to assist representatives of indigenous communities and organisations to participate in the sessions and meetings of UN institutions, dealing with indigenous issues, by providing them with financial assistance, funded by means of voluntary contributions from governments, non-governmental organisations and other private or public entities. In its session in June 2005, the Board of Trustees ap-

---

94 M. Ludescher, *Menschenrechte und indigene Völker*, 2004; see also van Genugten/ Perez-Bustillo, see note 83, 388 et seq.

95 A/RES/45/164 of 18 December 1990; printed also as an Annex to the article of B.R. Howard, "Human Rights and Indigenous People: On the Relevance of International Law for Indigenous Liberation", *GYIL* 35 (1992), 105 et seq. (151).

96 As a subsidiary organ of ECOSOC, E/RES/2000/22.

97 L. Malezer, "Permanent Forum on Indigenous Issues: 'Welcome to the Family of the UN'", in: Castellino/ Walsh, see note 81, 67.

98 Baer, see note 82, 250.

99 Van Genugten/ Perez-Bustillo, see note 83, 387.

100 A/RES/40/131 of 13 December 1985; the mandate was extended by A/RES/50/156 of 21 December 1995 and A/RES/56/140 of 19 December 2001.

proved a total of 60 grants, a sum of US$ 280,100,00, to representatives of indigenous communities.[101]

The issue of indigenous peoples has been integrated in the work of organisations like WIPO or institutions like UN Habitat. There is a growing awareness of the specific problems of indigenous populations. But these results only concern the institutional frame within the UN system. In fact, the situation of the indigenous peoples themselves has not been improved. The report of the coordinator of the Decade acknowledges that indigenous peoples in many countries continue to be among the poorest and most marginalised.[102] In many countries their living conditions have not improved during the Decade.

The official evaluation of the Decade of the World's Indigenous People has not yet been concluded but in his preliminary review the Secretary-General noted advances in the UN system.[103] New institutions have been established in order to favour the rights of indigenous populations, e.g. the establishment of the Permanent Forum on Indigenous Issues and the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People by the former Commission on Human Rights.[104] This represented further progress for indigenous issues within the United Nations.[105]

From a legal and juridical point of view, an important goal of the Decade of the World's Indigenous People, which was not achieved, was the adoption of a Declaration on the Rights of Indigenous Peoples. The former Commission on Human Rights established already in 1995 a working group with the task of reviewing the Draft Declaration on the Rights of Indigenous Peoples,[106] proposed by the Sub-Commission. In May 2004, only two articles of forty five had been adopted at first reading and in view of the slow progress, the Commission at its 2004 ses-

---

101 Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Working Group on Indigenous Populations, Doc. E/CN.4/Sub.2/AC.4/2005/5.

102 Report, see below, No. 66-67.

103 Report of the Secretary-General on the Preliminary Review by the Coordinator of the International Decade of the World's Indigenous People on the Activities of the United Nations System in Relation to the Decade, Doc. E/2004/82.

104 Established by Resolution 2001/57.

105 Baer, see note 82, 250.

106 Docs E/CN.4/1995/2; E/CN.4/Sub.2/1994/56, reprinted in: *ILM* 34 (1995), 541 et seq.

sion recommended that additional meetings be held. The finalisation of the project was one part of the goals of the International Decade. However, the Decade ended in 2004 without any success in this respect.

Progress was finally achieved within the recently installed Human Rights Council, replacing the Commission on Human Rights. As mentioned the Council adopted the text of the Declaration. It contains wide-reaching guarantees for indigenous peoples which are not yet part of customary or treaty law on the international level.[107] In the meantime, single guarantees may be at least candidates for customary law, especially aspects of the right to the use of land.[108] In the Declaration, the legal personality of indigenous peoples is recognised and their territorial security is guaranteed. Various provisions refer to the protection of their cultural life and identity.[109] Although states have objected to the establishment of collective human rights, some provisions of the Declaration can only be exercised by an indigenous people collectively.[110]

3. Fundamental Elements of the Protection of Indigenous Peoples

The crucial point of the rights of indigenous peoples is their capacity for claiming the right to self-determination.[111] If they are attributed this capacity they would be entitled to put forward rights to autonomy entailing the danger of secession. The standard of protection of indigenous peoples is based on a combination of legal instruments and customary international law. Wiessner concludes this in his in-depth analysis by stating,

> "First, indigenous peoples are entitled to maintain and develop their distinct cultural identity, their spirituality, their language, and their traditional way of life. Second, they hold the right to political, economic and social self-determination, including a wide range of autonomy and the maintenance and strengthening of their own system of justice. Third, indigenous peoples have a right to demarca-

---

107 R. Wolfrum, "The Protection of Indigenous Peoples in International Law", *ZaöRV* 59 (1999), 372 et seq. (376).

108 See arts 24, 25 of the Draft Declaration. See also G. Ulfstein, "Indigenous Peoples' Right to Land", *Max Planck UNYB* 8 (2004), 1 et seq.

109 E.g. arts 4, 12, 14, 16.

110 Wolfrum, see note 107, 382.

111 Scheinin, see note 53, 9 et seq.

> tion, ownership, development, control and use of the lands they have traditionally owned or otherwise occupied and used. Fourth, governments are to honor and faithfully observe their treaty commitments to indigenous nations."[112]

This far-reaching standard is not consented to as a whole in international law but it marks the crucial points of protection. As an elementary part of protection, the cultural autonomy of indigenous peoples has to be guaranteed by the state. This contributes to the cultural diversity within a state. The protection of indigenous peoples guarantees the protection of cultural diversity.

VII. Cultural Diversity of Groups

Cultural diversity is part of the framework which is necessary to guarantee the identity of groups of a distinct character in relation to other groups in a society or in other societies. To preserve the identity of a group can be an issue of international law. The rights related to cultural identity are of special importance for minorities and indigenous peoples.[113] The protection of indigenous peoples is a problem of striving for exclusion and preventing inclusion, whereas the protection of minorities is often a problem of striving for inclusion and preventing exclusion. Indigenous peoples live apart from the society in their traditional territory; as a consequence there is no discussion about integration. Minorities live in the society and contribute to its cultural richness. They form part of it, but in many cases nevertheless, want to keep their identity; as a consequence the intensity of their integration is a crucial point of discussion.

As a result of the UNESCO Convention of 2005, the concept of cultural diversity is implemented in international law. However, its content is not yet clarified.[114] The main field of application in treaty and statutory law is international economic law, in which cultural diversity

---

112 S. Wiessner, "Rights and Status of Indigenous Peoples: A Global Comparative and Legal Analysis", *Harvard Human Rights Journal* 12 (1999), 57 et seq. (127).

113 Y. Donders, "The Development of the Right to Cultural Identity in International Human Rights Law", in: Y. Donders et al. (ed.), *Law and Cultural Diversity*, 1999, 65 et seq.

114 See above.

provides for a corollary of globalisation.[115] Diversity of cultures in a more sociological sense can be found in the approach of UNESCO promoting a general approach but still linked to the specific protection of cultural goods and services in international trade. This aspect of cultural diversity may be the starting-point for an influence of the notion on the situation of groups.

The idea of cultural diversity in this general meaning may collide with certain approaches of integration. There is a fundamental difference between assimilation and diversity. The government of a state may try to integrate immigrants in a way that they change their identity. In recent times, this was the way the American Indians or the old nations in Australia were treated. Concerning "new" minorities[116] the problem of integration into society leads to the question of identity.

Measures for maintaining cultural diversity may contribute to the upholding of group identity. This is also the case if the narrow concept of cultural diversity is applied because the cultural goods and services of the groups enjoy a certain protection. Understanding diversity in a wider sense leads to the protection of culture and tradition of the group in general and may amount to state obligations for the protection of groups. However, under current international law state obligations mainly arise from human rights instruments, especially from article 27 ICCPR.

Relating to the protection of indigenous peoples, economic, social and cultural rights play a central role. The preamble of the *Declaration on the Rights of Indigenous Peoples* affirms that all peoples contribute to the diversity and richness of civilisations and cultures.[117] As a consequence of the underlying approach of collective protection, indigenous peoples claim religious or cultural traditions and need access to social welfare systems or adequate housing. They want to uphold their identity as a group. Minority protection is based on the principle of non-discrimination. The focus lies on individual freedoms. In state practice, minority protection is realised in most cases by granting individual freedoms to persons belonging to a minority. The promotion of minority rights relies on the strengthening of state obligations towards minorities.

---

115 Graber, see note 4, 554.

116 Wolfrum, see note 15, 153 et seq.

117 See above.

VIII. Conclusion

The protection of minorities as a legal issue works in the frame of the general system of human rights protection, but a progress in the direction of a general improvement of the situation of minorities as a group can hardly be recognised. As part of the protection of human rights the contents of minority protection in universal international law has been individualised. This process has led to the application of the general rules of human rights protection on persons belonging to a minority without regularly taking into account the peculiarities of the protection of a group. International law will contribute to the vanishing of the protection of differences if specific legal regimes are not developed. The most effective existing regime is the European Framework Convention.

However, the advantage of this process lies in the application of the human rights enforcement system, which in spite of its weaknesses, works in favour of the realisation of minority rights. In the context of this system, the principles of non-discrimination and individual freedoms are guaranteed for persons belonging to a minority. The common enforcement of individual rights by various persons is accepted. But the exercise of rights in community with others does not mean that collective rights are acknowledged. Typical collective aspects like preserving the collective identity of a group are neglected by the focus of minority protection on subjective rights. As a consequence, the chances to maintain cultural diversity through the international law of minority protection are diminishing.

Affirmative action and the maintenance of differences between groups are acknowledged in the context of indigenous peoples. This is one of the reasons for the growing importance of indigenous issues in international law. Most of the prominent cases in which article 27 ICCPR was applied are cases concerning indigenous issues. The system of the protection of minorities in international law contains the instruments to prevent cultural diversity from disappearing, but the relevant instruments are primarily used in favour of indigenous peoples. The protection of indigenous people is about to become the decisive factor for the promotion of collective rights and group rights.

Persons belonging to a minority enjoy individual human rights which may be exercised collectively. The specific granting of collective rights to minorities can be only rarely observed in state practice or treaty law. But a collective approach is realised in favour of indigenous peoples who enjoy benefits as a group, not only as an assembly of persons realising their individual rights. Therefore, the general concept of

cultural diversity as respecting different cultural traditions and values of different groups is closer to the international protection of indigenous peoples than to the protection of minorities. Persons belonging to minorities, however, are entitled to the right to enjoy their own culture which may entail the fostering of cultural diversity. At the heart of the matter, the specific legal regime for indigenous peoples applies to the cases of group protection whereas the systems of minority protection apply to the protection of individual rights. The development and promotion of safeguards against the vanishing of cultural peculiarities of groups can result primarily from the protection of indigenous peoples.

The Eighth Conference of the Parties to the Convention on Biological Diversity: Summary and Analysis

Nele Matz-Lück

Biodiversity is the foundation of life on earth
and one of the pillars of sustainable development.[1]

I. Introduction
II. The Eighth Conference of the Parties
  1. Thematic Areas and Subjects for In-Depth Consideration
  2. Summary of Selected Decisions
    a. Island Biodiversity
    b. Biological Diversity of Dry and Sub-Humid Lands
    c. Global Taxonomy Initiative
    d. Access and Benefit-Sharing
    e. Indigenous Knowledge: Article 8(j) CBD and Related Provisions
    f. Communication, Education and Public Awareness
    g. Environmental Impact Assessment
    h. Liability
    i. Biodiversity and Climate Change
III. Analysis

[1] UN Secretary-General Ban Ki-moon in his message on the International Day for Biological Diversity, 22 May 2007.

A. von Bogdandy and R. Wolfrum, (eds.),
Max Planck Yearbook of United Nations Law, Volume 11, 2007, p. 265-277.
© 2007 Koninklijke Brill N.V. Printed in The Netherlands.

I. Introduction

The Convention on Biological Diversity (CBD)[2] is one of the so called "Rio Conventions", together with the UN Framework Convention on Climate Change (UNFCCC)[3] and the UN Convention to Combat Desertification (UNCCD)[4]. It was opened for signature at the United Nations Conference for Environment and Development (UNCED), the so called "Earth Summit", in Rio de Janeiro 15 years ago and entered into force on 29 December 1993. The objective of the Convention is to prevent the rapid and still continuing worldwide depletion of biological diversity. Article 2 CBD defines biological diversity as follows:

> "'Biological Diversity' means the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and ecosystems."

This broad definition goes substantially further than previous international approaches by states concerned with the conservation of specific species or certain designated ecosystems. It includes wild and domesticated animals as well as wild and cultivated plants in terrestrial and marine or inland water ecosystems within and outside national jurisdiction.[5] Other aspects of the Convention that distinguish its approach from relevant prior instruments are its integrated approach – as opposed to a sectoral one – and the perception of biological diversity as a benefit in itself, i.e. without regard to whether species or ecosystems are valuable for human use (e.g. for nutrition, medicinal usage or recrea-

---

2 *ILM* 31 (1992), 818 et seq.

3 *ILM* 31 (1992), 849 et seq.

4 *ILM* 33 (1994), 1328 et seq. The full title of the Convention, United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, is hardly ever used.

5 A. Kiss/ D. Shelton, *International Environmental Law*, third edition, 2004, 352. In regard to jurisdiction, however, while, by the definition in article 2 CBD, areas outside the sovereignty or jurisdiction of states are included, or at least not excluded, the Convention's scope does not substantively extend to e.g. the high seas. According to article 4 CBD the Convention applies to components of biodiversity within areas of national jurisdiction and to activities that have an effect inside or beyond areas of national jurisdiction.

tion) or not.[6] While designation for human use is hence not a prerequisite for protection, the CBD attempts to instrumentalise controlled and sustainable human use of biological diversity as an incentive for enhanced protection. This method stands in contrast to treaties that seek to implement the preservation of a natural resource by strict prohibitions of any kind of human usage.

So far, eight ordinary meetings and an extraordinary one, at which the Cartagena Protocol on Biosafety to the CBD[7] was adopted, have been conducted. The Convention held its eighth Conference of the Parties (COP) in Curitiba (Brazil) in March 2006.[8] While the parties to the CBD met annually for the first three years after the Convention's entry into force, regular meetings are now held on a biennial basis. A week before the beginning of the eighth COP the third Meeting of the Parties (MOP) to the Cartagena Protocol took place at the same location.[9] The next COP and the fourth MOP to the Cartagena Protocol will be held in Germany.

The CBD has currently 190 parties, i.e. it enjoys quasi-universal participation. Those subjects of international law that could ratify or accede to the treaty but have not yet done so are the Holy See, Brunei Darussalam, Iraq, Somalia, and the United States. Brunei Darussalam, the Holy See, and the United States attended the eighth COP as observers. Instruments which have by their definition and objectives a global scope necessarily strive for universal participation in order to enhance effectiveness. The achievement of such an impressive rate of participation, however, signifies both the importance of the issue and the

---

6 However, since the regime on access and benefit-sharing is inseparably linked to the approach to conserve biodiversity, R. Wolfrum "Völkerrechtlicher Rahmen für die Erhaltung der Biodiversität", in: N. Wolff/ W. Köck, *10 Jahre Übereinkommen über die biologische Vielfalt*, 2004, 18 et seq. (27), in footnote 29 criticises the emphasis on the protection of biological diversity for biodiversity's sake by other authors.

7 *ILM* 39 (2000), 1027 et seq.

8 See Report of the 8th Mtg. of the Conference of the Parties to the Convention on Biological Diversity, 15 June 2006, Doc. UNEP/CBD/COP/8/31, available at <http://www.biodiv.org/doc/meetings/cop/cop-08/official/cop-08-31-en.pdf>, hereinafter referred to as COP8-report.

9 Report of the 3rd Mtg. of the Conference of the Parties to the Convention on Biological Diversity serving as the meeting of the parties to the Cartagena Protocol on Biosafety, 8 May 2007, Doc. UNEP/CBD/BS/COP-MOP/3/15, available at <http://www.biodiv.org/doc/meetings/bs/mop-03/official/mop-03-15-en.pdf>.

relatively soft approach adopted by the treaty. It may be assumed that participation would be significantly lower, if parties had to accept and meet enforceable targets and timetables. With the potential exception of the United States which signed the Convention under the Clinton administration but could never get its ratification through Congress, the adopted text of the CBD, unlike many environmental treaties attempting to establish liability regimes, was not perceived as a particularly controversial treaty.[10] While the instruments to prevent climate change have adopted some obligations with targets and timetables for – at least some – parties in the Kyoto Protocol, the CBD lacks comparable substantive duties.

II. The Eighth Conference of the Parties

1. Thematic Areas and Subjects for In-Depth Consideration

So far all conferences, with the exception of the first meeting, had one major leading issue, respectively: a so-called "thematic area" as the focus of the assembly. Marine and coastal biodiversity was the focus of the second COP, agriculture was given particular attention at the third COP, inland water ecosystems at the fourth, dry and sub-humid ecosystems at the fifth, forest biodiversity was the sixth COP's thematic area and mountain biodiversity the seventh. In 2006 the main "new" issue of those deserving "in depth" consideration was island biodiversity. In fact, island biodiversity includes all thematic areas previously considered by the Convention because islands are necessarily surrounded by coastal areas and their ecosystems may also include forests, inland waters, dry lands, mountains, and agricultural land. Despite its comprehensive character the issue of island biodiversity is listed as a separate thematic area in addition to the preceding ones.[11]

With every COP new issues have been added to the agenda either as thematic areas or as issues for in-depth consideration. Once included,

---

10 The only issues that gave rise to concern are the concept of access to genetic resources and the sharing of benefits as well as technology transfer (arts 15 and 16 CBD), since some countries perceive this as a threat to intellectual and other property rights, see Ph. Sands, *Principles of International Environmental Law*, second edition, 2003, 519.

11 See List A annexed to Decision VIII/8. on the implementation of the Convention and its Strategic Plan, COP8-report, see note 8, 191.

these issues continue to be subject to supervision and reports by working and regional groups. The process of adding onto the list of thematic areas of biological diversity on top of other established areas of interest and cross-cutting issues leads to reports like the one on the eighth COP with almost 400 pages. In terms of public awareness such extensive reports are contra-productive, since they are difficult to handle, even for researchers or non-governmental organisations with an interest in the issue. While the relevance of the different issues is not to be doubted, it is nevertheless questionable whether the broadening of the agenda and the variety of working groups enhance effectiveness and support the slowing of biodiversity loss.

In general, the CBD distinguishes between thematic areas and cross-cutting issues, e.g. liability and redress, protected areas, public education and awareness, traditional knowledge, biodiversity and climate change.[12] The report identifies the seven thematic areas mentioned above and refers to further 17 cross-cutting issues.[13]

This paper summarises some selected decisions of the catalogue of altogether 34 decisions[14] adopted by the parties. The majority of the presented decisions were regarded as issues for in-depth consideration by the parties and are placed in a priority position in the report as the first six ones. They refer to island biological diversity, biological diversity of dry and sub-humid lands, Global Taxonomy Initiative, access and benefit-sharing (article 15), article 8(j) and related provisions, and communication, education and public awareness (article 13).[15] As regards the other issues this paper only summarises the decisions on Environmental Impact Assessment, liability, and climate change. In addition to these decisions further topics discussed at the COP were *inter alia* the implementation of the Convention and its Strategic Plan (Decision VIII/8.), operations of the Convention (Decision VIII/10.), review of implementation of article 20 (financial resources) and article 21 (financial mechanism) (Decision VIII/13.), national reporting and the next

---

12 The circumstance that the public currently takes note of the global threat of climate change is also reflected by the decision to chose the issue "Biodiversity and Climate Change" as the focus for the International Day of Biological Diversity in May 2007.

13 List A annexed to Decision VIII/8. on the implementation of the Convention and its Strategic Plan, COP8-report, see note 8, 191.

14 The decisions are annexed to the COP8-report, see note 8, Annex 1, 76 et seq.

15 COP8-report, see note 8, 31 et seq.

Global Biodiversity Outlook (Decision VIII/14.), and decisions on different thematic areas as well as the implementation of relevant working programmes.

2. Summary of Selected Decisions

a. Island Biodiversity

As an issue for in-depth consideration and the seventh thematic area island biodiversity was given special attention by the delegates. From a biological perspective the conservation of island biodiversity is worth emphasising because some island ecosystems have a high level of endemism, i.e. they contain species that have not developed anywhere else and that no longer interbreed with related species or other varieties of what was once the same species. Many island ecosystems are particularly vulnerable in regard to alien species introduced by humans, e.g. mammals in Australia and New-Zealand (rats, cats, dogs, but also rabbits). Decision VIII/1. on island biodiversity[16] and its Annex which contains a programme of work emphasise that in addition to those island ecosystems with rich biodiversity some islands are "cool spots" without much diversity. However, these ecosystems are equally threatened and worth preserving. The main decision concerning island biodiversity consists of the adoption of a further programme of work. This programme presents targets and timetables. It calls for a significant reduction of island biodiversity loss by 2010. It should also contribute *inter alia* to the Strategic Plan of the CBD which was adopted at the sixth COP[17] and the Plan of Implementation of the World Summit on Sustainable Development[18] and the Millennium Development Goals[19]. The

---

16 COP8-report, see note 8, 79 et seq.

17 This Strategic Plan sets the priorities and establishes general guidelines for the future in order to achieve by 2010 a significant reduction in the rate of diversity loss, see Decision VI/26. and its Annex, Report of the 6th Mtg. of the Conference of the Parties to the Convention on Biological Diversity, 27 May 2002, Doc. UNEP/CBD/COP/6/20, available at <http://www.biodiv.org/doc/meetings/cop/cop-06/official/cop-06-20-en.pdf>, 304 et seq. The report is hereinafter referred to as COP6-report.

18 Report on the World Summit on Sustainable Development, Doc. A/CONF.199/20, available at <http://www.unmillenniumproject.org/documents/131302_wssd_report_reissued.pdf>, 7 et seq.

19 See UN Millennium Declaration, A/RES/55/2 of 8 September 2000.

Decision recommends in detail how states shall in their national programmes deal with certain identified priority issues, i.e. in particular with monitoring, partnerships, public awareness, and capacity building. In the past, the parties to the CBD adopted comparable work programmes for the other thematic areas, e.g. concerning the conservation of forest biodiversity, inland waters or coastal zones. Although such programmes draw attention to important issues, they remain only political declarations without legally binding force or enforcement mechanisms attached to them. The last 15 years showed that despite the adoption of different working programmes, member states have not achieved any considerable improvement in terms of slowing the loss of biological diversity.

b. Biological Diversity of Dry and Sub-Humid Lands

Parties adopted a similar strategy containing specific goals and targets for the programme of work on the biological diversity of dry and subhumid lands. Decision VIII/2.[20] emphasises the necessity to cooperate closely with the Convention to Combat Desertification in order to create synergies. Consequently, parties are *inter alia* called upon to implement the joint working programme of the two conventions. Delegates referred to the question of climate change as a particular threat to dry and sub-humid ecosystems to the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) for the development of further proposals.

c. Global Taxonomy Initiative

Decision VIII/3. is entitled "Global Taxonomy Initiative: in-depth review of the programme of work for the Global Taxonomy Initiative".[21] The Global Taxonomy Initiative is one of the cross-cutting issues, the progress of which is continuously reviewed by the delegates. The programme concerning the Global Taxonomy Initiative was initiated and has been carried on since the sixth COP. Parties perceive enhanced knowledge about taxonomy as one of the major elements for monitoring which in turn is crucial for measuring loss of diversity and potential success in slowing extinction rates. Only if we know what kind of biological diversity exists and set this into relation with the focus and

---

20 COP8-report, see note 8, 79 et seq.

21 COP8-report, see note 8, 119 et seq.

methods of the Convention, can we assess whether efforts fail or lead to progress in the conservation strategies. Consequently, the parties make a reference to,

> "the urgent need for timely provision of scientific names of organisms to support implementation of work under the Convention on Biological Diversity."[22]

With Decision VIII/3. and its Annex parties broaden the work programme on the Global Taxonomy Initiative to include four so-called "additional planned activities": mountain biodiversity, invasive alien species, protected areas, and island biodiversity.

d. Access and Benefit-Sharing

The provisions on access and benefit-sharing by the CBD are part of the concept by which biological resources shall be conserved.[23] The text of the Convention does not give any guidance on the establishment of systems for access and benefit-sharing, since access is subjected to national legislation of the member states according to article 15 para. 1 CBD. Despite the explicit acknowledgment of sovereignty over their natural resources, states shall endeavour to facilitate access and shall not impose restrictions contrary to the CBD's objectives.

In the years following the entry into force of the Convention, the relevant COPs have intensively debated different models for access and benefit-sharing and attempts have been made to establish an international regime on access to genetic resources and benefit-sharing. The *Ad Hoc Open-ended Working Group on Access and Benefit-sharing* presents a collection of views concerning a proposal for such an international regime that is annexed to Decision VIII/4. However, at this early stage nearly all relevant questions are still left open, e.g. the legal nature of the regime, whether it shall be binding or non-binding, and the scope and conditions for the fair and equitable sharing of benefits. As a result, the Annex is no more than a first starting point for further discussion by the parties, the working groups involved in the process and stakeholders.

---

22 Decision VIII/3., para. 7, COP8-report, see note 8, 119.

23 See Wolfrum, see note 6, 27.

In regard to the *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising out of their Utilization*[24] the COP welcomes any progress already accomplished and invites parties to submit voluntary reports on their experiences. Although further efforts undertaken at prior meetings of the parties are mentioned in the report, no substantive new approach or progress was agreed upon as regards the important issue of access to genetic resources and the equitable sharing of benefits resulting from the commercial use of resources.

e. Indigenous Knowledge: Article 8(j) CBD and Related Provisions

Concerning the protection of knowledge and practices by indigenous communities relevant to the conservation of biodiversity (article 8(j)), Decision VIII/5. provides for some innovations. The first novel issue concerns mechanisms to enhance the effective participation of indigenous peoples in matters relevant to traditional knowledge and biodiversity and related issues.[25] The parties to the CBD decided to establish a trust fund to achieve this objective which shall be entitled "Voluntary Trust Fund to Facilitate Participation of Indigenous and Local Communities in the Work of the Convention on Biological Diversity". UNEP will administer the fund. It is the only funding mechanism within the UN which is designed for the objective to exclusively enhance participation of indigenous and local communities in CBD meetings.

The second innovative approach adopted by the parties in regard to indigenous knowledge relates to the development of elements of *sui generis* systems for the protection of the knowledge, innovations and practices of indigenous and local communities. This idea, however, is still at its very beginning and the parties invite governments, indigenous communities and non-governmental organisations to share their views on the issue by communication to the CBD Secretariat.

Another future project in the realm of article 8(j) CBD concerns the drafting of an ethical code of conduct for ensuring respect for the cultural and intellectual heritage of indigenous and local communities relevant to the conservation and sustainable use of biological diversity. To promote work on the elements that shall be addressed by the code of

---

24 These Guidelines were adopted as an Annex to Decision VI/24. by the sixth COP, COP6-report, see note 17, 253 et seq.

25 VIII/5., Section D. and Annex, COP8-report, see note 8, 144 et seq.

conduct the *Ad Hoc Working Group on Article 8(j) and Related Provisions* is mandated with drafting a proposal.

f. Communication, Education and Public Awareness

Awareness-raising in different modes and by various methods is considered crucial for success in achieving the Convention's objectives. The parties appreciate the efforts by the Global Initiative on Communication, Education and Public Awareness (CEPA) to identify priority activities and strategies for the implementation of the initiative. The short-list of priority activities for the programme of work on communication, education and public awareness is contained in Annex II to Decision VIII/6.[26] This list shall serve as a framework to guide implementation of CEPA's programme of work in the short term. The list identifies the following elements as priority activities: establishment of an implementation structure for CEPA activities, assessment of the state of knowledge and awareness on biodiversity, development of key messages, implementation of media relations strategy, elaboration of toolkits for CEPA strategies, organisation of workshops for the articulation of CEPA strategies, development of infrastructure and support for a global network, the International Day for Biological Diversity, raising of the profile of meetings of the COP and the SBSTTA, and the strengthening of formal and informal education on biodiversity.

The second issue parties considered relevant to the raising of awareness on biological diversity is the proposal to proclaim 2010 the International Year of Biodiversity. To this end the parties to the CBD drafted a resolution for adoption by the UN General Assembly at its sixty-first ordinary session. The text of the draft is appended as Annex I to Decision VIII/6.

g. Environmental Impact Assessment

Of the other decisions that *inter alia* concern the implementation of former action plans and programmes of work and the various cross-cutting issues, Decision VIII/28.[27] on Environmental Impact Assessment (EIA) seems worth mentioning because it elaborates voluntary guidelines on biodiversity-inclusive EIA. These guidelines follow the international best practice rules while focusing on the consideration of

---

26 COP8-report, see note 8, 161 et seq.

27 COP8-report, see note 8, 324 et seq.

biodiversity in EIA procedure. The guidelines shall serve to strengthen and improve national systems, thereby contributing to the implementation of the CBD's objectives in the member states. For the EC member states so far the main guidance on EIA stems from the 1985 EIA Directive that was amended in 1997.[28] Although it seems that the guidelines elaborated under the roof of the CBD shall rather assist states with no or only rudimentary EIA legislation, the EC Directive does not take special account of biological diversity.[29] Its article 3 establishes a list of factors that refers to direct and indirect effects on fauna and flora but not to the special issue of biodiversity. As opposed to this, para. 2 of the German EIA-Statute[30] explicitly mentions biological diversity in its definitions.

h. Liability

Decision VIII/29. on the issue of liability which could be crucial for enhancing compliance as a negative incentive is very brief. Basically, legal and technical experts shall collect examples of national legislation on liability in order to prepare a synthesis report and disseminate information. It seems that the CBD is far from employing a liability regime as a tool to achieve its objectives.

i. Biodiversity and Climate Change

Since the early meetings of the COP, the parties have dealt with the relations between the CBD and other conventions, particularly, the other Rio Conventions. The explicit linkage between climate change and biodiversity seems to go further than the usual confessions to promote cooperation with the bodies of other conventions. In addition to the usual invitations to the parties to cooperate more closely with each other and the relevant institutions, Decision VIII/30., which is entitled "Biodiversity and Climate Change: Guidance to Promote Synergies among Activities for Biodiversity Conservation, Mitigating or Adapting to Cli-

---

28 Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, *OJ* L 073, 5 et seq.

29 Only the preamble to the Directive mentions species diversity, which, according to the definition of the CBD, is only one part of biological diversity.

30 Gesetz über die Umweltverträglichkeitsprüfung (UVPG), *Federal Law Gazette*, Vol. I (2005), 1757 et seq., *corrigendum* 2797 et seq.

mate Change and Combating Land Degradation",[31] requests the SBSTTA to develop draft guidance on the integration of climate change response activities into the work programmes of the CBD. Furthermore the Joint Liaison Group of the Rio Conventions shall consider options for mutually supportive activities.

III. Analysis

The work of the CBD in general and of specific meetings of the COP are difficult to assess. On the one hand, the CBD may be considered a failure because even after 15 years it has not yet managed to meet its objectives. In the decision concerning the implementation of the CBD and the Strategic Plan, Decision VIII/8., the parties note the slow progress and propose voluntary guidelines to solve the practical implementation problems.[32] However, there are doubts whether the list of obstacles to the implementation of the CBD, which is reproduced in List B to Decision VIII/8.,[33] will get any shorter in the near future and whether the slow progress can be speeded up, if the main obstacle is lack of political will and support to implement the Convention. Voluntary Guidelines are not a persuasive means to trigger a change of political priorities in member states. On the other hand, the efforts by the parties and CBD institutions manage to raise awareness and have in fact lead to the initiation of many regional and national programmes and strategies. Despite the obvious deficiencies in halting the loss of biodiversity, we do not know how much worse the situation might be without these efforts.

In any case the continuous proliferation of work due to the enlarging of the CBD's agenda seems contra-productive. With ever more action plans, programmes of work, reports, funds and operations it seems that the "organisation" (that is not even an international organisation in the legal sense) spends a lot of time and resources on dealing with its own methods, structures and administrative matters. It is telling that the decision on the operations of the Convention is amongst the most extensive ones adopted at the eighth COP.[34] Although efficient work by an institution certainly requires functioning administration with different bodies and means of communication between organs, an interna-

---

31 COP8-report, see note 8, 346 et seq.

32 COP8-report, see note 8, 184 et seq.

33 COP8-report, see note 8, 191 et seq.

34 Decision VIII/10., COP8-report, see note 8, 198 et seq.

tional biodiversity administration in the wider sense that is too busy administering itself may not be able to concentrate on its core function: streamlining and further developing effective methods to prevent the rapid loss of biological diversity in the near future.

Misplaced Blame: Islam, Terrorism and the Origins of *Hawala*

Edwina A. Thompson[*]

I. Introduction
II. Economic Order in Crisis
III. Conventional Wisdom on *Hawala*
IV. Etymology of *Hawala*
V. Role of Islam in *Hawala*
VI. Assessment

I. Introduction

Hawala is an ancient form of money dealing and funds transfer that spans the globe and operates outside the reach of state control.[1] In the wake of 9/11, it received much attention as an "underground", "shadow", or "black" channel for terrorist funds across the Muslim world. Surprisingly little remains known, however, about the true origins of *hawala* and why it continues to persist into the present day despite state collapse and efforts to regulate, disrupt, or replace the system.

---

[*] This article is dedicated to the memory of Michael MacAvoy, David O'Neill, and Craig Linacre.

[1] The classical Arabic term *hawala* is used in Afghanistan and the Middle East, while *hawilaad* is commonly employed by Somalis to denote the same practice in the African continent. While originating in the Middle East and Indian subcontinent, *hawala* networks now link up to most of the world's major trading and financial centres due to the steady reduction of regulatory and other obstacles to cross-border flows of goods, capital, and people in the global economy.

A. von Bogdandy and R. Wolfrum, (eds.),
Max Planck Yearbook of United Nations Law, Volume 11, 2007, p. 279-305.
© 2007 Koninklijke Brill N.V. Printed in The Netherlands.

Although not publicised widely, humanitarian relief workers are among the first to recognise the indispensable service of local money dealers, or *hawaladars*, for the delivery of funds in both war-torn areas and states in crisis. Indeed, over the past five years in Afghanistan alone, *hawaladars* have facilitated the movement of hundreds of millions of dollars of "humanitarian money" to ensure the smooth running of the first national democratic elections in more than three decades, the construction of hundreds of kilometres of road that had fallen into disrepair, the implementation of agricultural assistance programmes, and the building of educational facilities in a country suffering from some of the lowest literacy rates in the world, and where less than half the children aged 7-12 years are enrolled in school.[2] Financial analysts speculate that between 500 and 2,000 unregistered *hawaladars* exist within Afghanistan today.[3]

In Iraq as well as refugee or IDP (internally displaced person) camps across Africa and South Asia,[4] variations of *hawala* are employed widely due to the collapse or weakening of formal institutions.[5] In early 2005 after the tsunami wave hit Aceh, for example, money dealers reportedly established an emergency communications system to help mi-

---

2 UNICEF and Central Statistics Office of Afghanistan, *Afghanistan – Progress of Provinces: Multiple Indicator Cluster Survey 2003*, May 2004, 64-66. Despite this, it is important to note that Afghanistan is experiencing the highest primary net enrolment rates in its history, with more than 4.3 million children attending primary and secondary school in 2003. See Government of Afghanistan, "Education: Technical Annexe," in: *Securing Afghanistan's Future. Accomplishments and the Strategic Path Forward*, January 2004, 4. On the restructuring and management of the post conflict situation in Afghanistan see the article by E. Afsah/ A.H. Guhr, "Afghanistan: Building a State to Keep the Peace", in: A. von Bogdandy/ R. Wolfrum (eds), *Max Planck UNYB* 9 (2005), 373 et seq.

3 S.M. Maimbo, "The Money Exchange Dealers of Kabul: A Study of the *Hawala* System in Afghanistan", Finance and Private Sector Unit South Asia Region, World Bank, 2003, 8.

4 Information gleaned from private security companies in Iraq, and the United Nations World Food Programme's Regional Public Information Officer for West Africa, who has observed the system operating in Chad, Somalia, and Sudan (November - December 2006).

5 Importantly, *hawala* is also the value transfer system of choice in some developed countries not experiencing crisis, particularly among migrant workers who either lack access to formal banks in the host country or require low rates and convenience in transferring small tranches of money abroad.

grants locate their families and arrange for the delivery of funds either to functioning bank accounts or directly to the camps themselves.[6]

Under these conditions, however, the money dealer's continued provision of services in the face of disorder ensures not only the delivery of material aid to displaced and vulnerable persons who have few alternative means of survival, but also the availability of a mechanism by which traffickers in illegal goods, terrorists, and corrupt politicians can move and launder their money under the radar of state regulation. This ambiguous dual function explains in part the alternative image that persists in policy and media accounts of money dealers – or *hawaladars* located in fragile, and more specifically Islamic, regions of the world – as belonging almost exclusively to the murky world of underground or criminal finance.

The invisible nature of *hawala* transactions to the officially regulated world of finance, coupled with the prevalence of *hawala* networks in Afghanistan and Somalia, are factors that have contributed to the growing suspicion among Western policymakers to the potential role of *hawaladars* in providing terrorists with a ready-made funds transfer apparatus.

Within this spirit, President Bush asserted in the wake of 9/11[7] that the "foreign scourge" of money dealers in the United States collectively present themselves as "legitimate businesses" on the surface, while enabling "the proceeds of crime in one country to be transferred to pay for terrorist acts in another … all at the service of mass murderers."[8]

With its popular rise in debates on terrorist finance and concomitant negative stereotyping, *hawala* has therefore come to be invoked more frequently than it is defined. A major problem is that almost no attention has been directed to the historical circumstances surrounding its early development. This has spawned a perceptible measure of confusion over the practice as we now understand it and has perhaps lent disproportionate weight to its Islamic heritage.[9] Some remedial work is

---

6 T. Wu, "The Role of Remittances in Crisis: An Aceh Research Study", *Humanitarian Policy Group*, Overseas Development Institute, August 2006, 21.

7 The terrorist attacks on US soil in September 2001 were certainly a catalyst for further suspicion and alarm regarding these financial networks.

8 G. Bush, "Bush Announces *Al-Qaeda* Crackdown: Transcript of an Address to the White House," *The Washington Post*, 7 November 2001.

9 There have been attempts to disassociate *hawala* from its popular linkages with terrorism and Islamic fundamentalism and universalise the practice

therefore required to clarify the current usage of the term in policy and academic discourse and to test the significance of religion in the early development of *hawala*. Before this is possible, it is necessary to devote some attention first to developments in the "peace-building" literature, which pose a challenge to the "top-down" and functionalist approach currently guiding state-building agendas, and then to some background on the conventional wisdom and conditions surrounding the emergence of *hawala*.

II. Economic Order in Crisis

The prevailing view of policymakers tends to be that disorder reigns where the core functions of the state are fatally weakened; hence it is the responsibility of international organisations and institutions to create order out of the chaos. Critics within the "peace-building" literature argue that this approach precludes any serious examination of whatever order might exist in "failed" states. With at least two thirds of the world's poorest countries either experiencing active conflict or an insecure peace, and having a major part of their economies unregulated by the state,[10] it appears especially timely to investigate the impetus behind local economic governance systems where the rule of public institutions remains fragile.

Frustrations in the humanitarian field and criticisms of aid practice over recent years have prompted a debate within the literature that represents at least the first step in redressing impoverished conceptions of local level agency. The community is broadly divided between those who stress the need for more "local participation" – which involves "engaging" host populations – and those who argue for a return to the original beliefs and doctrine of humanitarianism – the primary imperative being that of "saving" lives through the principles of neutrality and impartiality. The promise of "engaging" local populations is that their

---

because of its occurrence in contexts outside the Arab or Muslim world by labelling it an "Informal Value Transfer System" (IVTS). While this is a helpful advance in terms of policy and destigmatisation, this paper prefers to use the term *hawala* because it is widely recognised by that label in the local and global contexts under investigation in this study.

10 B. Harriss-White, "Globalization, Insecurities and Responses: An Introductory Essay," in: id., *Globalization and Insecurity: Political, Economic and Physical Challenges*, 2002, 1.

unique systems of governance will no longer be dismissed, but rather incorporated into the overall development strategy.

Further benefits accrue from such an approach in the development relief context. In the specific case of unravelling *hawala* – just one part of economic order in "failed" states – it is possible to locate several layers of inquiry and insight into the local context, such as what fragile state rule reveals about a local population's capacity for adaptation and survival, and how local perceptions of legitimacy and legality are altered through the reordering of political and economic relations.

At the national level, it crystallises the realities of relief and development in transition to peace; for example, what constitutes acceptable economic practice in a war zone. In light of the "reputational risks" associated with involvement in informal economy networks, and the many grey areas surrounding them, those seeking to build a functioning state and market are presented with the awkward dilemma of whether they should rely on the resources available in the local economy when they run the risk of involving themselves in "shady" practices.[11]

Further questions arise in the process, such as whether it is possible to treat local institutions and practices as *tabula rasa* awaiting the imprimatur of the liberal democratic core, while at the same time relying on them for the smooth functioning of external assistance missions; whether the regulator's aim to disrupt informal economic networks can be reconciled with the aid community's willingness to work with them; and at what point different logics of action in the development-relief context become hypocrisy.[12] Against the background of debates calling for a more nuanced examination of "transition" than the short-term rationality of replacing one set of economic institutions with another set of institutions of proven efficiency elsewhere,[13] this paper tries to pro-

---

11 J. Daudelin/ L.J.M. Seymour, "Peace Operations Finance and the Political Economy of a Way Out: Living Off the Land," *International Peacekeeping* 9 (2002), 99 et seq.

12 See A. Van Rooy, *The Global Legitimacy Game: Civil Society, Globalisation, and Protest*, 2004. These questions are explored in detail in E. Thompson, *Economic Order in Failed States: A Case Study of the Money Dealer in Afghanistan*, Unpublished PhD Thesis, 2007.

13 Grabher and Stark argue from an "evolutionary" perspective that although such institutional homogenisation might foster *adaptation* in the short run, the consequent loss of institutional diversity will impede *adaptability* in the long run. G. Grabher/ D. Stark, "Organizing Diversity: Evolutionary The-

vide the foundation for exploring questions such as these. As mentioned above, it will try to achieve this by demystifying the conventional wisdom that shrouds current understandings of the true origins and concept of *hawala*.

III. Conventional Wisdom on *Hawala*

Hawala exponentially entered the lexicon of world leaders and media at a time when policymakers were scrambling to lay blame for the brutal attacks on America in September 2001. In its fast-developing "war on terrorism", the Bush administration conducted a search not only for the guilty terrorists but for a suitable accomplice in the world of finance. As a result, it executed a military campaign in Afghanistan in parallel with a war against terrorist finance that incorporated a focus on informal economic networks in the Muslim world.[14]

The approval of Executive Order 13224 and launch of Operation Green Quest, a multi-agency terrorist financing task force, marked the first major step in the expansion of the US Treasury's authority in these matters. While financial sanctions were nothing new as a strategy to counter terrorism, the broadened scope of the sanctions' coverage from terrorists and terrorist organisations to individuals and organisations associated with terrorists was a fairly new and somewhat worrying development, especially because evidence to support an order to block transactions and freeze assets may come from classified sources that do not have to be revealed to anyone other than a reviewing court.[15]

These powers were accompanied by America's Counter-Terrorist Financing Public Awareness and Rewards Campaign in which individual rewards of up to five million dollars have been made available for

---

ory, Network Analysis and Postsocialism," *Regional Studies* 31 (1997), 533 et seq.

14 K. Medani, "Financing Terrorism or Survival? Informal Finance and State Collapse in Somalia and the US War on Terrorism," *Middle East Report* 223 (2002), 2 et seq.

15 B. Zagaris, "US Court of Appeals Upholds Freeze of Global Relief Foundation," *International Enforcement Law Reporter* 19 (2003), 90 et seq.; see also P.D. Buckley/ M.J. Meese, "The Financial Front in the Global War on Terrorism," Paper delivered to the US Military Academy, West Point, New York, 2005.

any information leading to the dismantling of funding mechanisms that support terrorist activities.

The US Treasury Department Undersecretary for Enforcement announced during the campaign that,

> "We are calling on the front lines of this war on terrorist financing to unite against the common scourge of blood money. As President Bush has said, we're making progress in this different kind of war. The enemy we seek hides in caves and operates in the dark alleys of the world ... With the public's help, this program will help us protect the homeland by hunting these killers down, one at a time, and bringing them to justice."[16]

Statements such as these, of which there is no shortage, have arguably reduced the issue to a popular slogan for sound-bite consumption. By locating the "enemy" in hidden caves and dark alleys, and associating him with the "unknown" or less familiar banking practices emanating from non-Western states, any real understanding of systems such as *hawala* remain shrouded in mystery, while Western banking is implicitly constructed as "the normal and legitimate space of international finance."[17]

On the day of one *hawala* company's closure, President Bush proclaimed a certain victory for America's "fight against evil."[18] Media accounts have been equally condemning the system in the years immediately following 9/11; one investigative reporter was so bold as to broadcast in a headline that *hawala* is quite simply, "A Banking System Built for Terrorism."[19] In a study commissioned by the Dutch Ministry of Justice even before 9/11, the author commented on the extent to which erroneous statements about informal value transfer systems (IVTS) had begun to be uncritically reproduced in articles, government reports,

---

16 US Treasury Department, "Press Statement by Treasury Department Undersecretary for Enforcement Jimmy Gurulé," available at: <http://www.ustreas.gov/rewards/gurule.shtml>.

17 M. de Goede, "Hawala Discourse and the War on Terrorist Finance," *Environment and Planning D: Society and Space* 21 (2003), 513 et seq.

18 Bush, see note 8.

19 M. Ganguly, "A Banking System Built for Terrorism," *Time Magazine*, 5 October 2001.

academic publications, and United Nations documents, leading to the creation of "facts by repetition."[20]

An important one of these "facts", or received wisdom, assigned *hawala* a distinctly Islamic disposition. The citation below provides an example of where *hawala* is depicted as not only based on Islamic law, but entrenched in Muslim society and practiced exclusively, or predominantly, by Muslims,

> "Known for centuries in the Islamic world, fundamental Islamic groups [have] chosen the ancient system to become the backbone of their financial structure. But this usage of hawala is only one step in the evolution of hawala banking as a worldwide financial system based on the principles of Islamic banking laws and deeply embedded in the religious and social thinking of the Islamic community."[21]

The sheer repetition of the reference to Islam in Western accounts such as these, and the present popular association of Islam with fundamentalism and terrorism, has further entrenched the stigmatism surrounding *hawala*. It has also served to position *hawala* as an *external* threat[22] and deflected calls for more diligent regulation of the Western financial system which, in a profound irony, was found to provide the actual vehicles – i.e. international banks – for *Al Qaeda* to move its money across some of the world's largest financial trading centres.[23]

The current regulatory context of global finance reinforces this tendency to marginalise further "informal" economies. Law enforcement agencies and multilateral regulation bodies, such as the Financial Action

---

20 N. Passas, *Informal Value Transfer Systems and Criminal Organizations: A Study into So-Called Underground Banking Networks*, 1999, 20.

21 M. Schramm/ M. Taube, "Evolution and Institutional Foundation of the *Hawala* Financial System," *International Review of Financial Analysis* 12 (2003), 405-406; see also C. Burger, "Religion, Ethnicity and Trust – Institutional Foundations of the Hawala Informal Funds Transfer System," Unpublished Thesis, Institut für Islamwissenschaft der Freien Universität Berlin, 2003.

22 M. Berdal/ M. Serrano, *Transnational Organized Crime and International Security: Business as Usual?*, 2002, 202. According to US policy, the authors note that criminal organisations must not be seen to exist within or interact with US institutions and practices.

23 See the official findings of *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States*, Washington D.C., 2005, 237.

Task Force (FATF) of the G7, Interpol, and the United Nations, are attempting, with varied success, to coordinate mechanisms to interdict criminal and terrorist finance. Thirty-three countries and territories have now pledged support for the FATF's basic framework of an anti-money laundering regime, which aims to "safeguard the global financial system against money laundering and terrorist financing" and "ensure global compliance" with its standards, of which there are 49 recommendations.[24] While it is virtually impossible to measure either the actual compliance of FATF members or the overall success in combating the problem of money laundering, the taskforce has expressed a certain level of confidence that, "the formal financial system [is becoming] increasingly closed to terrorists and criminals."[25] Its aim since this perceived victory has been to "enhance its focus on informal and non-traditional methods of financing terrorism and money laundering, including through cash couriers, alternative remittance systems, and the abuse of non-profit organisations."[26] This has placed the previously under-researched role of weaker, non-state activities in the global political economy, such as *hawala*, under increased scrutiny. But due to their "unofficial" and sometimes clandestine nature, the available information on these activities remains limited, vague, and contradictory, causing emergent policy to be based upon an inadequate understanding of the processes at work.

It follows that, for all the attention and relentless stereotyping, little remains known about the true origins of *hawala*, how it has survived and adapted throughout the centuries, and why it continues to persist into the present day despite state collapse and subsequent efforts to regulate, disrupt, or replace the system.

This paper addresses the concept and origins of *hawala* – where, for example, the term originates, what it was originally intended to describe, and how this relates to the financial practices of those to whom such a label is attached today. Only once these basic questions are resolved can we judge the relevance of examining the case of *hawala* in Afghanistan and elsewhere from the perspective of criminality, religion or other cultural forms.

---

24 Financial Action Task Force, "FATF Mandate Renewed for Eight Years," 14 May 2003, available at: <http://www.fatf-gafi.org/dataoecd/46/33/35065565.pdf>. Money laundering is the act of converting money gained from illegal activity into assets that cannot be traced to the underlying crime.

25 Ibid.

26 Ibid.

Before presenting the evidence a note on the available historical records is required. Some suggest, with good reason, that it remains virtually impossible to establish when credit instruments were first used as a lubricant of business and commerce, or indeed to provide a continuous uninterrupted account of their evolution.[27] Here it is instructive to draw from *Muhammad Akbar's* general comments on the bias in historical accounts.[28]

The present paper should be viewed within these limitations. It nevertheless offers an unprecedented overview of *hawala* and related trade practices within the broader historical context of world commerce, in addition to an analysis of its emergence in the Islamic legal texts.[29]

IV. Etymology of *Hawala*

Scholars attempting to search for the origins of *hawala* tend to begin with Islam. Etymologically this indeed makes sense. *Hawala* is an Arabic term[30] that denotes a "transfer", and in commercial terms the practice of transferring money and value from one place to another through service providers, known as *hawaladars*.

Hawala is understood in Arabic legal commentaries as the "exchange of debt", particularly in its historical context of long distance trade. When adopted into Hindi and Urdu – the national languages of India and Pakistan – the term retained this sense but gained the additional meanings of "trust" and "reference", which reflect the code by

---

27 R. Orsingher, *Banks of the World*, translated by D.S. Ault, 1967, 1.

28 "Although we hear a great deal about the valiant deeds of the kings and the remarkable feats of the veteran soldiers, the amorphous mass of mankind is enwrapped in mystery and our notions about it are quite dim and hazy. The explanation of all this is to be sought in the fact that to the historians of the time man as man was quite insignificant; it was only when he rose much above the common level that he came to have some meaning. So it was a king, a warrior, a savant, or a saint that attracted their notice and not men in the street", M.J. Akbar, *The Punjab under the Mughals*, 1948, 235.

29 I am grateful to *Sheikh Afifi al-Akiti* at the Oxford Centre for Islamic Studies for his help in navigating the classical Islamic texts cited in this paper.

30 *H-w-l* root, meaning "transform", or "change".

which the *hawala* system functions.[31] Afghans involved in the trade tend to call themselves *sarafi,* or the singular, *saraf*, which means "money changer".[32]

In recent times, a number of scholars have attempted to redress the lack of clarity surrounding the origins of *hawala*. *Divya Sharma* makes the latest attempt in an article that compares *hawala* with the *hundî,* a longstanding Indian credit instrument.[33] She asserts that,

> "The origins of Hawala could be traced back to the past seven or eight decades or so, although it is virtually impossible to trace the origins of Hundi. Hawala is more recent and could be seen as an offshoot of Hundi. The Hundi, a bill of exchange, was an integral part of indigenous banking in the Indian subcontinent, but Hawala came into being with a formal banking system already in place and therefore carried an illegal connotation since its inception."[34]

This statement is representative of the tendency in current Indian literature on *hawala* to disassociate local financial practices there from those that are tainted with the brush of terrorism in neighbouring Pakistan and Afghanistan. As will become clear, this ahistorical perspective on the connections between India and Afghanistan's financial systems shrouds the origins of *hawala* in further mystery.

Matthias Schramm and *Markus Taube* were among the first academics to investigate exclusively the true historical origins of the concept and etymology of *hawala*. They took a different approach by examining the classical Islamic sources, and conclude that the earliest reference to *hawala* as a legal concept appears in 1327 in a text written by legal scholar *Abu Bakr b. Maseud al-Kasani*.[35] A review of some of the original literature in the *hadîth* reveals, however, that *Schramm* and *Taube* stopped their search prematurely. It transpires that, in the early part of

---

31 P.M. Jost/ H.S. Sandhu, "The Hawala Alternative Remittance System and its Role in Money Laundering", Interpol General Secretariat, January 2000.

32 I refer to bankers in Afghanistan who conduct *hawala* as *hawaladars* rather than *sarafi* in order to avoid confusing them with the ordinary currency exchange dealers.

33 Reserve Bank of India, "Chapter 2: Evolution of Payment Systems in India", 1995, available at: <http://www.rbi.org.in/scripts/PublicationsView.aspx?id=155>.

34 D. Sharma, "Historical Traces of Hundi, Sociocultural Understanding, and Criminal Abuses of Hawala," *International Criminal Justice Review* 16 (2006), 99 et seq.

35 Schramm/ Taube, see note 21, 407.

the 7th century A.D., *Abu Huraira* recalls the following instruction given by his companion, the Prophet Mohammed, "Sahîh al-Buhârî, kitâb al-hawâlât"[36] which can be translated thus,

> "Procrastination by the wealthy [in paying debts] is unjust, and when one of you is transferred [the claim for his debt] to a wealthy person, he should accept [the transfer]".[37]

Soon after Mohammed's death, the Islamic jurists prescribed this concept of delegation of debt, identifying the practice as *al-hawâla*. While it appears likely that the practice existed well before its codification in Islamic law, it should now be clear from his prophetic sayings that Mohammed himself was familiar with the technique.

But what was *hawala* originally intended to describe, and how does this relate to the financial practices of those to whom such a label is attached today? According to the classical definition, *hawala* as a financial term refers to the payment of a debt through the transfer of a claim. For example, if A is indebted to B, but has a claim against C, he can settle his debt by transferring his claim against C to the benefit of B.[38] In such a transaction, no physical transfer of money takes place; only a delegation of debt.

Today's understanding of the mechanics behind a *hawala* transaction is quite different. Virtually every current user of the system and commentator on it provides the following explanation of how *hawala* operates: a customer (C) wishes to send money to a person at another destination (D), so pays a small fee to a remittance agent (A), who in turn contacts a local agent in the destination (B) with instructions detailing the amount and the identity of the intended recipient. Within 24 hours, this person (D) can collect the money from the agent (B), within the local currency if required. Simplified to the most basic level, the Figure below demonstrates this perspective of the customer, from

---

36 *Sahih Bukhari* [810-870 A.D.] Vol. 3, Book 41, No. 585.

37 *Ibn Rushd* [1126-1198 A.D.] "The Book of Hawala," XLII, in: *The Distinguished Jurist's Primer: Bidayat Al-Mujtahid*, 2001, 360-363.

38 S.D. Goitein, *A Mediterranean Society: The Jewish Communities of the Arab World as Portrayed by the Documents of the Cairo Geniza*, 1967-1993, 242.

which value can be transferred between distant locations, while avoiding the inconvenience and risk of transporting money.[39]

Figure: Customer view of a *hawala* transaction



The Islamic legal and religious texts reveal this kind of value transfer mechanism to be more analogous to a financial instrument called *suftaja*.[40] In the *Da'a'im al-Islam*, composed by *al-Qadi al Nu'man* in roughly 960 A.D. one of Mohammed's companions is reported to have said,

> "He gave a certain sum of money in a particular town (*min madînat*) and received it back in another place (*bi-ard ukhrâ*). He permitted the use of bills of credit (*safâtij*), and this means that a man obtains a loan at one place, and receives it at another place."[41]

The bills enabled the safe transfer of money without carrying actual specie from one place to another and made it possible to raise short term credit repayable at another place. Although the pronoun in the first passage actually refers to the *sarrâf* (money dealer), archival evidence of the period suggests that in practice the *sarrâf* could be substituted for the customer.

There were thus two modes of transfer: the first was for the customer to draw money from a *sarrâf* against a promise to pay him in another town when the written note was produced there; the alternative was to pay money down with a promise from the *sarrâf* that the money would be recovered in the other town once the note was produced, re-

---

39 This is the service that Afghan, Pakistani, and Somali *hawaladars* have been accused of providing to members of *Al Qaeda* and other fundamental Islamist groups in support of terrorism.

40 *Saftaja* or *suftaja*, pl. *safâtij*, is an Arabic form of Persian *sufta* meaning promissory note, letter of credit, or bill of exchange. See F.J. Steingass, *A Comprehensive Persian-English Dictionary*, 1963.

41 "Book of Business Transactions and Rules Concerning Them," in: *The Pillars of Islam: Da 'A' Im Al-Islam* of *Al-Qadi Al-Nu'Man*, Vol. II, translated by A.A.A. Fyzee, revised and annotated by I.K.H. Poonawala, 2004, 47.

sembling the function of the *hundî* to which *Divya Sharma* refers above.

The classical Islamic legal view of the *suftaja* was nevertheless a delegation of credit between three parties, whereby "one party extends a loan to another, whose agent repays the loan to the first party or his agent in a different country".[42]

There are relatively few mentions of this mechanism in the legal texts, which is curious in light of its apparently widespread use. In the 10th century A.D., for example, the *Abbâsid* financial administration made full use of the *suftaja* in transferring its funds between the provincial treasuries of Baghdad.[43] According to an Arab historian the central treasury received bills of exchange from the provinces to the amount of 900,000 dirhams in 928 A.D.[44] In a similar vein, a British Lieutenant-Colonel expressed the ease with which the *hundî* operated during the British colonial period. He recalls in particular the time he possessed a letter of credit for the sum of five thousand rupees, payable from the public treasuries of Lodiana or Delhi.[45]

---

42 M. El-Gamal, "Translation of *Dr. Wahba Al-Zuhayli's*: *Al-Fiqh Al-Islamic wa Adillatuh"*, Vol. 5, *Financial Transactions in Islamic Jurisprudence* 1, (in press).

43 A.E. Lieber, "Eastern Business Practices and Medieval European Commerce," *The Economic History Review* 21 (1968), 233 et seq. The Abbasids were the second of the two great Sunni dynasties of the Islamic empire that overthrew the *Umayyad* caliphs and held loose control over Afghan territory by the ninth century.

44 Recorded in *The Eclipse of the Abbâsid Caliphate: Original Chronicles of the Fourth Islamic Century,* edited, translated and elucidated by H.F. Amedroz/ D.S. Margoliouth, 1920-1921, 186.

45 "… the Cabool merchants did not hesitate to accept it. They expressed their readiness either to discharge it on the spot with gold, or give bills on Russia at St. Macaire (Nijnei Novogorod), Astracan, or Bokhara, which I had no reason to question. I took orders on the latter city. The merchants enjoined the strictest secrecy; and their anxiety was not surpassed by that of our own to appear poor; for the possession of so much gold would have ill tallied with the coarse and tattered garments which we now wore. But what a gratifying proof have we here of the high character of our nation, to find the bills of those who almost appeared as beggars cashed, without hesitation, in a foreign and far distant capital! *Above all, how much is our wonder excited to find the ramifications of commerce extending uninterruptedly over such vast and remote regions, differing as they do from each other in language, religion, manners, and laws!"*(italics added), A. Burnes, *Travels*

Other first-hand accounts of *hundîs* from this period consistently reveal the preference among travellers for the letter of credit to the alternative of sewing golden ducats in one's belt, turban, or even slippers, which were vulnerable to theft as they were routinely left at the door of every house.[46]

The fact that evidence of such transactions left barely a trace in the official local records could be partly explained by the strict repudiation of the practice by the Islamic jurists. Three of the four major *madâhib* (schools of law) ruled that the *suftaja* is reprehensible to the point of prohibition (*karâha tahrîmiyyah*) if the benefit of avoidance of risk in transportation to another country was a stipulated condition,

> "Letters of credit are reprehensible since they are loans that give the lender the benefit of avoiding the dangers of the road, thus rendering it as one of the types of loans that result in a benefit to the lender forbidden by the Messenger of Allâh".[47]

Because of the classical jurists' hostile attitude towards the *suftaja*, current legal scholars maintain that the practice became obsolete before it could develop into a more sophisticated credit instrument. *Richard Grasshoff* argues otherwise in an invaluable but unfortunately neglected

---

into Bokhara; Containing the Narrative of a Voyage on the Indus from the Sea to Lahore, with Presents from the King of Great Britain: and an Account of a Journey from India to Cabool, Tartary, and Persia, 1831, 32 and 33, Vols I, II, and III, 1835, 145-146 .

46 A notable exception is the experience of East India Company official George Forster, who was unfortunate in his encounter with *hundîs*. On arrival in Kabul from Kashmir, he endeavoured in vain to procure payment on an "injured bill". Having been lodged in a canvas belt that served him as a girdle, he found the writing on the note "so much obliterated by perspiration" from the almost "flammable" heat of Peshawar, "that no one could read, or even conjecture its subject; from beginning to end, it had literally a black appearance." Unsurprisingly, "not a merchant of the city, and all were applied to, would even attempt to decipher the paper, when he understood it contained an order of payment", G. Forster, *A Journey From Bengal to England, through the Northern Part of India, Kashmire, Afghanistan, and Persia*, 1798, Vol. II, 91, 51, 64.

47 Al-Mirghînânî, "Chapter 12: The Loan Contract (*Aqd al-Qard*)," in: El-Gamal's translation of *Dr. Wahba Al-Zuhayli's: Al-Fiqh Al-Islamic wa Adillatuh*.

doctoral study.[48] He puts forward a convincing case based on etymological studies that the bill of exchange was invented by the Arabs, subsequently adopted by Italian and Aragonian traders, and then re-imported to the Orient in a Europeanised version.[49]

Regardless of whether one subscribes to *Grasshoff's* conclusion on this point, his overall conceptual clarification of *hawala* and *suftaja* is important for an account of the origins of these commercial instruments. *Grasshoff* demonstrates that *hawala* refers to the legal concept of delegation of debt, rather than to a concrete application, while the term *suftaja*, by contrast, refers to a bill of exchange as one of the possible commercial instruments based on *hawala*.[50] This, according to *Grasshoff*, is why the *suftaja* is rarely mentioned in legal texts and the term *hawala* is inconsistently used in commercial language to describe a variety of functions.

Modern-day *hawala* departs somewhat from the earlier practice in that the debt settlement occurs only among banking agents, while the liquidity is supplied by other groups, such as labour migrants and refugees, foreign traders and humanitarian agencies. Technically speaking, it could therefore be argued that customers operate at the level of the *suftaja*, while dealers more accurately operate a *hawala*-based system. In "back office" terms, the *suftaja* thus becomes far more complex than a straightforward transfer of funds through bills of exchange. Its execution entails a long-standing relationship of debt between the *sarrâf* who honours the payment instruction and his distant partner who issued the instrument in the first place, in addition to linkages with additional *sarrâfi* with whom it is propitious to do business. *Roger Ballard* describes this as "a multi-nodal network of value transmission", whereby each

---

48 R. Grasshoff, *Das Wechselrecht der Araber: Eine rechtsvergleichende Studie über die Herkunft des Wechsels*, 1899. I am grateful to Christofer Burger for his help on explaining these concepts in the original German text.

49 While the *suftaja* is closest to the modern bill of exchange in function, the earliest examples found in the Geniza records were distinct in that the value transferred kept its identity and payment was made in the same currency as the original imbursement.

50 Goitein also suggests that payment through a third party in another city fell under the general category of transfer of debt; S.D. Goitein, *A Mediterranean Society: The Jewish Communities of the Arab World as Portrayed by the Documents of the Cairo Geniza*, 1967-1993, 242.

participant stands in a "constantly shifting position of debit and credit with respect to each of the other members of the network."[51]

The interconnected grid of credit relations is perhaps more visible within the *hundî* market because of its official exchange of credit notes. *Sanjay Subrahmanyam* explains that a "resale market" used to exist in *hundî*, which meant that the bills did not have to be cashed by those initially partaking in their issue.[52] He argues that, from the mid-16th century, the patterns involved in the use of these grew more and more complex as the socio-economic networks proliferated. Major transfers became possible not only within a region (such as western India), or between the port and inland administrative city, but between more distant regions. This situation was described in the mid-18th century, as one where the possessor of the *hundî* could give it to one of his own debtors and "so free himself from that obligation."[53] Not only this, "Similarly, he may transfer it to another, until it reaches a person against whom the drawee of the *hundî* has claims, and who therefore, surrendering to the latter, relieves himself of his debt. But cash is not used throughout."[54]

Hawala operates in essentially the same spirit as the *hundî* transactions. Nevertheless, without the use of credit notes, the lack of physical evidence has encouraged its reputation as an "invisible" banking system, "structured like a financial archipelago with connections hidden beneath the surface."[55] Oversimplified accounts of both the various sets of relations that feed into the system and the religious disposition of the dealers have followed which have in turn been used to support the idea that all *hawaladars* exist to cater for the needs of Islamist terrorists.

Despite this, the similarities between *hawala* and *hundî* raise important questions surrounding the Islamic or Arab origins of the practice. Evidence in the literature suggests that these commercial instruments – which are variations of the single principle of debt transfer – were in practice well before the European trade fairs and the even earlier arrival

---

51 R. Ballard, *System Security in Hawala Networks: An Analysis of the Operational Dynamics of Contemporary Developments*, 2005, 8.

52 S. Subrahmanyam, *Money and the Market in India 1100-1700*, 1994, 34.

53 Ali Muhammad Khan, *Mirât-I Ahmadî (A Persian History of Gujarat)*, edited by S. Nawab Ali, 1965, 411.

54 Ibid.

55 M. Freedman, "The Invisible Bankers," *Forbes*, 17 October 2005; K. Eichenwald, "Terror Money Hard to Block, Officials Find," *The New York Times*, 10 December 2001.

of Islam.[56] The next section of this paper investigates why, if this is indeed the case, there is such a heavy emphasis in the literature on religion in the normative development of *hawala*.

V. Role of Islam in *Hawala*

Subhi Labib asserts that,

> "[e]verywhere that Islam entered, it activated business life, fostered an increasing exchange of goods and played an important part in the development of credit."[57]

Islam, it appears, made true socio-economic cooperation and integration possible because it brought with it an unprecedented potential to flatten out previous cultural and logistical barriers to trade.[58] Some argue, therefore, that the moment one of the key cities in a trading cluster converted it was in the best interest of others to follow suit in order to enhance personal ties and provide a common basis in Muslim law to regulate business deals.

Conversion to Islam linked trading centres culturally as well as economically to the merchants and ports of India, the Middle East, and the Mediterranean, which made it an appealing opportunity for Arabs, Jews, Armenians, and Hindus to exploit when operating in the wider trade circuits.[59] The rise in importance of religious pilgrimages to the holy places in Arabia, on which a great body of men converged each year from all over the world, offered ideal occasions for these merchants from far-distant lands to exchange information and market local products along the route.[60] In commercial terms, it could therefore be argued that Islam consolidated a framework of institutionalised behaviour that allowed trust to develop among spatially dislocated traders who had no recourse to formal enforcement. Banking historian *Rodney Wilson* supports this view,

---

56 Thompson, see note 12.

57 S. Labib, "Capitalism in Medieval Islam," *Journal of Economic History* 29 (1969), 80 et seq.

58 Lieber, see note 43, 230.

59 R.A. Guisepi/ F.R. Willis, "The History of Ancient Sumeria including its Cities, Kings and Religions", 2005, available at: <http://history-world.org/sumeria.htm>.

60 Ibid.

> "The sudden eruption of the Arab (Muslim) people in the seventh century is something unique in history. In three generations a collection of scattered tribes, some settled, some nomadic, living by trade and subsistence farming, had transformed itself into a rich and powerful empire dominating the whole of southern Mediterranean and the Near-East from Afghanistan to Spain … They had succeeded in welding together peoples of diverse beliefs and languages into a unified society based on a common religion, a common language and common institutions."[61]

Lieber maintains that the ability of Arab merchants to read and write also played an important part in the unification of trade patterns among previously disconnected groups.[62] From an analysis of 10th century Arabic papyri and papers, *Lieber* concludes that the comparative literacy of Muslim merchants meant that large-scale commercial operations could be conducted from the counting house for the first time, easing the merchant's duty to move constantly with his wares. Somewhat ironically today, however, the common perception is that the transfer of debt among Muslims is paperless.[63] The practice has conversely grown out of a long tradition of careful recording. The double entry accounting method, which allowed the merchant to monitor not only the flow of single values but also the circulation of capital, was particularly important for the management of business in the early medieval period.[64] Nevertheless, while Islamic law stipulates that all transactions with future financial obligations ought to be recorded in writing (Qur'ân 2: 281), there is no available evidence to suggest that the motivation behind the use of written records for transferring funds can be attributed to religious adherence.[65]

---

61 R. Wilson, *Banking and Finance in the Arab Middle East*, 1983, 40-53.

62 Lieber, see note 43, 232.

63 See R. Huang, "The Financial War Against Terrorism," CDI Terrorism Project, 2002, available at: <http://www.cdi.org/terrorism/finanical-pr.cfm>; C. Reich, *The Devil's Banker*, 2003; Bariek Testimony, "Prepared Statement of Mr. Rahim Bariek, Bariek Money Transfer, A Hawala Broker," US Senate Committee Hearing on Banking, Housing and Urban Affairs, 14 November 2001.

64 Labib, see note 57, 92. This does not include the use of credit notes such as the *hundî* mentioned above.

65 Burger, see note 21, 65. Grasshoff argues that the consensus among *Shi'a* jurists is that the validity of *hawala* transactions depended on its written form; Grasshoff, see note 48, 59.

It seems worthwhile at this stage to recall a question posed by *Landes* in his book: does an early society choose its religion to justify institutions already selected, or does it select its institutions according to pre-received religious values, or is the causation mutual?[66] An important place to turn for answers to this question in the case of *hawala* and Islam is the social setting of medieval Arab economic life – how, for example, the early society organised itself, and what role it perceived commercial institutions to play in framing socio-economic affairs.

By the 6th century A.D., Mecca was controlled by the Koraysh tribe, to which Mohammed belonged, and whose rulers organised themselves into syndicates of merchants and wealthy businessmen. The Koraysh held lucrative trading agreements with Byzantine and Persian contacts, as well as with the southern Arabian tribes and the Abyssinians (Ethiopians) across the Red Sea. It has been suggested that the Koraysh were also concerned with protecting the shrine of the Kaaba, to ensure that the pilgrimage would continue as a source of revenue for the merchants of the city.[67] A commercial, or at least mercantile, mentality and profit motive thus permeated all elements of Arab society in the pre-Islamic period.

The number of words borrowed from contemporaneous commercial usage that appear in the Qur'ân,[68] along with the various *hadîth* devoted to economic principles, reflect the ubiquitous role of commerce in the earliest stages of Islam's development, leaving "no doubt that the believers were engaged in, indeed preoccupied with, trade".[69] Qur'ânic approval of buying and selling afforded the merchant an unusually highly honoured place in society, which is amplified in a large number of sayings attributed to Mohammed and to the leading figures of early Islam.[70] In *Kitâb al-Kasb* ("On Earning"), for example, the earliest known Muslim work on economic ethics, it is argued that money

---

66 D.S. Landes, *The Wealth and Poverty of Nations: Why Some are so Rich and Some so Poor*, 1999.

67 Guisepi, see note 59, 1.

68 See C.C. Torrey, *The Commercial-Theological Technical Terms in the Koran*, 1892, for explorations of the way in which the Prophet's language is suffused with commercial metaphors, especially in connection with spiritual reward and punishment.

69 P. Crone, "How Did the Quranic Pagans Make a Living?" *Bulletin of the School of Oriental and African Studies* 68 (2005), 387 et seq. (398).

70 M.A. Cook (ed.), *Studies in the Economic History of the Middle East from the Rise of Islam to the Present Day*, 1970, 87.

earned by commerce or crafts is more pleasing in God's eyes than money received from the government.[71] Hence, Islam grew out of a highly conducive trading environment, where economic concerns were central in the minds of the first converts.

This reality is often overlooked by analysts who cite the prohibition against interest as a key instance where Islamic thinking did challenge and depart from the ancient Arabian standards of mercantile behaviour. Interest was seen to concentrate more and more money in the hands of those who lend, while decreasing the prosperity of those who take loans,

> "[t]he result is that a people who accept interest as the basis of their economic system come to have two classes: enormously rich who lend and enormously poor who cannot afford even the immediate necessities of life – of course with every grade of middle class in between."[72]

Accordingly, the *hadîth* literature warns,

> "One dirham of *ribâ* [interest] that a man devours, while knowing it is *ribâ*, is more severe [in crime] than thirty-six acts of fornication [or adultery]."[73]

Bjorvatn explains that terms of credit in the Arabian Peninsula during Mohammed's time could be very harsh, with the commercial elite taking advantage of their market power by doubling the debt if loans were not repaid on time, and suggests that this is why usury is made the focus of attention several times in Islamic writings.[74] In much the same way that the medieval Christian Church placed restrictions on interest-bearing activity among its followers, Islamic law clearly attempted to set limits on commercial behaviour and create frameworks around existing institutions in the Muslim world.[75] *Sheikh Mahmud Ahmad* con-

---

71 *Shaybânî, Muhammad ibn al-Hasan* [ca. 750-804] *Kitâb al-Kasb*, 1997.

72 M. Ahmad, *Economies of Islam (A Comparative Study)*, 1947, 42.

73 *Ahmad* with a *Sahih* chain of narration in *Shaykh Abû Bakr Jâbir al-Jaza' iry, 'Ar-Riba'* ("Usury and Interest"), available at: <http://www.islaam.net/main/display.php?id=1231&category=7>.

74 K. Bjorvatn, "Islamic Economics and Economic Development," *Forum for Development Studies* 2 (1998), 231 et seq.

75 Similarly coarse language to that in the Qur'ân was used centuries later by those who lamented the presence of the usurious Lombard bankers at the European trade fairs: "The Lombard monster not only devours man and beast, but also mills, castles, woods and forests, he drinks the marshes and dries up the rivers. … They never bring a ducat with them, nothing but a

fidently proclaims that Islam, however, has been the more successful of the two in excluding the possibility of money becoming a measure of success among its followers because of its consistent "abolition of interest".[76] This may well reflect the legal and religious theory of Islam, but it can also be argued that it is far removed from any real understanding of commercial practices of the time and even now.

The task of finding information in the Islamic sources on the extent to which the anti-usury laws were observed in actual practice is difficult. Nonetheless, as *Udovitch* points out, the "frequent, copious, and vehement reiteration of the prohibition against usury in medieval Islamic religious writing" could be interpreted "as indirect testimony to its equally frequent violation in practice".[77] In search of practical evidence to support this, *Ronald Jennings* has devoted considerable energy to mining the 1,400 entries registered in Ottoman judicial records in central and eastern Anatolia between 1600 and 1625 A.D. He discovered that, contrary to the popular opinion that Jewish merchants dominated the credit business, approximately 80 per cent of credit was both given and received by Muslims.[78] In addition, throughout the 20-year period under investigation, *Jennings* found no examples of large money-lenders. In fact, very few creditors appeared more than once.[79] Instead, *Jennings* uncovered a widespread profusion of partnerships among the traders and the highly developed legal institutions that supported them.[80]

Scholars such as *Joseph Le Goff* suggest that the distorted picture has emerged due to the tendency of historians studying medieval commerce to devote excessive attention to the abstraction "usury" – "the merchant's satanic alter ego", without taking sufficient account of the

---

sheet of paper in one hand and a pen in the other; with that, they fleece the townsmen and then lend them their own money", cited in R.H. Bautier, *The Economic Development of Medieval Europe*, translated from French by H. Karolyi, 1971, 153.

76 Ahmad, see note 72, 42.

77 A.L. Udovitch, "Bankers without Banks: The Islamic World," in: *The Dawn of Modern Banking*, University of California, 1979, 257.

78 R.C. Jennings, "Loans and Credit in early 17th Century Ottoman Judicial Records: The Sharia Court of Anatolian Kayseri," *Journal of Economic and Social History of the Orient* 16 (1973) (Parts II-III), 168 et seq. (182).

79 Ibid., 177.

80 Ibid., 180.

historical reality, the "usurer".[81] This also obscures the positive stress on the profit motive that can be found at the core of Islam. While the Prophet Mohammed certainly emphasised that believers should always remember that nothing could be more important than God and His Messenger – true believers are men for "whom neither commerce nor buying and selling can divert from the remembrance of God, the performance of prayer, and the giving of alms" (Qur'ân 24:37) – he was supportive of competitive trade as long as it did not further disadvantage the poor. Within this field, he and his contemporaries understood firsthand the need for generating profit in a business; hence, flexibility was built into the Islamic systems of commerce through the *hiyal* (literally "devices") to circumvent the problem of interest.[82] The jurists endorsed these legal deviations from the law as long as they were debated and resolved in one of the legal traditions.

Commercial associations or partnerships based primarily on debts and credit purchases rather than cash or goods are a prominent example of the *hiyal*. Eleventh century legal scholar *Sarakhsî* explains the Hanafi interpretation of these forms of commercial arrangement,

> "As for credit partnership, it is also called the partnership of the penniless (*sharikat al-mafâlîs*). It comes about when people form a partnership without any capital in order to buy on credit and then sell. It is designated by the name partnership of good reputations[83] (lit. 'faces') because the capital of the partners consists of their status and good reputations; for credit is extended only to him who has a good reputation."[84]

Udovitch points out that the above designations for the credit partnership – the "partnership of the penniless" and the "partnership of those with status and good reputations" – reflect two of the major functions of credit in trade.[85] In the first instance, traders seek finance

---

81 J. Le Goff, "The Usurer and Purgatory", in: *The Dawn of Modern Banking*, see note 77, 26 et seq.

82 Bernard Lewis explains that these allowed merchants to organise credit, investment, partnerships, and banking, while formally respecting the law, B. Lewis, *The Middle East*, 1995, 173.

83 The Arabic term for "partnership of those with good reputations" is *sharikat at-wujûh*.

84 M.A. Sarakhsî, *Kitab al-Mabsût* Vol. II, 2001, 152.

85 A.L. Udovitch, "Reflections on the Institutions of Credits and Banking in the Medieval Islamic Near East," *Studia Islamica* 41 (1975), 5 et seq. (12).

due to insufficient resources of their own. In the second instance, capital seeks an investment outlet, and thus hires the trader.

In some of the earliest Islamic legal works, such as the "Book of Partnership" of *Shaybânî's Kitâb al-asl* (late 8th or early 9th century A.D.), provisions entitling each of the parties to a partnership to buy and sell on credit are constantly asserted as though they were "self-evident".[86] *Sarakhsî* was among the early jurists who recognised that credit sales were the surest way of securing a good profit, "An object is sold on credit for a larger sum than it would be sold for cash," he explains, in that it entails a return to the creditor for the risks involved in the transaction, and as compensation for the absence of his capital. Thus, while the difference in the price for which one sells on credit and the price for which one sells on cash does not formally or legally constitute interest, it does fulfil the same role and provides one way of "licitly" fulfilling the economic function of an interest-bearing loan while remaining within the confines of Islamic law.[87] "No doubt," suggests *Robert Lopez*,

> "… it was an open secret that in long-distance exchange, entailing a delay for transportation, a premium would be worked in by doctoring up the rate of conversion; it was equally obvious that the changer's stock in trade would be largely borrowed and lent at interest rates not openly declared."[88]

The use of these various forms of commercial association goes some way to explaining why the prohibition against interest did little to shackle the development of capitalism in the Arab world, and also explains the large number of small partnerships that *Jennings* located in his research. Some might argue that the *hiyal* also provided merchants with a "legitimate" method to lighten their guilt.

It is worth noting that the credit partnerships were justified not only on legal grounds or by virtue of the general economic function of partnership (which *Kâsânî* epitomises as "a method for augmenting or creating capital"[89]), but also on grounds of precedent and thus usage. *Kâsânî* argues that people have been engaging in these two forms of partnership for centuries without rebuke, and so surely, as the Prophet

---

86 Ibid., 8.

87 Ibid.

88 R.S. Lopez, "The Dawn of Medieval Banking," in: *The Dawn of Modern Banking*, see note 77, 7.

89 Cited in Udovitch, see note 85, 13.

himself said, his community would not unanimously agree upon an error.

German Orientalist *Joseph Schacht* attributes this general tendency in Islam to submit to pre-ordained custom to the reassertion of the ancient Arab idea of *sunna* – precedent or normative custom – in Islam's early period.[90] *Goitein's* view of the position of the *wakil*, or economic agent, which is generally considered a religiously prescribed office, concurs with *Schacht's* premise. He explains,

> "… the office of Wakil was a position acquired first *de facto* and confirmed afterwards by secular and religious authorities *de jure*, rather than a post to which a man was elected by some formal procedure."[91]

Goitein's observation certainly resonates with the current practice of *hawaladars* in Afghanistan who report that they select men, labelled *wakils*, to adjudicate difficult situations within the *hawala* market on an informal and ad hoc basis.[92]

It seems fair to suggest from the above survey of Islam's medieval economic history (as far as it can be reconstructed from the sporadic historical sources) and the context out of which Islam emerged that Muslim teachings had a dual effect: in general, they reflected the spirit of the commercial world of their time, rather than set radically new foundations for economic conduct, and yet they also created a unique institutional environment out of which various commercial partnerships and techniques were consolidated to provide traders with the necessary framework to cooperate more efficiently across different cultures.

A possible answer to *Landes*' question then is that pre-Islamic and early Islamic society in the Arab world both chose religion to suit its existing institutions, and also used it either strategically or morally to delimit rules around commercial conduct (including the means by

---

90 "Whatever was customary was right and proper, whatever their forefathers had done deserved to be imitated", J. Schacht, "Law and Justice," *Cambridge Encyclopaedia of Islam*, 1970, Vol. II, Pt. VIII, Chapter 8, 543.

91 S.D. Goitein, "From the Mediterranean to India: Documents on the Trade to India, South Arabia, and East Africa from the Eleventh and Twelfth Centuries," *Speculum* 29 Part 1, 1954, 191. The *wakil* remains an important figure in the resolution of financial disputes among *hawaladars* in Afghanistan today.

92 Information gathered from author's field interviews conducted in Afghanistan, February – December 2005.

which those rules could be bypassed). The causation could thus be interpreted to some degree as "mutual". *Schacht's* comment is helpful here,

> "Islamic law was created by Islam, but the raw material out of which it was formed was to a great extent non-Islamic. This raw material, itself of varied provenance, was tested by religious and ethical standards, and gained a uniform character in the process."[93]

It appears only natural, as *Schacht's* comment suggests, for the commercial practices of the Islamic period to embody borrowings from elsewhere for its "raw material" was of non-Islamic provenance. In addition, commercial communities were perhaps by necessity the most pragmatic and eclectic of all segments of a medieval society because of their need for international linkages and travel.

VI. Assessment

This paper has clarified the usage and origin of the term *hawala* and established that, while it has strong connections with the Islamic legal tradition, its practice was widespread among the non-Muslim merchant communities throughout the ancient and medieval periods.

This challenges the current conventional wisdom that the system is exclusively Islamic, and opens up the possibility of testing the significance of religion and other cultural factors to the use of *hawala* in a modern setting. In the current regulatory context of "post-conflict" economic reconstruction and "failed" states, findings such as these help move analyses away from the seemingly blind acceptance of international institutions' modernising or civilising power to a more rigorous assessment of local institutions that uncovers the often flimsy evidence on which conventional wisdom is based.

Reflecting on observations made at the start of this paper, it could be argued that the *hawaladar*, who is represented widely in media and policy accounts as a "one-sided coin" with a decidedly criminal face, in reality exerts rather extreme effects that are necessarily at least two different sides of the same coin. Therefore the security impact of unregulated financial networks and their links with terrorism cannot be

---

93 J. Schacht, "Pre-Islamic Background and Early Development of Jurisprudence", in: M. Khadduri/ H.J. Liebesny (eds), *Law in the Middle East I: Origin and Development of Islamic Law*, 1955, 28.

viewed in isolation from their development potential and the specific historical or political context.

To date, increased scrutiny of *hawala* has contributed little to deepening our understanding of these areas. Instead, the system is rendered culturally static and dangerous, while international regulatory initiatives are cast as the rationalising and peaceful influence of outside forces. This explains, perhaps, the reticence of humanitarian agencies and international institutions to admit their reliance on local informal institutions such as *hawala*, in spite of the growing consensus that local populations should be better "engaged" and their unique systems of governance no longer dismissed.

In order to improve upon the success of reconstruction efforts in states in crisis, this paper advocates that a more "legitimate" approach to economic recovery must include considerations of the history and political culture of the country concerned. This would enable not only a more fine-grained analysis of how locally generated "economic order" can exist under the rubble of collapsed or weak formal institutions, but also more insight into the implications of overlaying such "order" with economic and socio-political infrastructures that are inconsistent with the needs or wants of the local population.

Little Steps Forward: Some Remarks on the Rome Conference on the Rule of Law in Afghanistan

*Tilmann J. Röder**

On 2-3 July 2007, a conference co-chaired by Afghanistan, Italy and the United Nations focused on the strengthening of the rule of law and justice in Afghanistan.

As to the background: the Bonn Agreement of 2001[1] was successfully concluded in December 2005 with the opening of Afghanistan's bicameral National Assembly. During this four-year implementation phase promising developments seemed to be prevailing in Afghanistan as such. The GDP per capita increased significantly. Millions of children were enrolled in school for the first time in their lives. The prevalence of menacing diseases such as tuberculosis was considerably reduced.

Since 2006 the situation has changed dramatically.

The implementation of the Afghanistan Compact, a new five-year blueprint for cooperation between the international community and the government of Afghanistan, was launched at the London Conference in

---

* Head of Afghanistan Project at the Max Planck Institute for Comparative Public Law and International Law.

1 The Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions (Bonn Agreement) of 5 December 2001 aimed at the creation of the Islamic Republic of Afghanistan. This process ended after the Loya Jirga's acceptance of the country's new constitution and the subsequent establishment of state institutions in 2005. The presentation of this report was unfortunately taken from the agenda of the Rome conference.

A. von Bogdandy and R. Wolfrum, (eds.),
Max Planck Yearbook of United Nations Law, Volume 11, 2007, p. 307-312.
© 2007 Koninklijke Brill N.V. Printed in The Netherlands.

2006. Still, since its adoption,[2] Afghanistan seems to be more deeply mired in difficulty than ever, since the fall of the Taliban.

Confronted with increasing insurgency, terrorist attacks and general crime, the government has turned out to be weak and barely capable to develop and implement sustainable policies.[3] Apart from this the international community's support in the rebuilding of the Afghan state did not have the expected impact, and quite a few failures have occurred.

Under the Bonn Agreement of 2001, G8 countries had been assigned lead nation responsibility for particular sectors. However, this strategy did not sufficiently foster change. The Afghan National Army, for example, which is mainly supported by the United States of America and France, and the police trained by Germany have proven to be unable to counter the guerilla war strategies of a militant opposition. The United Kingdom, as the lead nation for Afghanistan's counternarcotics programs, was faced with a record harvest of opium in 2006. A total of 6,700 tons was produced last year, enough for the fabrication of about 670 tons of heroin, or 90 per cent of the world's supply of the drug. Only the Disarmament, Demobilization, and Reintegration (DDR) initiative, part of the Japanese-led Afghan New Beginnings Program, seems to have been more successful. Although the true size of the militia forces remains unknown and some 200 warlords still control wide parts of the country, the UNDP reports that some 50,000 of the warlords' followers have been reintegrated into society so far.

Concerning the rule of law sector, one has to state, however, that here the lead nation, in this case, Italy, has not met expectations either. The Afghanistan Human Development Report of June 2007[4] suggests that more than 80 per cent of disputes are still settled outside the state courts. The majority of legal professionals has no access to up-to-date legal sources. Legal norms must be described as a patchwork rather than a system. The discrepancy between Islamic and secular provisions

---

2 Available under: <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1132599286730>.

3 Cf. in this respect Doc. S/2006/935 of 4 December 2006, Report of the Security Council Mission to Afghanistan.

4 Center for Policy and Human Development, *Afghanistan Human Development Report. Bridging Modernity and Tradition: Rule of Law and the Search of Justice*, 2007. The report suggests, among others, a more collaborative relationship between formal and informal institutions of justice.

remains unresolved and a highly political issue.[5] New codes like the Interim Criminal Procedure Code of 2004 even worsened this situation. Italian legal reform consultants had streamlined the five-hundred articles of the 1965 criminal procedure code to just ninety-eight provisions. However, Afghan judges seem to find the new code too abstract – if they have ever seen it at all – and resort to its predecessor. Accustomed to the civil law tradition, they prefer more detailed legislation. In this case, foreign support turned out to be counterproductive. Two special ambassadors from Italy were unable to orient support programs in one direction. Donors and implementing agencies set up other coordination mechanisms to fill the gap. In fall 2006, the Italian Justice Project Office (IJPO) was downsized and committed to the First Secretary of the Italian Embassy in Kabul.

Other barriers to the rule of law are the extensive lack of sufficient education of Afghan law professionals and poor remuneration resulting in widespread judicial corruption and an alarming absence of attorneys.[6]

In addition to the already existing difficulties, new ones result from unnecessarily duplicated structures and a lack of coordination. Already in 2003,[7] Amnesty International as well as others have criticized "a lack of coordination by the international donor community ... and delays ... in initiating regular donor coordination meetings."[8] Moreover, a financial shortfall on the part of the Afghan state and delays in securing and

---

5 The Rome conference coincided with the call of a group of 200 Afghan clerics from the Western province of Herat for the nationwide enforcement of Islamic Sharia including punishments such as executions and the stoning of adulterers.

6 UNAMA (United Nations Assistance Mission in Afghanistan) mentions a number of 223 attorneys in Afghanistan, a country with roughly 30 million inhabitants. See the discussion paper of the working group on Legal Aid, Access to Justice and Human Rights on the conference website, available under: <http://www.rolafghanistan.esteri.it/ConferenceRol/Menu/Ambasciata/Gli_uffici>.

7 Rome Conference on Justice in Afghanistan (19-20 December 2002), available under: <http://www.esteri.it/mae2000/eng/archives/arch_events/cards/21/home.htm>.

8 Amnesty International (ed.), *Re-establishing the Rule of Law in Afghanistan*, available under: <http://www.web.amnesty.org/library/index/engasa110212003>.

distributing international assistance have to be mentioned. This analysis is still valid.

Concerning the rule of law sector the Italian government did not re-establish its lead at the Rome Conference in July 2007 but restricted itself to the role of a host and moderator. The three co-chairs (Italy, Afghanistan, and the United Nations), the European Union and NATO were represented by high-ranking officials.[9] In contrast, donor countries sent vice ministers and state secretaries instead. Delegates from development organisations and research institutes brought in legal and technical know-how.

The results on the political level remained vague. Participants promised to support Afghanistan on its path towards the rule of law and justice. The co-chairs proclaimed new pledges from diverse donors amounting to US$ 360 million. The lion's share came from the European Union[10] which has established itself as one of the top donors in Afghanistan.

On the technical level, developments are increasingly dominated by the United States which has stronger financial resources and more specialised staff available than other donors. The intention of the United States to push progress by filling coordination gaps came to the fore in many of the seven technical working groups.[11] For instance, one working group prepared and co-chaired by the United States agreed upon the installation of a Provincial Justice Coordination Mechanism (PJCM) by the end of this year. Field offices in eight provincial capitals

---

9 Afghanistan was represented by President Hamid Karzai and Foreign Minister Rangin Dadfar Spanta, the United Nations by Secretary-General Ban Ki-moon and the Special Representative of the UN Secretary-General for Afghanistan Tom Koenigs. NATO by Secretary-General Jaap de Hoop Scheffer, the EU by Portuguese Foreign Minister Jorge Amado (Presidency of the Council) and Benita Ferrero-Waldner (Commissioner for External Relations and New Neighbourhood Policy).

10 Commissioner Ferrero-Waldner confirmed a conference package worth 200 million euro for 2007-2010. This support will focus institutional reform in the justice sector, especially recruitment and grading systems, and co-funding of judicial and police salaries.

11 The working groups discussed: (1) Legal Education and Training; (2) Provincial Justice Coordination Mechanism; (3) Legal Aid, Access to Justice and Human Rights; (4) Effective Police-Prosecutor Coordination; (5) Criminal Justice Task Force; (6) Constitutional and Legislative Process; (7) Institutional Strategies.

and a main office in Kabul are supposed to assess the need for support outside of Kabul and monitor ongoing programs. The United States pledged funding for the main office and two field offices; Germany and France for one field office each.

New concepts were also presented and approved in the working group on legal education and training. The main focus was put on university education, which represents a good setting of priorities, as trainings for legal professionals only seek to correct deficiencies in their basic legal education. The traditional division between Shari'a faculties and Law and Political Sciences faculties, which leads to great difficulties in practice, was addressed with the idea of a compulsory core curriculum for students of both faculties.

Another problem derives from diverging professional preparation courses for judges, prosecutors and attorneys. So far, a legal traineeship has existed for judge-applicants alone. The Office of the Attorney General has recently launched an inception training of its own. In the future, the National Legal Training Center (NLTC) is planned to host these classes and to streamline the contents in order to ensure a coherent understanding and implementation of the Afghan legislation. By this, the NLTC will gain the status of a legal institution *sui generis*. Participants in the Conference also called for more translation of teaching materials from Dari into Pashto and for more training in this second official national language.

These and other results of the meeting have been combined into Conference Joint Recommendations.[12] The Afghan justice institutions[13] intend to develop, with the help of donors and the UN, a Justice Sector Strategy by October 2007, which will also include their own five-year strategies. This strategy is supposed to coalesce into a comprehensive National Justice Program in 2008.

It is hoped that the existing deficits will be overcome by that strategy as soon as possible, as Afghanistan is still at a crossroads and facing lots of challenges. The proposal of the Afghanistan Human Development Report 2007 to move further towards a hybrid model of justice

---

12 Cf. under: <http://www.rolafghanistan.esteri.it/ConferenceRol/Menu/Ambasciata/La_rete_consolare>.

13 I.e. Ministry of Justice, Supreme Court and Office of the Attorney General.

embracing legal, transitional, distributive, and restorative approaches should be carefully considered.[14]

[14] See note 4, 5 and 126 et seq.

Focus:

How to speed up Implementation of the Right to Adequate Food at the International Level?

Selected Papers from the Expert Seminar held at the Max Planck Institute for Comparative Public Law and International Law, 11-12 September 2006.

Food and Agriculture Organization of the United Nations

Max Planck Institute for Comparative Public Law and International Law

FIAN International (FoodFirst Information and Action Network)

"The Special Rapporteur on the right to food is gravely concerned to report to the Human Rights Council that global levels of hunger continue to rise. The number of people suffering from hunger has increased to 854 million people and has been rising every year since 1996.

Virtually no progress has been made in reducing hunger, despite the commitments made by Governments in 1996 at the first World Food Summit and again at the Millennium Summit in 2000. More than 6 million children still die every year before their fifth birthday.

This is unacceptable. All human beings have the right to live in dignity, free from hunger."

Special Rapporteur on the Right to Food, Jean Ziegler
Doc. A/HRC/4/30

Introductory Remarks

Article 25 of the Universal Declaration of Human Rights of 1948, article 11 of the International Covenant on Economic, Social and Cultural Rights of 1966 and some regional instruments[1] have recognised the Right to Food as a human right.

Moreover, international legal standards regarding this right have been developed *inter alia* by the UN Committee on Economic, Social and Cultural Rights, especially through its General Comment No. 12 (Right to Adequate Food),[2] and by the FAO, through the Voluntary Guidelines to Support the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security, adopted by the 189 Member States of FAO in 2004. These instruments and other hard and soft law sources establish different parameters for the national implementation of the Right to Food.

Still the latest estimates of the FAO, issued in 2006, show that the number of undernourished people has grown from 854 to 869 million[3] during the last few years. The vast majority of them are peasants, small farmers, landless farmers, indigenous peoples and traditional populations (80 per cent); however, the proportion of urban malnourished people is growing the fastest. Close to 70 per cent of all malnourished people are women.

This critical situation with regard to the Right to Food has been highlighted again by the UN Special Rapporteur on the Right to Food, Jean Ziegler in his last report presented to the Human Rights Council in June 2007.[4] Ziegler stated that virtually no progress has been made in reducing hunger. Despite the commitments made by governments in 1996 at the first World Food Summit and again at the Millennium Summit in 2000, more than 6 million children still die every year before

---

1 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Protocol of San Salvador of 1988, OAS Treaty Series 69, article 12.

2 UN Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999), Doc. E/C.12/1999/5 of 12 May 1999.

3 FAO (ed.), *The State of Food Insecurity in the World – SOFI 2006*, FAO 2007. Full text available under: <http://www.fao.org/docrep/009/a0750e/a0750e00.htm>.

4 Doc. A/HRC/4/30.

their fifth birthday. Ziegler expressed his concern regarding so-called "Refugees from hunger", people leaving their countries looking for a solution for the hunger they and their families are suffering.

Aware of this critical situation and the necessity to translate the international developments on the Right to Food into national reality, the FAO, the Max Planck Institute for Comparative Public Law and International Law and FIAN International (FoodFirst Information and Action Network) invited in September 2006, knowledgeable international experts and recognised practitioners on the Right to Food to respond collectively to the question:

How to speed up Implementation of the Right to Adequate Food at the International Level?

During the seminar, participants: 1.) Analysed the *status quo* of the Right to Adequate Food at the international level, focusing on the role of international organisations, 2.) explored the opportunities available which could be taken advantage of and the challenges still to be faced at the national level, especially taking into account the role of civil society and 3.) identified which steps should be taken in order to reach a more effective implementation of the right to adequate food in line with the Voluntary Guidelines, especially with regard to human rights based monitoring, follow-up of cases and justiciability strategies for the adequate implementation of international standards.

In the following articles, some of the participants present their analysis of the diverse issues presented and discussed during the event.

Flavio Luiz Schieck Valente,
Secretary General – FIAN International

The Right to Food as a Justiciable Right: Challenges and Strategies

Christian Courtis

I. Introduction
II. The Debate on the Justiciability of ESC Rights and the Right to Food
III. Particular Challenges Regarding the Right to Food
IV. A Comparative Perspective of the Justiciability of the Right to Food
V. Conclusions

I. Introduction

This article will discuss some of the problems and challenges regarding the consideration of the right to food as a justiciable right – that is, as a right that can be interpreted by the courts and can be the subject of litigation. Firstly the debate regarding the justiciability of economic, social and cultural rights will be discussed in general; secondly the focus will shift to some particular issues that arise when the general problem of justiciability is considered in the context of the right to food. Then some of the strategies for advancing justiciability of the right to food that have proved to be successful in different domestic and regional legal systems will be presented and discussed. Finally, some summary conclusions from the discussion will be drawn.

II. The Debate on the Justiciability of ESC Rights and the Right to Food

Is there any role for courts in the full realisation of the right to food? In order to clarify some of the aspects to be taken into consideration, a first attempt to answer this question involves placing it in the broader

A. von Bogdandy and R. Wolfrum, (eds.),
Max Planck Yearbook of United Nations Law, Volume 11, 2007, p. 317-337.
© 2007 Koninklijke Brill N.V. Printed in The Netherlands.

context of the debate on the justiciability of economic, social and cultural rights (hereinafter, ESC rights).

While ESC rights have been part of the international human rights regime at least since the adoption of the Universal Declaration of Human Rights in 1948, considerably less effort has been made to develop a conceptual framework to give them content and to construct protection mechanisms to enforce them, than in the case of civil and political rights. One of the traditionally neglected issues regarding ESC rights has been their justiciability – that is, the possibility for alleged victims of violations of ESC rights to file a complaint before an impartial body, and request adequate remedies or redress if a violation is deemed to have occurred. There has been – and there still is – a passionate debate regarding the issue of the justiciability of ESC rights: according to some critics, ESC rights are by their nature different from civil and political rights, and are not suitable for judicial adjudication.[1] Other voices maintain that differences between civil and political, on the one hand, and ESC rights, on the other hand, are differences of degree and not differences of nature, and that – therefore – nothing prevents ESC rights from being the object of judicial adjudication.[2]

The central arguments which arise in this debate will not been expanded here: it is enough to point out that, according to the present author's viewpoint, the idea that, due to their specific nature, ESC rights are *in toto* not suitable subjects for judicial enforcement is a misguided idea, and does not reflect the largely accumulated empirical evidence against it – i.e., an amount of comparative case law in which judges adjudicate situations of alleged violations of ESC rights.

Of course, there are some aspects of ESC rights which may make judicial adjudication more complicated – but, again, these aspects are

---

1 See, from different points of view, A. Neier, "Social and Economic Rights: A Critique", *Human Rights Brief* 13-2 (2006), 1-3; G. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?,* 1991; C. Tomuschat, "An Optional Protocol for the International Covenant on Economic, Social and Cultural Rights?", in: *Weltinnenrecht. Liber amicorum Jost Delbrück,* 2005, 815 et seq.

2 See again, from different viewpoints, V. Abramovich/ C. Courtis, *Los derechos sociales como derechos exigibles,* 2nd edition, 2004; R. Alexy, *Theorie der Grundrechte,* 2nd edition, 1994; COHRE (Centre on Housing Right and Evictions), *Litigating Economic, Social and Cultural Rights. Achievements, Challenges and Strategies*, 2003; C. Fabre, *Social Rights under the Constitution: Government and the Decent Life,* 2000.

not alien to civil and political rights either, and have never been used to suggest a claim that civil and political rights are not justiciable *in toto*.

To avoid Byzantine discussions, it is enough here to point out the matters that the present author considers to be relevant to the debate about the justiciability of ESC rights. There is no difficulty in recognising that judicial adjudication is not, and cannot be, the main means to fully realise ESC rights. The development and implementation of services and policies necessary to make these rights a reality are the kinds of tasks that mainly correspond to the political branches of governments, and not to the judiciary. Courts may not even be the best actors to perform the task of monitoring the general results of policies oriented to ensure the realisation of ESC rights – a task for which political and especially independent technical bodies are better equipped.

The functioning of courts is selective: courts typically deal with narrowly defined factual situations, so judicial proceedings are not necessarily the best forum to evaluate the empirical indicators, necessary to understand the full picture of variables, which characterise complex public policies in fields such as health, education, social security or housing. This is, however, also true for some obligations stemming from civil and political rights that require for fulfilment legislation and implementation of services, so this is not a decisive argument against justiciability of ESC rights.

But those who favour the justiciability of ESC rights do not propose otherwise. The relevant question is not whether litigation and judicial adjudication should be the main means through which ESC rights are advanced, but instead whether litigation and judicial interpretation should play *some* role – as opposed to *no* role whatsoever – in this area. Arguments in favour of the justiciability of ESC rights cannot be different from arguments in favour of the justiciability of human rights in general: that is giving voice to right-holders and offering them forms of reparation in case of a violation, subjecting duty-bearers to control in case of failure to comply with their legal duties, protecting the rights of minorities and disadvantaged groups against biased decisions of the political majority, offering means for the solution of situations of legal uncertainty and of conflicting interpretation of the law and finally – from the viewpoint of the institutional design of constitutional democracies – channelling the idea of mutual control of powers (frequently illustrated

with the image of "checks and balances") and defending the supremacy either of the constitution or of the law.[3]

Accepting that there is no insurmountable conceptual difficulty to conceive ESC rights as justiciable rights does not exempt them from meeting – as with any right – a number of pre-requisites, in order to be fit for adjudication. Some of these pre-requisites are: the existence of a clear "rule of adjudication" on the basis of which the legality of a legal norm or a factual situation can be assessed; identification of right-holders and duty-bearers; adequate judicial procedures; and the regular functioning of an independent and impartial judiciary. If these pre-conditions are not met, litigation before courts would hardly be an effective strategy to strengthen ESC rights – it would rather be a sure call for failure. Even if the pre-requisites are met, there are also other strategic considerations to be made in order to decide if litigation is the most convenient way to make claims regarding ESC rights. For instance, the length and cost of judicial proceedings, the confrontational character of litigation – which may lead to the interruption of negotiations with political authorities who will, eventually, be in charge of delivering the services necessary to satisfy ESC rights – , and the compatibility or consistency of litigation with other strategies to realising rights advanced by the right-holders.

The argument here is that justiciability should be considered as *another* or additional means of enforcement and implementation of ESC rights, as is the case with civil and political rights. Considering that ESC rights should be completely devoid of any kind of judicial protection, and left to the complete discretion of political branches of government, has actually contributed to the considerable devaluation of ESC rights in the legal hierarchy. While courts and litigation should not be seen as the only means for the realisation of ESC rights, the complete absence of any resource to courts of law in relation to these rights clearly downgrades the span of mechanisms available for victims of rights violations, makes state accountability weaker, erodes deterrence and fosters impunity.

If the right to food is to be considered a right in a meaningful – and not just in a rhetoric or metaphoric – way, the above considerations should also apply to it. In the next section some consequences of these

---

[3] See, for example, Y. Rabin/ Y. Shany, "The Case for Judicial Review over Social Rights: Israeli Perspectives", *Israel Affairs*, forthcoming. Available at <http://ssrn.com/abstract=896289>.

general ideas about justiciability of ESC rights in the particular context of the right to food will be discussed.

III. Particular Challenges Regarding the Right to Food

What shall be explored here are some issues regarding justiciability that are specific for the right to food, and thus may not apply to the same extent to the whole category of ESC rights – even if there could be relevant analogies drawn regarding other ESC rights.

The first issue is related to the "rule of judgment" regarding the right to food. While the right to food has been enshrined in the International Covenant on Economic, Social and Cultural Rights for more than 40 years now, efforts to develop and clarify its content are relatively recent, especially in comparison with other rights recognised by the same covenant – i.e. labour rights. Landmarks in this process of clarification are General Comment No. 12 on the Right to Adequate Food of the Committee on Economic, Social and Cultural Rights, adopted in May 1999, and the FAO *Voluntary Guidelines to Support the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security*, adopted in November 2004.[4]

A number of factors may explain this situation – among them the fact that, for a long time, ESC rights were mainly conceived as rights related only to work, under the assumption that, given that people were part of the formal workforce and, thereby, ensured a decent income, the primary allocation of this income would be oriented to the satisfaction

---

4 See, in this sense, H. Faúndez-Ledesma, "The International Recognition of the Right to Food and Access to Justice"; S.A. Way, "The Right to Food and Access to Justice: Understanding the Right to Food as a 'Negative' Right" and P. Spitz, "Justiciability of the Right to Food: Interdisciplinary, Transversal Character and Conflicts", all of them in: M. Borghi/ L. Postiglione Blommestein (eds), *The Right to Adequate Food and Access to Justice,* 2006, 21 et seq.; 45 et seq. and 57 et seq. respectively, L. Weingärtner, "The Concept of Food and Nutrition Security", in: K. Klennert (ed.), *Achieving Food and Nutrition Security. Actions to Meet the Global Challenge,* 2005, 14-15. For a pioneer work, paving the road for the clarification of the content of the right to food, see A. Eide, *The Right to Adequate Food as a Human Right*, 1989. Compare also Skogly, in this Volume, footnote 30.

of basic needs, such as nutrition, housing and healthcare.[5] While this assumption seems empirically sound, it seems that its premise – the progressive inclusion of the whole population in the formal workforce – was optimistic in excess – both for developing countries, where the pace for inclusion in the formal workforce is much slower than it was thought, and for developed countries, where permanent long-term jobs have become the exception and not the rule.

The political strategy of pegging ESC rights to the position of the worker in the formal workforce has proved to be a limited one, as it weakens or denies protection to those who have little chance to be incorporated into the formal workforce, and have no links of dependency to someone who is in the formal workforce. The paradox is that this group often includes those who are worse off in society – that is, the neediest, who should actually be the preferred target of ESC rights. In consequence, during the last 20 years, international efforts have been devoted to developing the content of ESC rights outside of a formal labour contract. Even within this process, while some rights – such as the rights to health, the right to education and the right to housing – have gathered considerable attention, the content of the right to food – along with the more recently framed right to water – has only recently started to be developed in a more systematic fashion. The legal standards regarding the content of the right to food are, therefore, comparatively recent to be agreed upon as developed standards upon which litigation can be based, without reference to other rights.

Yet another particular issue is the fact that, while other ESC rights – such as the rights to health and to education – have had broader constitutional recognition throughout the world, this has not been the case for the right to food, and thus there are fewer countries with an express constitutional provision of this right.

A third problematic factor is, that statutes regarding food security and other food issues usually state public policy goals and principles, but rarely enunciate an individual (or collective) right to food.

These three factors may create some difficulties in the identification of a firm legal basis to take a case to court regarding the right to food. If there is no express constitutional basis for the right to food, and there is no clear statutory basis either, directly arguing a case on the basis of the text of the International Covenant on Economic, Social and Cultural

---

5 For this argument, see V. Abramovich/ C. Courtis, *El umbral de la ciudadanía. El significado de los derechos sociales en el Estado social constitucional,* 2006, Chapter 1.

Rights and on soft law documents such as the already mentioned General Comment No. 12 and the FAO Voluntary Guidelines on the Right to Food, before domestic courts with little or no knowledge about international law, can be a highly uncertain bet. This is the case even in the (monistic) legal systems where international law is directly part of domestic law and can be directly invoked before courts. Difficulties increase in dualistic systems, where international law is not automatically incorporated into domestic law. Moreover, the right to food is a relatively "young" right and lacks a consistent body of case law on which to draw in order to frame a new case and apply law to a new set of facts.

While these issues may indeed constitute obstacles for the justiciability, they are not insurmountable – most of them are actually effects of the lack of an interpretive tradition identifying the right to food as a autonomous right. There is no conceptual impediment to define the content – or some aspects of the content – of the right to food in a legislative statute or to include the right to food in a constitution; the experience of directly applying international human rights instruments and standards is also a growing practice in domestic courts in different parts of the world. And the absence of case law is just a state of affairs that can change gradually, when cases start being decided by courts and therefore accumulate.

Even in those cases where the right to food is not directly enshrined in a constitution or defined by a legislative statute, and even when international law cannot be directly invoked before domestic courts, or – as a matter of fact is not frequently invoked before domestic courts – comparative legal experiences highlight a number of indirect ways of protecting the right to food through litigation. Some of these experiences will be explored in the next section.

There is also another characteristic of the right to food that may call for further attention in the context of developing the possibilities of justiciability. The satisfaction of the right to food has traditionally been entrusted, in a high degree, to the market – in this regard, the right to food can be compared to the right to housing and the right to work, and is different in this respect compared to rights which are often dealt with in a more centralised/state-dependent fashion, such as the right to healthcare and the right to education. On the supply side, food is a good characterised by the multiplicity of producers and providers. On the demand side, leaving aside those who produce or directly obtain their own food – mostly traditional communities, peasants and inhabitants of rural settings, who are an ever decreasing percentage of the world population – as a result of the growth of urban dwellers and the

extension of the social division of labour, most of the world's population depends on someone else's food production and distribution – typically satisfying its nutrition needs through purchasing food in the market.

The definition of the right to food offered by the Committee on Economic, Social and Cultural Rights actually grasps this dimension. When asserting that,

> "the right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement" (para. 6),

it points both to *access to food* and to *the means for its procurement*. An adequate income is, of course, part of those means for the procurement of food through purchase.

Thus, the right to food involves the existence of a multiplicity of actors: right-holders, but also other private actors, especially those who produce and distribute food, those who are involved or can affect the means for the procurement of food, and of course the state. This requires an understanding of the complex ramifications of the right to food. The relative importance of the array of state duties stemming from the right to food vary dramatically, depending on the different situation of the right-holders and of third parties involved in the production and distribution of food, or those who could affect the means for its procurement.

Duties to fulfil, requiring the direct provision of food by state authorities, typically arise in cases of acute market failure – failures in the supply side, and failures in the possibilities of purchase by deprived segments of the population. In many other relevant scenarios, state duties stemming from human rights instruments regarding the right to food are mostly duties to respect – i.e., to abstain from interfering in the means through which individuals and groups satisfy their access to food – and especially duties to protect – to regulate, and to monitor the conduct of the relevant private parties. But, as the means for the procurement of food can be different, regulating and monitoring the relevant parties may also involve a number of different situations: private parties affecting access to land and commodities such as water necessary to produce food in rural environments, the quality of food produced and distributed by private parties, private parties with enough power to affect or distort the supply in food markets, private parties – such as employers, or persons in charge of sustenance or alimony duties in the

family context – that play some role or may affect the availability of salaries or income necessary to purchase food, an so on. The state itself can also be a relevant actor regarding the provision of the income necessary to obtain food, such as old-age pensions or social assistance benefits.

What consequences does this range of involved actors and variety of situations, relevant to satisfying the right to food, have on its justiciability? A pessimistic approach would probably stress that such a complex array of interrelations makes it difficult to consider the right to food as a coherent unity and difficult to define its limits. Doubts might be cast even on the possibilities of defining the content of the right to food, and on its conceptual viability.

But this kind of complexity is not only a characteristic of the right to food, but of many other human rights. The multiplicity of actors, the variety of situations in need of regulation and monitoring, and the fact that rights are multifold, and cannot be reduced to a single, nuclear duty, are not alien to many other rights, such as *inter alia*, the right to life, the right to liberty and security of the person, the right to a fair trial, freedom of expression, the right to vote and to participate in elections, labour rights, the right to health or the right to education. Indeed, the classification of "levels of duties", employed by the Committee on Economic, Social and Cultural Rights, intended to encompass this complexity, and is not only devised to be applicable to ESC rights, but to any other human right. The diversity of actors and situations involved by the human right to food does not foreclose, but actually opens up the opportunities for justiciability. While in the international sphere the state is the subject of responsibility for any violation of the right to food, domestic legislation enacted by states in order to comply with their international duty to protect can impose obligations on private parties, and establish private-to-private legal actions in different spheres. Examples are labour relations, protection against forced evictions, protection of dependent children from a failure by their parents to comply with sustenance duties, food consumer protection, antitrust protection, and many others.

Judicial protection in these areas is another means through which state duties to protect are complied with. Domestic judicial protection should also involve legal proceedings against state actions or omissions, both against violation of negative duties, and violations of positive duties, when their content is well defined or can be reasonably determined.

Indeed, it will be shown in the next section, that the comparative experiences of judicial protection of the right to food are, in the most part, indirect, through the interconnection of the right to food with other rights, or through framing violations of the right to food as violations of some other right. The right to food offers a practical lens through which to view the notion of interdependence of human rights, and especially a particular "intra-ESC rights" dimension of that interdependence: the close connection of the different components of the right to an adequate standard of living, such as food and housing, with the means to satisfy these needs, such as self-production, a job in the labour market, and other means to secure an adequate income.[6]

IV. A Comparative Perspective of the Justiciability of the Right to Food

Bearing in mind this background scenario, it is time to turn to the illustration of some comparative experiences regarding the justiciability of the right to food.[7] The main point will be to show that different aspects of the right to food have been actually considered in a number of different ways by courts, regardless of the actual usage on the denomination "right to food".

---

6 These connections can be clearly identified in the International Covenant on Economic, Social and Cultural Rights. For example, article 7 (a) (i) defines the notion of "fair ... remuneration" as "remuneration which provides all workers, as a minimum, with: (ii.) a decent living for themselves and their families in accordance with the provisions of the present Covenant. The referral links this definition with the right to an adequate standard of living, provided by article 11.1: "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."

7 For other approaches on this topic, see C. Golay, "The Right to Food and Access to Justice: the International Covenant on Economic, Social and Cultural Rights Before National Jurisdictions"; A. Beurlen de França, "The Juticiability of the Right to Adequate Food in Brazil" and M.C. Cohen/ M. Ashby Brown, "The Right to Adequate Food, Justiciability, and Food Security: the Cases of the United States of America, India and South Africa", all of them in: Borghi/ Postiglione Blommestein, see note 4, 117 et seq.; 199 et seq. and 219 et seq., respectively.

To start with, there are, in the comparative experience, cases decided on the right to food. Argentine local courts provide some examples. The local courts of the city of Buenos Aires ordered preliminary measures in the context of injunctive actions, directing the Administration to include the plaintiff and her family in a food plan,[8] and, in another case, to include a food plan and provide adequate food to a patient under a cancer treatment.[9] Similar cases were registered in local courts of the Provinces of Entre Ríos[10] and Tucumán.[11] There is actually no constitutional mention in respect of a right to food: its textual basis lies exclusively in article 11 of the International Covenant on Economic, Social and Cultural Rights and arts 24 (2)(c) and 27 (3) of the Convention on the Rights of the Child, treaties that were granted constitutional hierarchy through a 1994 constitutional amendment.

U.S. courts, while not referring to a human or constitutional right to food, have frequently dealt with statutory food stamp programs. The U.S. Supreme Court, for example, decided that a statutory restriction in the eligibility conditions for a food stamp program was unconstitutional,[12] confirming a lower court's decision to include plaintiffs in the program. A U.S. Federal District Court also held that eligibility decisions concerning food stamp programs by administrative authorities should be delivered promptly, within statutory guidelines.[13]

---

8 See Buenos Aires Administrative Trial Court No. 3, *C.M.D. y otros c. GCBA s/amparo*, of 11 March 2003.

9 See Buenos Aires Administrative Court No. 4, *González Rayco, Artidoro c. GCBA s/amparo*, of 19 May 2005.

10 See Paraná (Entre Ríos) Family and Juvenile Court No. 2, *Defensor del Superior Tribunal de Justicia c. Estado Provincial-Acción de amparo*, of 28 August 2002.

11 See Tucumán Administrative Court of Appeals, Chamber I, *Rodríguez, José Angel y otra c. Sistema Provincial de Salud y otro s/amparo s/medida cautelar*, of 10 December 2003.

12 See U.S. Supreme Court, *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528, June 25, 1973. The challenged statute excluded from food stamp benefits any household containing an individual who was unrelated to any other household member. The Court found that the exclusion violated the due process clause of the U.S. constitution, finding the distinction "wholly without any rational basis."

13 See U.S. District Court, 2nd district, *Robidoux v. Kitchel*, 876 F. Supp. 575 (D. Vt. 1995). The decision states that "in establishing a processing deadline for all applications, the federal government recognized the interest of all applicants in a timely decision. Individuals deemed eligible for benefits

The right to food has also been cited in less traditional settings. For example, the High Court of Fiji struck down a punishment imposed by the prison authorities to an inmate, consisting in reducing his food rations by half. The High Court considered that the reduction of food rations and the use of food as a means of control was not consistent with article 11 (1) of the ICESCR.[14]

While there are indeed comparative cases where the basis of a judgment was the right to food, most of the experiences regarding justiciability of the right to food have involved framing duties related to the right to food in relation to the violation of a different right. This is hardly an argument against the justiciability of the right to food, where the right to food is recognised in the constitution, in a statute or through the domestic applicability of international human rights treaties. The same cases could have been argued on the basis of the right to food. Also a supplementary claim on the violation of the right to food could have been made. This is actually a proof of the interdependence or interrelatedness of human rights.

Duties stemming from a particular human right usually overlap with duties stemming from other rights, so protecting the first one may also result in protecting the second. In fact, in legal systems where ESC rights are generally not granted a complaints mechanism, such as the jurisdictions of the European and the Inter-American Courts of Human Rights, or in domestic systems where ESC rights have no constitutional recognition, or where the doctrine of non-justiciability of ESC rights is still prevalent among judges, judicial protection of ESC rights has mainly been channelled through its interconnection with civil and political rights or with general human rights principles – such as the prohibition of discrimination.[15] So the case of the right to food is actually not different from other ESC rights cases.

Some courts have, of course, framed violations of the right to food as violations of the right to life. This strategy may not cover all the as-

---

need assistance quickly. Those who are found to be ineligible need to seek alternative resources, and potentially pursue an appeal, as soon as possible."

14 See High Court of Fiji, *Tito Rarasea v. State*, of 12 May 2000. Moreover, the Court found that the reduction of food as a means of punishment was incompatible with human dignity, and amounted to degrading and inhuman treatment.

15 For an account of cases which illustrate this strategy, see Abramovich/Courtis, see note 2, Chapter 3.

pects of the right to food. If the right to life is interpreted strictly, it would cover only those cases where lack of access to food is life-threatening – freedom from starvation. A broader interpretation of the right to life, as a right to a dignified life, or a life according to human dignity, may encompass a wider variety of aspects of the right to food, such as those relating to food adequacy. In legal systems, where the right to health is considered to be a justiciable right, similar connections could be made between food and health.

Two noted cases could serve as examples. While the Indian constitution does not enshrine expressly the right to food, the Supreme Court of India decided in the *People's Union For Civil Liberties v. Union of India* case[16] that state failure to implement food schemes and distribution in cases of starvation and risk of starvation, even when there were grain stocks available, amounted to a violation of the right to life, and issued a number of interim measures prompting the state to implement the Famine Code and detailing a number of measures to be complied with, especially in relation to vulnerable groups. In a similar vein, the Inter-American Court of Human Rights decided that the Paraguayan state had violated the right to life for failing to ensure access to food, water and health services to 19 members of an extremely poor indigenous community, 18 of them being children.[17] The Court stated that the state's positive obligations concerning the right to life, including providing access to food, are triggered when the state authorities

> "knew or should have known about the existence of a real and immediate risk for the life of a determinate person or group of persons, and did not take the necessary measures, within the realm of its powers, which could be reasonably deemed adequate to prevent or avoid that risk."[18]

A second, somewhat related strategy consists in deriving duties regarding the right to food from a "right to a vital minimum" or "existential minimum", considered to stem from the constitutional formula of the social or welfare state, and sometimes from the notion of human

---

16 See Supreme Court of India, *People's Union For Civil Liberties v. Union of India and others*, of 2 May 2003.

17 See Inter-American Court of Human Rights, *Sawhoyamaxa Indigenous Community v. Paraguay*, of 29 March 2006, paras 150-178, especially 159, 167, 168, 170, 173 and 175.

18 Ibid., para. 155, quoting its own judgment in the *Pueblo Bello Massacre v. Colombia* case, and the European Court of Human Rights' judgements in *Kilic v. Turkey*, *Öneryildiz v. Turkey* and *Osman v. the United Kingdom*.

dignity. The reasoning implied here is that the goal of the social or welfare state is achieving at least the material conditions necessary to honour its commitment to human dignity. Access to food is therefore considered to be one of these material conditions.

The German Federal Constitutional Court and Federal Administrative Court provide examples of the "minimum core content" strategy, deriving from the constitutional principles of the welfare (or social) state and of human dignity. The Courts decided that these constitutional principles translate into positive state obligations to provide an "existential minimum" or "vital minimum", comprising access to food, housing and social assistance to persons in need.[19]

Similarly, the Swiss Federal Court, the highest court in Switzerland, ruled that an implicit constitutional right to a "minimum level of subsistence" ("*conditions minimales d'existence*"), even for undocumented foreigners, could be enforced by courts.[20] The plaintiffs were three stateless persons, who found themselves in Switzerland with no food and no money. As they had no papers, they could neither work, nor leave the country. For the same reason, they were not eligible for social assistance and cantonal authorities rejected their claim in this regard. The Court considered that they had, at least, a right to basic minimum conditions, including "the guarantee of all basic human needs, such as food, clothing and housing", to prevent a situation where people "are reduced to beggars, a condition unworthy of being called human." It therefore ordered political authorities to grant the plaintiffs relief.

Courts have also offered negative protection against inadequate food products that constitute potential threats to human life. The Supreme Court of Bangladesh, for example, interpreting the constitutional clause enshrining the right to life, decided that the government should remove threats posed by a consignment of powdered milk which exhibited levels of radiation above the acceptable limits. The Court stated that the right to life includes the protection of health and normal longevity of an

---

19 See, for example, German Federal Constitutional Court (BVerfG) and German Federal Administrative Court (BVerwG), BVerfGE 1, 97 (104 et seq.); BVerwGE 1, 159 (161); BVerwGE 25, 23 (27); BVerfGE 40, 121 (134); BVerfGE 45, 187 (229).

20 See Swiss Federal Court (Tribunal fédéral suisse), *V. v. Einwohnergemeinde X und Regierungsrat des Kanton Bern*, BGE/ATF 121 I 367, 371, 373 V. JT 1996, of 27 October 1995. For an academic comment, see A. Auer/ G. Malinverni/ M. Hottelier, *Droit Constitutionnel Suisse*, 2000, 685-690.

ordinary human being, and that these can be threatened by the consumption and marketing of food and drink injurious to health.[21]

A third strategy advanced before different courts purports to protect the right to food through protecting the means to procure for oneself food. This strategy varies, of course, depending on the relevant means to procure food for oneself.

A first cluster of cases is related to the protection of income, obviously relevant for those who procure themselves food through purchasing it. In this light, it is possible to encompass all judicial strategies directed to claim the recognition and payment of a basic income (be it a salary, a pension, other kinds of social security or social assistance allowances, alimony, etc.), and the adequacy of this income in terms of its sufficiency to cover food requirements. While most ordinary litigation before social courts (typically, labour and social security courts) seeking to obtain work and pension payments could be seen as an example of this strategy, the focus here will be on specific cases where components regarding access to food are apparent. In some of these cases, the discussion concerns the maintenance of a certain level of income necessary to cover, *inter alia*, food needs, against degradation caused by factors such as the increase of the cost of living, or tax impositions.

Again, the German Federal Constitutional Court provides an interesting example: it has held in several cases that the state tax power cannot extend to the material means necessary to cover the "existential minimum,"[22] which includes food needs. Thus, the legislature has a duty to respect the means for basic livelihood, and cannot impose taxes beyond these limits.

A number of cases decided by the Argentine Supreme Court are also good examples of this approach. These cases involved the judicial review of reasonability of the methods utilised to readjust the levels of payments deriving from labour and social security benefits, taking into account the maintenance of the purchasing power of wages and of social security payments. In the *Jáuregui*[23] case, the Court decided that the method employed by a lower court to award a compensation for unfair dismissal in times of high inflation did not reflect adequately the

---

21 See Supreme Court of Bangladesh (High Court Division), *Dr. Mohiuddin Farooque v. Bangladesh and Others (No. 1)*, of 1 July 1996.

22 See, for example, German Federal Constitutional Court, BVerfGE 82, 60 (85), BVerfGE 87, 153 (169).

23 See Argentine Supreme Court, *Jáuregui, Manuela Yolanda c. Unión Obreros y Empleados del Plástico,* of 7 August 1984.

deterioration of the purchasing power of wages, and ordered that a different formula be used. In the *Rolón Zappa* case[24], the Court, arguing on the same basis, confirmed that a legislative statute, which regulated the method for levelling old-age pension payments, was unconstitutional, for affecting disproportionately their amount. In the *Martinelli*[25] case, the Court reviewed the way in which the executive branch fixed the level of the minimum wage, to which the compensation for unfair dismissal was referred, finding it unconstitutional. In the *Vega*[26] case, the Court found that a failure to update the minimum wage level by political authorities, in order to calculate compensations regarding worker's injury payments, was unconstitutional, and amounted to a deprivation of any value of the credit due to the worker. The Court ordered a new determination of the payment amount. In the *Sánchez*[27] case, the Court, made express reference to the close relation between the level of the minimum wage and access to food, housing and health care, and decided that barring social security payments from automatic readjustments according to inflation rates was unconstitutional, and ordered a recalculation of the payment, in line with the judgment.

However, as stated before, the means to procure food for oneself does not mean solely purchasing food in the market, but also growing and producing one's own food or obtaining food through traditional activities, such as hunting and fishing. Most of these activities are characteristic for rural, indigenous or traditional communities, and in many cases, they constitute definitive traits of these communities' cultures. The judicial protection of these activities against arbitrary interference by state authorities or third parties, and judicial enforcement of measures oriented to promote access and security of tenure of land, such as those derived from agrarian reforms or land distribution, are thus further examples of the (indirect) judicial protection of the right to food.

---

24 See Argentine Supreme Court, *Rolón Zappa, Victor Francisco,* of 30 September 1986.

25 See Argentine Supreme Court, *Martinelli, Oscar Héctor Cirilo y otros c. Coplinco Compañia Platense de la Industria y Comercio S.A.,* of 23 April 1991.

26 See Argentine Supreme Court, *Vega, Humberto Atilio c. Consorcio de Propietarios del Edificio Loma Verde y otros/ accidente-ley 9688,* of 16 December 1993.

27 See Argentine Supreme Court, *Sánchez, María del Carmen c. ANSeS*, of 17 May 2005.

Agrarian law and agrarian courts, common in a number of countries throughout the world, offer a good example of the judicial treatment of thousands of conflicts regarding, *inter alia*, access and security of tenure of rural lands.[28]

The Inter-American Court of Human Rights has also followed this approach in a number of cases regarding the indigenous peoples' right to the recognition and titling of traditional communal lands.[29] The Court stresses that access and security of legal tenure of ancestral lands is particularly important in the case of indigenous peoples, as a means to survive, obtain food, carry out their traditional productive activities and maintain their own culture. Thus, the court has developed a broad interpretation of the right to property enshrined in article 21 of the American Convention on Human Rights, reading it in the light of Convention No. 169 of the ILO, in order to highlight the special link that indigenous peoples have with their traditional land. Judicial enforcement of access and proper legal recognition of ancestral lands can therefore be seen as a way to guarantee the access and cultural adequacy of food for indigenous peoples.

A comparable case was decided by the Supreme Court of Canada. The Court partly struck down a criminal prosecution directed against a member of an indigenous community who was charged for fishing without a requisite license in a natural reserve. The Court held, *inter alia*, that the requirement of a license infringes the aboriginal right to fish for food.[30]

In the same context, the right to housing can play a relevant role in the protection of different aspects of the right to food. Judicial protection against forced evictions in rural settings is another strategy through

---

28 See, for example, a description of Mexican agrarian law and courts in M. Chavez Padrón, *El derecho agrario en México,* 1999; A. De La Ibarra, *Derecho agrario,* 1983; I. Rivera Rodríguez, *El nuevo Derecho Agrario mexicano*, 1994; Tribunal Superior Agrario, *La nueva justicia agraria. Años de fundación: 1992-1994,* 1994.

29 See Inter-American Court of Human Rights, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, of 31 August 2001, paras 148, 149 and 153; *Yakye Axa Indigenous Community v. Paraguay*, of 17 June 2005, paras 131, 132, 135, 136, 137, 140, 143, 146, 147, 154 and 155; *Sawhoyamaxa Indigenous Community v. Paraguay*, of 29 March 2006, paras 118, 119, 120, 131, 132, 133, 139 and 143.

30 See Supreme Court of Canada, *R v. Cote,* (1996) 138 DLR (4th) 385, of 3 October 1996.

which housing and food rights can be connected, in those cases were people both live and procure their food on the same piece of land, a common feature of rural, traditional and indigenous communities. Judicial monitoring of procedural conditions before state authorities or third parties decide or carry out evictions is a fundamental safeguard against arbitrary interference both to the rights to food and to housing.[31] For instance, growing attention is being paid to establishing necessary steps, including *inter alia* consultation, fair notice and alternative re-accommodation *before* massive displacements justified by development and infrastructure projects occur.[32]

---

31 See, for example, Federal District Court of Brazil, Maranhão District (Justiça Federal de 1º Instância, Seção Judiciária do Maranhão, 5ª Vara), *Joisael Alves e outros v. Diretor Geral do Centro de Lançamento de Alcântara*, Sentença No. 027/2007/JCM/JF/MA, Processo No. 2006.37.00. 005222-7, of 13 February 2007 (preliminary measure forbidding activities of a space centre that would affect traditional subsistence activities of an afro-descendant community). The example was kindly provided by Letícia Osorio. For a dramatic case where both violations to the right to housing and the right to food were found, see African Commission on Human and Peoples' Rights, *SERAC and CESR v. Nigeria*, Communication No. 155/96, of 13-27 October 2001, paras 63-69. For a comment on this case, see F. Coomans, "The Ogoni Case Before The African Commission on Human and Peoples' Rights", *ICLQ* 52 (2003), 749 et seq. For international legal standards regarding forced evictions, see Committee on Economic, Social and Cultural Rights, General Comment No. 7, *The Right to Adequate Housing (Art. 11 (1) of the Covenant): forced evictions* (1997), Doc. E/C.12/1997/4; COHRE, *Forced Evictions and Human Rights. A Manual for Action*, 1999.

32 See, in this vein, Colombian Constitutional Court, Decisions SU-039/1997 (environmental licence to conduct oil explorations in indigenous peoples' ancestral land found illegal for failure to conduct proper consultation with indigenous community – violations of rights to participation, to a due process, and to ethnical, cultural social and economic integrity of the indigenous community) and T-652/1998 (environmental licence to build a dam declared illegal for failure to conduct consultation with indigenous community – violations of rights to participation, to a due process, to the survival of the community and to the respect of its ethnic, cultural, social and economic integrity). On forced evictions caused by development and infrastructure projects, see, "The Practice of Forced Evictions: Comprehensive Human Rights Guidelines On Development-Based Displacement", adopted by the Expert Seminar on the Practice of Forced Evictions Geneva, 11-13 June 1997; Special Rapporteur on Adequate Housing as a component of the right to an adequate standard of living, and on the right to

Furthermore, violent interference with housing rights and with assets necessary to produce food have also been considered violations of civil rights. The European Court of Human Rights has held in a number of cases that forced evictions,[33] forced displacements and destruction of homes and property,[34] may amount to a violation of the right to privacy, family life and home, to a violation of the right to property,[35] and even to inhuman and degrading treatment.[36] In the same vein, the Inter-American Court of Human Rights decided that forced evictions and displacements, and destruction of homes constitute a violation of the right to property,[37] and to freedom from interference with private life, family, home and correspondence.[38]

The Committee against Torture considered a case where the police failed completely to intervene when a mob destroyed, vandalised and

---

non-discrimination in this context; *Basic Principles and Guidelines on Development-based Evictions and Displacement*, Doc. E/CN.4/2006/41.

33 See, for example, European Court of Human Rights, *Connors v. the United Kingdom*, of 27 May 2004, paras 85-95; *Prokopovich v. Russia*, of 18 November 2004, paras 35-45.

34 See, for example, *Aakdivar and others v. Turkey*, of 16 September 1996, para. 88; *Cyprus v. Turkey*, of 10 May 2001 (rights of displaced persons, paras 174-175); *Yöyler v. Turkey*, of 10 May 2001, paras 79-80; *Demades v. Turkey*, of 31 October 2003, paras 31-37 (article 8); *Selçuk and Asker v. Turkey*, of 24 April 1998, paras 86-87; *Bilgin v. Turkey*, of 16 November 2000, paras 108-109; *Ayder v. Turkey*, of 8 January 2004, paras 119-121; *Moldovan and others (2) v. Romania*, of 12 July 2005, paras 105, 108-110.

35 See, for example, European Court of Human Rights, *Aakdivar and others v. Turkey*, of 16 September 1996, para. 88; *Cyprus v. Turkey*, of 10 May 2001 (rights of forcefully displaced persons, paras 187-189); *Yöyler v. Turkey*, of 10 May 2001, paras 79-80; *Demades v. Turkey*, of 31 October 2003, para. 46; *Xenides-Arestis v. Turkey*, of 22 December 2005, paras 27-32; *Selçuk and Asker v. Turkey*, of 24 April 1998, paras 86-87; *Bilgin v. Turkey*, of 16 November 2000, paras 108-109; *Ayder v. Turkey*, of 8 January 2004, paras 119-121.

36 See European Court of Human Rights, *Yöyler v. Turkey*, of 10 May 2001, paras 74-76; *Selçuk and Asker v. Turkey*, of 24 April 1998, paras 77-80; *Bilgin v. Turkey*, of 16 November 2000, paras 100-104; *Moldovan and others (2) v. Romania*, of 12 July 2005, paras 111, 113-114.

37 See Inter-American Court of Human Rights, *Moiwana Community v. Suriname*, of 15 July 2005, paras 127-135; *Ituango Massacres v. Colombia*, of 1 July 2006, paras 175-188.

38 See Inter-American Court of Human Rights, *Ituango Massacres v. Colombia*, of 1 July 2006, paras 189-199.

burnt the homes and agricultural assets of a Roma community, apparently in revenge for a crime attributed to one of its members. The brutal action of the mob caused the Roma community to flee and lose their homes, jobs and means of livelihood. The Committee considered that the state's failure to protect the group amounted to cruel, inhuman and degrading treatment,[39] while two partially dissenting members considered that the deeds constituted a case of torture.

Combining some of the previously reviewed approaches, the Colombian Constitutional Court has developed a strong jurisprudence in the field of internal displacements of poor rural population due to armed conflicts. In a considerable number of cases, the Court has included components related to the right to food in the description of the complex picture of violations caused by forced displacements, and in the kind of remedies ordered.[40] In this context, the Court has considered that food security is one of the rights threatened by forced displacements; it has included food relief as a component of the "right to a vital minimum", thus ordering political authorities to adopt positive measures to fulfil this right; it has also urged political authorities to develop and implement programs to achieve the re-establishment of the displaced population, including adequate nutrition, access to work and, when possible, return to their homes and places of origin.

The last way employed to protect the right to food through courts that will be mentioned here, with no intention of having been exhaustive, are consumer rights. While consumer rights do not form part of international human rights law, they indeed form part of the constitutional law developed in the last decades,[41] and consumer protection laws, and consumer protection agencies, have also regularly been part of domestic law throughout the world for the last 20 or 30 years. Consumer law has been one of the distinctive ways through which adequacy of food products has been dealt with before courts. For example,

---

39 See UN Committee against Torture, *Hajrizi Dzemajl et al. v. Yugoslavia*, Communication No. 161/2000, of 2 December 2002.

40 See, for example, Colombian Constitutional Courts, Decisions T-227/1997, SU-1150/2000, T-1635/2000, T-327/2001, T-1346/2001, T-098/2002, T-215/2002, T-268/2003, T-419/2003, T602/2003, T-721/2003, T-025/2004, T-078/2004, T-097/2005, T-312/2005, T-563/2005, T-882/2005, T-1076/2005, T-086/2006, T-138/2006 and T-585/2006.

41 For example, constitutions of the following countries include consumer protection clauses: Argentina, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Paraguay, Peru, Portugal and Spain (the list is not exhaustive).

courts deal regularly with issues regarding non-compliance with food information requirements, and cases requiring withdrawal of food products from the market for failure to comply with health and sanitary standards are not rare.[42] Anti-trust legislation may also constitute a means through which monopolistic practice causing distortion in food supply and availability can be tackled.

V. Conclusions

To summarise the main points made in this article: sweeping arguments against the justiciability of ESC rights in general, and of the right to food in particular seem conceptually wrong and empirically unfounded.

On the other hand, justiciability is not necessarily a panacea, and should be carefully considered as a means to advance the right to food, taking into account advantages and disadvantages *vis-à-vis* other potential strategies for exigibility, such as mobilisation, political negotiation, civil society participation in the formulation, implementation and monitoring of public policies, etc.

However, one should not underestimate the possibilities of justiciability either: as the right to food has multiple aspects or components, most of them offer possibilities for judicial protection, both directly and indirectly. Courts throughout the world have dealt with a range of different claims related to the right to food, sometimes directly invoking this right, sometimes framing violations to duties, stemming from the right to food as violations of other rights, such as, *inter alia*, the right to life, the right to a vital minimum, the respect for human dignity, the right to health, the right to an income, the right to land, the respect for ethnic and cultural rights, the right to housing and consumer rights.

---

42 See, for example –among many others–, Federal District Court of Brazil, São Paulo District (Justiça Federal de 1º Instância, Seção Judiciária de São Paulo-capital, 11ª Vara), Processo No. 200461000344728, of 27 October 2005 (preliminary measure ordering the Ministry of Agriculture to ban the production, import, sell and use, and to cancel the register of a chemical substance called Carbadox, used for feeding animals, for its potential toxic effects on human consumption). I am indebted to Inês Virginia Prado Soares for sending me the decision.

Right to Adequate Food: National Implementation and Extraterritorial Obligations

Sigrun I. Skogly[1]

I. Foundations for Extraterritorial Obligations
II. Legal Basis
III. Practical Implications for the Right to Food
IV. Remedies
V. Concluding Remarks

The implementation of human rights standards is imperative if individuals are to enjoy the human rights that international human rights law guarantees. The standards are set through the conventions that states have ratified and through the customs of states' international interaction, and are intended to have effect for individuals within states' territories. Whether or not this implementation is "national" or "international" depends on the perspective taken. If it is an individual that is looking to having his/her human rights implemented, this will by its nature be "national" implementation, as we all operate in a territorial setting: we are citizens or residents[2] of a state in which we have a right to have our human rights respected and protected. However, if the perspective is from a state or a government, the implementation of human rights may not necessarily be national only, or at least not only refer to

---

1 Professor Skogly is also coordinator of the International Human Rights Obligations Network (IntHRON) <http://www.lancs.ac.uk/fss/organisations/humanrights/inthron/index.htm>.

2 Many of us are residents in a state other than that of our nationality. However, due to the universality of human rights, we are entitled to rights protection both from the state of our nationality and that of our residence.

A. von Bogdandy and R. Wolfrum, (eds.),
Max Planck Yearbook of United Nations Law, Volume 11, 2007, p. 339-358.
© 2007 Koninklijke Brill N.V. Printed in The Netherlands.

its own national territory. The question of extraterritorial implementation of human rights is gaining recognition, both as a legitimate concern and a legal obligation of foreign states.[3]

In this article, the author will focus on the right to adequate food as guaranteed by article 25 of the Universal Declaration of Human Rights, and article 11 of the International Covenant on Economic, Social and Cultural Rights.[4] While the obligations of states for the implementation of the right to food within their own territory are firmly established in international human rights law,[5] the question of the obligations beyond the borders of the national state has not received as much attention either in literature or in international practice. Therefore, this article will address some fundamental issues with regard to extraterritorial obligations in Part I. This will include a discussion of the nature of human rights as universal, as well as the consequences of the fundamental principle of non-discrimination in human rights law. Part II. will give a brief overview of the legal foundation of extraterritorial human rights obligations in general, and in relation to the right to food in particular. Furthermore, Part III. will address the practical implications of extraterritorial obligations related to the implementation of the right to food, while the final substantive part (Part IV.) concerns the often difficult question of remedies in case of non-compliance with extraterritorial obligations related to the implementation of the right to food.

---

3 See generally M. Gibney/ K. Tomasevski/ J. Vedsted-Hansen, "Transnational State Responsibility for Violations of Human Rights," *Harv. Int'l L. J.* 40 (1999), 267 et seq.; F. Coomans/ M.T. Kamminga (eds), *Extraterritorial Application of Human Rights,* 2005; S.I. Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation*, 2006; S.I. Skogly/ M. Gibney, "Transnational Human Rights Obligations", *HRQ* 24 (2002), 781 et seq.

4 Hereinafter the ICESCR.

5 This obligation is particularly strong for the 156 states that have ratified the International Covenant on Economic, Social and Cultural Rights (ratification status as of 19 April 2007), while other states will have this obligation in relationship to children based on the provisions in the Convention on the Rights of the Child, ratified by 193 states (19 April 2007); it also stems from other international and regional human rights treaties and customary international law.

I. Foundations for Extraterritorial Obligations

Since the adoption of the Charter of the United Nations in 1945 and the Universal Declaration of Human Rights in 1948, the international human rights discourse has emphasised the universality of human rights – all individuals should enjoy human rights equally everywhere. This is clearly the foundation and inspiration for the Universal Declaration itself, in that it reaffirms in article 1 that, "All human beings are born free and equal in dignity and rights. ..", and in article 2 that, "Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind …"

The universality of human rights has been the underlying inspiration for all further developments of human rights law and standards over the past sixty years. The possibility of implementing human rights in exact the same manner and on a completely universal level has been widely debated, not least from the protagonists of cultural relativism.[6] However, the principle of human worth and human dignity which comes with the respect for fundamental rights and freedoms for all is rarely questioned. But in the debate on the universality of human rights, by far the most attention has been given to the content of *rights*. The corresponding universality of the content of *obligations*, and the implications for obligation-holders (in particular states), have not received the same attention.

A key concept in this discussion is the principle of non-discrimination. Non-discrimination is a fundamental part of human rights law, and is a logical extension of the universality principle. It is overarching and deeply penetrates all international human rights treaties and customary international law. The UN Charter, while not defining what human rights are, confirms that,

> "The Purposes of the United Nations are: … (3) To achieve international co-operation in … promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion …"[7]

---

6 H. Steiner/ P. Alston, *International Human Rights in Context – Law, Politics, Morals*, 2nd edition, 2000.

7 UN Charter, Article 1 (3).

Furthermore, the ICJ has held that discriminatory practices, such as *apartheid*, represent a "flagrant violation of the purposes and principles of the United Nations Charter."[8]

Therefore to treat people differently in relation to the way in which they may enjoy their rights, is a breach not only of human rights treaties, but also of fundamental principles of customary international human rights law. With regard to human rights obligations, this becomes a central point. If states are able to treat individuals in other countries differently from the way they may treat individuals in their own territory, this is discriminatory practice in contravention of the principle of universality of rights enjoyment. We will see in the second part that there are legal provisions that may seemingly limit the geographical reach of human rights obligations, but the interpretation of these provisions should always be carried out with the principles of universality and non-discrimination as the foundation.

II. Legal Basis

For a right to be a legal right that provides entitlement, the substance of it has to be combined with the identification of an entity or some entities that carry corresponding obligations. This is the case for international human rights law. By becoming parties to international treaties in the field of human rights, states accept legal obligations to respect and promote the enjoyment of human rights for individuals. The primary state obligation is to respect and promote human rights enjoyments for individuals within their territory. However, to the extent that the state affects the enjoyment of human rights for individuals within other states, the obligations also apply to these persons.

Commonly international or regional human rights treaties specify the content and scope of human rights obligations in the early provisions. The UN Charter, although encompassing far more than human rights provisions, provides, as already stated, that one of the purposes of the organisation is to achieve international co-operation "in promoting and encouraging respect for human rights and for fundamental freedoms."[9] Furthermore, in Arts 55 and 56, it is provided that the Member

---

8 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports 1971, 16 et seq., (56, para. 128).

9 UN Charter, Article 1 (3).

States of the United Nations, "pledge themselves to take joint and separate action in co-operation with the Organization …"[10] to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[11]

Joint action to promote this universal respect, will logically imply that at least some states will act beyond their own borders – or extraterritorially – to achieve this.[12]

Some international human rights treaties limit the obligations somewhat, such as the International Covenant on Civil and Political Rights (ICCPR), which provides that,

> "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant …"[13],

and the European Convention on Human Rights and Fundamental Freedoms states that,

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the Convention."[14]

However, the interpretation of these articles in the jurisprudence of the UN Human Rights Committee and the European Court of Human Rights, clearly demonstrates that the instruments have reach beyond national borders in certain circumstances,[15] and that the references to territory and jurisdiction by the drafters were included more for practical reasons than to permit human rights violations by states abroad.[16]

However, as the present article deals with the implementation of the right to food, the essential document to analyse is the ICESCR, which was drafted with a different wording in its general obligation article, and also in the specific obligations in the substantive articles.

---

10 UN Charter, Article 56.

11 UN Charter, Article 55 lit. c.

12 For further discussion on this reasoning, Skogly, 2006, see note 3, 74-83.

13 ICCPR, article 2 (1).

14 ECHR, article 1.

15 For an in-depth discussion of this jurisprudence, and the practice of other bodies entrusted with the supervision of the implementation of other human rights treaties, Skogly, 2006, see note 3, Chapters 4, 6 and 7.

16 See individual opinion by Human Rights Committee Member Tomuschat in the *Lopés Burgos v. Uruguay* case, Doc. A/36/40, para. 184.

Article 2 of the ICESCR provides,

"1. Each State Party to the present Covenant undertakes to take steps, *individually and through international assistance and co-operation, especially economic and technical,* to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[17]

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be *exercised without discrimination of any kind* as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[18]

Thus, article 2 of the ICESCR confirms that the way in which states ratifying the Covenant shall ensure the implementation of it, goes beyond national and territorial application, as does the strong reiteration that it shall be done without discrimination, in keeping with the universality principle already discussed.

The provision of "international assistance and co-operation" has not been widely analysed, as the focus on the obligations stemming from article 2 has concentrated on the role of the domestic state. The primary obligation for human rights compliance, quite clearly lies with the territorial state, and will not be questioned by the present author. Nevertheless, the article does refer to actors and activities beyond national borders, and envisages that international cooperation is necessary for the "full realization of the rights recognized in the present Covenant." Indeed, during the drafting of this article, the views that such international cooperation is necessary are evidenced by the statements by Denmark, which held that "countries with insufficient resources should be able to obtain help under the technical assistance programmes or similar projects"[19] and from Egypt which held that "the available resources of the small countries, even if utilised to the maximum, would be insufficient; [and] as a result, those countries would have to fall back on international cooperation …"[20]

---

17 Emphasis added.

18 Emphasis added.

19 Doc. E/CN.4/SR.236.

20 Doc. E/CN.4/SR.236. For further accounts on the drafting history of this passage in the Covenant, Skogly, 2006, see note 3, 84 et seq.

In General Comment No. 3 on the Nature of States parties Obligations, from 1990, the UN Committee on Economic, Social and Cultural Rights held that,

> "international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States,"[21]

and that,

> "the phrase 'to the maximum of its available resources' was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance."[22]

Furthermore, as a result of the wording of article 11 of the Covenant, which *inter alia* provides for the right to adequate food, States Parties to the Covenant,

> "will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."[23]

Additionally, para. 2 of the said article states that,

> "The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, *individually and through international co-operation*, the measures, including specific programmes, which are needed:
>
> a) to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge ...;
>
> b) taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need."

In General Comment No. 12, on The Right to Adequate Food, the Committee held that,

> "States parties should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to adequate food. In implementing this commitment, States parties should take

---

21 UN Committee on Economic, Social and Cultural Rights, General Comment No. 3 (1990), para. 14, Doc. E/1991/23 of 1 January 1991.

22 Ibid., para. 13.

23 For a discussion on the background on the passage "based on free consent", Skogly, 2006, see note 3, 89-93.

> steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required. States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end."[24]
>
> Furthermore the Committee emphasised that,
>
> "States parties should refrain at all times from food embargoes or similar measures which endanger conditions for food production and access to food in other countries. Food should never be used as an instrument of political and economic pressure."[25]

While other articles in the Covenant contain references to international cooperation,[26] the provisions in article 11 seen in conjunction with article 2 (1) provide a firm legal basis for extraterritorial obligations in relation to the right to food, and its implementation. This is further confirmed on the basis of the provisions in the Convention on the Rights of the Child,[27] which in article 24 (2) calls for the combat of malnutrition, combined with the provisions in article 4 that ensure that,

> "with regard to economic, social and cultural rights, States Parties shall undertake […] measures to the maximum extent of their available recourses and, where needed, within the framework of international cooperation."[28]

III. Practical Implications for the Right to Food

It has now been established that states have obligations beyond their own borders, and that the way in which they carry out their foreign

---

24 UN Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999), para. 36, Doc. E/C.12/1999/5 of 12 May 1999.

25 Ibid., para. 37.

26 In particular arts 15 (4), 22 and 23.

27 The Convention on the Rights of the Child, as ratified by 193 states, thus binding for virtually all states in the world, should provide protection for the vast majority of children.

28 For an in-depth discussion on these provisions in the Convention on the Rights of the Child, see W. Vandenhole, "Economic, Social and Cultural Rights in the CRC: Is There a Legal Obligation to Cooperate Internationally for Development?", forthcoming, *International Journal of Children's Rights* 15 (2007).

policy and international cooperation may have implications for the compliance with their obligations stemming from human rights law. The time has therefore come to address the practical implications of the national implementation of the right to food in an extraterritorial perspective. In the introduction, it was held that implementation is, from the perspective of the individual, always national. However, the way in which states act through their foreign policy and their international cooperation, may have significant impact on how this national implementation is carried out, and whether the right to food is respected, promoted, or violated. It should be clarified that "international assistance and cooperation" is a broad concept that encompasses international development assistance, but which also goes wider and includes other aspects of foreign policy that may have effect on human rights enjoyment in third countries. This will include areas such as trade relations, financial cooperation, military and security cooperation, as well as activities carried out by private parties internationally. In this understanding, the concept of "international assistance and cooperation" shall qualitatively be carried out in a manner that is conducive to the realisation of the right in the ICESCR, as well as a quantity concept, requiring further assistance when needed.[29]

In this section, the FAO *Voluntary Guidelines to Support the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security*[30] will be used as a point of reference for ways in which states may implement the right to food nationally, taking steps both "individually and through international assistance and co-operation."[31]

---

29 For a discussion of the concept of "international assistance and co-operation" as provided in article 2 (1) of the ICESCR, see P. Hunt/ J. Bueno de Mesquita, *Draft Guidelines on the 'International Covenant on Economic, Social and Cultural Rights: International Obligations'*, prepared for the UN Committee on Economic, Social and Cultural Rights, 2003, (on file with author).

30 Drafted by the Intergovernmental Working Group for the Elaboration of a Set of Voluntary Guidelines to Support the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security (IGWG), which is a subsidiary body of the Committee on World Food Security, both bodies were established by the Council of FAO. The Voluntary Guidelines were adopted by acclamation in November 2004. Hereinafter: the Voluntary Guidelines. Compare also Courtis, in this Volume, footnote 4.

31 Article 2 (1) ICESCR.

The Voluntary Guidelines consist of three sections, the first being Preface and Introduction, the second covering "Enabling Environment, Assistance and Accountability" containing nineteen guidelines, and the third section concerning "International Measures, Actions and Commitments". In Guideline 19, it is confirmed that states,

> "should fulfil those measures, actions and commitments on the international dimension, as described in Section III below, in support of the implementation of the Voluntary Guidelines, which assist States in their national efforts in the progressive realisation of the right to adequate food in the context of national food security …"

Therefore, the Voluntary Guidelines themselves confirm the strong and direct relationship between the national "measures, actions and commitments" for the implementation of the right to food, with the "international dimension".

The third section covers issues such as international cooperation and unilateral measures, the role of the international community, technical cooperation, international trade, external debt, official development assistance, international food aid, and partnerships with NGOs/CSOs (Civil Society Organisations)/Private Sector. This listing of relevant issues for national implementation through an international dimension, is important as it confirms that "international assistance and cooperation" in article 2 (1) of the Covenant covers more than international development cooperation, which is often taken as the full content of that article.

In discussing how extraterritorial obligations may have a practical impact upon the national implementation of the right to food, it is important to consider ways in which measures taken in accordance with section III. may have a positive or negative effect on the realisation of the right to adequate food, as approached by the Guidelines in section II. It is not possible within the confines of this article to carry out an exhaustive analysis as to how section III. measures may impact up on all the issues covered in the 19 Guidelines in section II. Therefore only a few examples as illustrations of how "international assistance and cooperation" may affect national implementation will be given.

Guideline 2 covers economic development policies, and calls for states to "promote broad-based economic development that is supportive of their food security policies,"[32] to "assess … the degree of food

---

32 Guideline 2, Sub-Section 2.1.

insecurity and its causes, the nutrition situation and food safety,"[33] and to "promote adequate and stable supplies of safe food through a combination of domestic production, trade, storage and distribution."[34]

Likewise, Guideline 4 covers "market systems", and provides that states should,

> "in accordance with their national law and priorities, as well as their international commitments, improve the functioning of their markets, in particular their agricultural and food markets, …"[35]

and that they,

> "should strive to ensure that food, agricultural trade and overall trade policies are conducive to fostering food security for all through a non-discriminatory and market-oriented local, regional, national and world trade system."[36]

Furthermore, Guideline 8 on "Access to Resources and Assets", confirms that states,

> "should facilitate sustainable, non-discriminatory and secure access and utilization of resources consistent with their national law and with international law and protect the assets that are important for people's livelihoods. States should respect and protect the rights of individuals with respect to resources such as land, water, forests, fisheries and livestock without any discrimination ..."[37],

and,

> "promote agricultural research and development, in particular promote basic food production with its positive effects on basic income and its benefits to small and women farmers, as well as poor consumers."[38]

If these measures (and others not brought in as examples) are considered in conjunction with section III., and its call for states and relevant international organisations to actively support the progressive realisation of the right to adequate food at the national level,[39] it is evident

---

33 Guideline 2, Sub-Section 2.2.
34 Guideline 2, Sub-Section 2.3.
35 Guideline 4, Sub-Section 4.1.
36 Guideline 4, Sub-Section, 4.7.
37 Guideline 8, Sub-Section 8.1.
38 Guideline 8, Sub-Section 8.4.
39 Section III., para. 4.

that issues of technical cooperation,[40] international trade,[41] external debt,[42] official development assistance,[43] and international food aid[44] are of immense importance, particularly for poorer countries that have difficulties in realising the right to food for all individuals within their national borders. Two issues should be brought forward here. First, in an integrated world, the measures taken by one state in its relationship to another may have significant impact on the possibility for the second state to progressively realise the right to food for its population; and also measures taken by states collaboratively through intergovernmental organisations (such as FAO, the World Bank, the IMF) may have even greater impact upon the receiving state's abilities in this regard.

For instance, take a state that decides to export chicken meat which, due to subsidies to farmers in their own state, is cheaper than the locally produced chicken meat in the importing state. In this case, the effect of export may be that a.) domestic poultry production in the importing state collapses; and b.) that the quality of the imported meat is substandard due to lack of adequate storage and treatment facilities in the importing state.[45] Such effects would clearly impact upon "food safety" and "stable food supplies"[46] have been negatively affected by the actions (i.e. giving export licence for such export or omissions i.e. failing to regulate the export industry to ensure that "the functioning of the markets, in particular … food markets"[47] is not negatively affected, to the extent, that the right to adequate food is put in jeopardy).

Second, when the guidelines talk about "international commitments" or "in accordance with international law", this reaches beyond the national implementation policies, in that international commitments in accordance with international law, refer to extraterritorial obligations as well. Therefore, any state that is bound by the provisions of the UN Charter, and more particularly the ICESCR, should ensure that their

---

40 Section III., para. 5.

41 Section III., paras 6-10.

42 Section III., para. 11.

43 Section III., para. 12.

44 Section III., para. 12.

45 This example is taken from the case related to Cameroon, and the export of chicken parts from the European Union. For details, see Brot für die Welt/FIAN (ed.), *Germany's Extraterritorial Human Rights Obligations: Introduction and Six Case Studies*, 2006.

46 Guidelines 2, Sub-Section 2.3.

47 Guideline 4, Sub-Section 4.1.

international commitments with regard to the right to adequate food, and more specifically the issues identified by the Voluntary Guidelines are honoured when engaging in international cooperation.

More specifically, when states aim to implement the right to food, and are challenged by the economic development policies of external actors such as developed states considering granting official development assistance or support from international financial institutions, such as the World Bank and the IMF, and these institutions propose certain policy measures, it may be difficult for the receiving state to withstand pressure for specific policy measures even if they work against food security strategies.

While the relationship between national and international policies and commitments seems evident and important, the way in which this represents an interaction in terms of human rights obligations is not quite as straight forward. The legal basis for extraterritorial obligations was summarised above. However, the content of these obligations was not detailed. What the obligations amount to will, of course, have great bearing on how the "international measures, actions and commitments" should be considered in this context.

As with national or domestic human rights obligations, extraterritorial human rights obligations may be divided into three categories: *respect, protect and fulfil* (which includes *promote and/or facilitate*).[48] This is confirmed by the Committee when providing that,

> "States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required."[49]

And while assessing the implications of this categorisation, the recognition that "international assistance and co-operation" as provided in article 2 (1) of the ICESCR relates to more than development assistance and a duty to "provide", is essential. This recognition is captured in section III. of the Voluntary Guidelines, in that it deals with a variety of activities that states engage in through their foreign policy or international cooperation, broadly defined.

Therefore, with regard to the obligation to *respect* the right to adequate food in other countries, it is necessary that foreign states ensure that their actions do not lead to the violation of the right to food for individuals in third states, whose right to adequate food was previously

---

48 Skogly, 2006, see note 3, 66-73.

49 General Comment No. 12, see note 24, para. 36.

enjoyed by them. For instance, states should "refrain at all times from food embargoes or similar measures which endanger conditions for food production and access to food in other countries."[50] Similarly, states should not give support to another state that uses food as a political tool, or blockades food deliveries for political reasons.[51] Furthermore, food aid that is provided by a foreign state should not be discriminatory and benefit only certain groups. Finally, measures taken by foreign states in terms of subsidies and market access, should not be done in a manner that endangers the livelihood of people in third countries. This is particularly important for individuals in poor countries, where alternative livelihoods may be more limited than in richer countries, and also where the national government's ability to provide financial assistance to those negatively affected may be restricted. An example of such a situation may be used as illustration.

The organisation 3D (3D- Trade, Human Rights and Equitable Economy) reported in 2004 on the situation for cotton producers in West and Central Africa, and in particular in Benin and Mali.[52] The report documented a reduction in cotton prices due to significant overproduction of cotton worldwide, and that subsidies had been paid to farmers in the United States and the EU (the United States paid out US$ 1.68 billion to 285 cotton farmers between 1995 and 2002; the EU gave subsidies to Spanish and Greek cotton farmers at 160-180 per cent of world prices).[53] This lead to sharp price falls for African cotton producers, which again undermined national efforts by the West African countries to protect the rights to life, to adequate food and to the highest attainable standard of health, and contributed to retrogression from achieving protection of these rights.[54] The United States and the EU also provided international assistance to Benin and Mali. In 2001, for example the United States assistance amounted to US$ 37.7 million for Mali and US$ 16 million for Benin.[55] "At the same time, however, due in large part to its price-depressing production and export policies relat-

---

50 Ibid., para. 37.

51 Ibid.

52 3D (ed.), *US and EU Cotton Production and Export Policies and Their Impact on West and Central Africa: Coming to Grips with International Human Rights Obligations*, Report 2004, available at <http://www.3dthree.org/pdf_3D/1404-EGICottonBrief_FINAL.pdf>.

53 3D, see above, 2.

54 Ibid., 4.

55 Ibid.

ing to cotton, the US contributed to losses in export revenue of $43 million that year to Mali and $33 million to Benin, with the consequent harm for livelihoods."[56]

3D concluded that,

> "by flooding WCA [West and Central Africa] markets with cheap cotton, US agribusiness contributes to depressing prices and undermining the market share for small scale farmers in WCA. This reduces the income both of WCA farmers and governments – income that is vital to food security and health care and to protecting the right to life."[57]

What this example illustrates is that if states are to take their "international commitments" and human rights obligations seriously in terms of not contributing to violations of the right to food in other countries, the effects of market oriented and subsidies policies need to be assessed from a human rights effects' perspective. This view has also been confirmed in research carried out by Wouter Vandenhole, who finds that,

> "subsidies – both direct ones and cross-subsidies – for structural overproduction of sugar, which is then exported to the South at dumping prices to the detriment of local farmers, are in violation of the third state obligation to respect the right to an adequate standard of living."[58]

The next level of extraterritorial obligations concerns the obligation to *protect* individuals from human rights violations committed by third parties – often referred to as private parties. These parties may be national or international private parties over which the foreign state exercises control. Commonly, the activities of transnational corporations (TNCs) are addressed in this regard. However, there is no reason why it should be limited to private business; there may be other actors who are capable of causing harm in foreign states, such as non-governmental organisations (NGOs) engaged in activities in third states.[59] Obligations to protect perspective states are required to ensure, through regulation or other means, that private entities over which they have control, do not cause harm to individuals' human rights in third states. This may

---

56 Ibid.

57 Ibid.

58 W. Vandenhole, "Third State Obligations under the ICESCR: A Case Study of EU Sugar Policy", *Nord. J. Int'l L.* 76 (2007), 73 et seq.

59 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 1997, para. 18, *NQHR* 15 (1997), 244 et seq.

entail regulating for certain human rights compliance by these entities, and that accountability structures are set up in the home state of the private party to establish responsibility for potential violations of the right to food standards. For instance, if a TNC establishes a plantation for export crops in an area previously used for subsistence farming, they should be regulated in a manner that secures the affected population adequate compensation and safeguards against suffering from violations of the right to food (and other human rights).

Finally, the third level refers to the obligation to *fulfil.* A far more positive obligation where states shall take positive steps to facilitate or promote human rights enjoyment.[60] This is perhaps the most contentious level from a political perspective, and the most difficult to prove legally.[61] This has also had the tendency to receive most attention when discussing extraterritorial obligations.[62] There is no doubt that positive action on part of foreign states for the fulfilment of the right to adequate food is imperative. This is also reflected in the wording in article 11 (1) and (2), as previously mentioned. The drafters of the Covenant considered such positive international cooperation a necessity for the implementation of the right to food (as well as other rights in article 11).[63]

Seeing this level of obligation in light of the Voluntary Guidelines, it is clear that the FAO considered that much of what states engage in as part of their international cooperation may have beneficial impact on the fulfilment of the right to food in foreign states. However, the Voluntary Guidelines do not add new legal obligations apart from those that already stem from international treaty and customary law. Nevertheless, what the Voluntary Guidelines do is to indicate policy measures possible for states to take through international cooperation to fulfil their already existing obligations.

These already existing obligations have been discussed by different bodies. The Committee holds that the references in article 2 (1) of the Covenant to "the maximum of its available resources" and "international assistance and co-operation", imply that states shall seek interna-

---

60 A. Eide, *Report Updating the Study on the Right to Food*, Doc. E/CN.4/Sub.2/1998/9, para. 9.

61 Vandenhole, see note 28.

62 Vandenhole, see note 28; see also J. Bueno de Mesquita, *International Covenant on Economic, Social and Cultural Rights: International Assistance and Co-operation*, 2002; Skogly, 2006, see note 3, 71.

63 Skogly, 2006, see note 3, 89-95.

tional assistance for the realisation of the rights in the Covenant.[64] Furthermore, where states have the resources available to assist other states in creating the conditions for progressive realisation of the right to food, this should be done. The Special Rapporteur on the Right to Food labels this an obligation to support fulfilment. He explains,

> "Governments also have a duty to support the fulfilment of the right to food in poorer countries. Developing States that do not possess the necessary resources for the full realization of the right to food are obliged to actively seek international assistance, and wealthier States have a responsibility to help. This requires States, depending on the availability of their resources, to cooperate with other countries to support their fulfilment of the right to food."[65]

Consequently, the positive obligations to take steps "to the maximum of its available resources" is also applicable for states in their foreign policy. The extent of resources available to support other states in their national implementation of the right to adequate food, will vary from state to state. However, the public commitments to provide development assistance (and the 0.7 per cent of GDP goal) that states have made on numerous and consistent basis in a variety of institutional settings, including the UN Millennium Summit, should warrant a claim on such resources to support fulfilment of the right to adequate food.[66]

IV. Remedies

Much of what has been discussed in this article are issues related to food security and food security policies of states and their international interaction in implementing such policies. However, rights are not im-

---

64 General Comment No. 3, see note 21, para. 13.

65 *Economic, Social and Cultural Rights. The Right to Food*, Report of the Special Rapporteur on the Right to Food, Jean Ziegler, Doc. E/CN.4/2005/47 of 24 January 2005, para. 56.

66 In a thought provoking article, Alston argues that there may be an emerging legal obligation to implement the Millennium Development Goals, which would imply assistance to states that lack the means to implement these, including the commitment to reduce the number of people suffering from hunger by half by 2015 (for details on the Millennium Development Goals, <http://www.un.org/millenniumgoals/index.html>). See P. Alston, "Ships Passing in the Night: The Current State of the Human Rights and Development Debate seen through the Lens of the Millennium Development Goals", *HRQ* 27 (2005), 778 et seq.

plemented through policies alone. There is a clear requirement that obligations are complied with, and in case of non-compliance, the availability of remedies to challenge the non-compliance is imperative. The right to a remedy is considered a separate human right[67] that should be available in case of breaches of obligations pertaining to all human rights.[68] However, remedies for violations of economic, social and cultural rights have been less developed than those for civil and political rights, and this is, in particular, the case for judicial remedies which are sought in courts of law.[69] This does not, however, imply that judicial remedies are not possible for violations of economic, social and cultural rights, and recent research has demonstrated that in a number of situations and in a number of countries, such remedies are available and effective.[70] Nevertheless, such situations have generally implied the possibility of bringing violations committed by the territorial state before the national courts. The remedies available for individuals whose economic, social and cultural rights are violated by actions committed by foreign states are theoretical at best. It is here that significant improvements need to be made for the right to food (as well as other economic, social and cultural rights) to be protected from violations committed by foreign actors (as well as domestic ones). While the Committee reviews reports from states that have ratified the ICESCR,[71] the Committee does not (yet) have a mandate to receive individual petitions for violations of the rights in the Covenant.[72] It is also unclear whether such a right to individual petition would be conceived to include violations committed by ratifying states other than the territorial state of the individual.

It is therefore necessary to develop remedy structures that could effectively deal with violations of human rights, including the right to adequate food, in a comprehensive manner. There have been some suggestions in this regard, and in particular the creation of a World Court

---

67 Article 8 of the Universal Declaration of Human Rights.

68 F. Coomans (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems*, 2006, 2.

69 Ibid.

70 See generally Coomans, see note 68.

71 In accordance with article 16 of the Covenant and Economic and Social Council resolution 1985/17, para. (f).

72 The mandate of the Open Ended Working Group to draft an Optional Protocol was extended by the Human Rights Council for another two years in June 2006, Doc. A/HRC/1/L.4/Rev.1 of 28 June 2006.

of Human Rights.[73] While these proposals are still very much in their infancy, this may be one way of addressing the need to take a comprehensive view of remedy provision for human rights violations in light of the increasing international interaction, both among states and among private parties.

It should, however, be noted that while formal, judicial remedy structures are essential for the full protection of human rights, more informal structures may also be applied. The exposure of negative effects of actions taken by foreign states in regard to the enjoyment of the right to food is one way of ensuring further accountability. Such exposure can effectively be done through the work of NGOs and their fact-finding and documentation of violations of the right to food. FIAN International has, in recent publications, demonstrated how this may be done, and how foreign governments may be held accountable for their acts and omissions that lead to breaches of the right to food.[74] Gaining expertise in this field, NGOs may also be able to assist states in identifying human rights problems stemming from activities by foreign actors and provide advice as how to eliminate the risk of such adverse effect in the future.

V. Concluding Remarks

The national implementation of the right to adequate food is affected by actions taken by a variety of actors, including the national government, national private parties, foreign private entities and foreign states. While the primary obligation for the fulfilment of the right to adequate food lies with the national government as a result of the ratification of the relevant international treaties, and in particular the ICESCR, the fo-

---

73 See *inter alia*, M. Nowak, "The Need for a World Court of Human Rights", *Human Rights Law Review* 7 (2007), 251 et seq.; M. Scheinin, "The Proposed Optional Protocol to the Covenant on Economic, Social and Cultural Rights: A Blueprint for UN Human Rights Treaty Body Reform Without Amending the Existing Treaties", *Human Rights Law Review* 6 (2006), 142 et seq.

74 See *inter alia*, FIAN International Reports, *Germany's Extraterritorial Human Rights Obligations in Multilateral Development Banks: Introduction and Case Study of Three Projects in Chad, Ghana and Pakistan*, Heidelberg, 2006; *Germany's Extraterritorial Human Rights Obligations, Introduction and Six Case Studies,* Heidelberg 2006; *Parallel Report Norway – Extraterritorial Obligations*, 2005.

cus on such obligations solely does not adequately reflect the complex situation for the implementation of this right. There are strong legal foundations for the wider scope of obligations, not least in article 2 (1) of the Covenant itself.

This article has demonstrated that while approaching implementation from a national perspective, the activities of foreign actors may have a considerable impact, both from a positive and negative approach. Positively, it is clear that international actors may support the fulfilment of the right to adequate food in other states, and that this is an obligation based on the wording of the Covenant. This should be considered a human rights mandate for positive international cooperation for the aim of providing an enabling environment for the full enjoyment of this right. However, it has also been demonstrated that acts and omissions on the part of foreign actors (states) may have a negative impact on such enjoyment, and that this represents a breach of an obligation. Nevertheless, the accountability and remedy structures to hold such foreign obligation-holders accountable have not been sufficiently developed. This is a challenge to the development of international human rights law in the future, as the lack of remedy structures, both formal and informal, for holding such actors to account, severely hampers the efforts to ensure global enjoyment of the right to adequate food.

Application of the International Covenant on Economic, Social and Cultural Rights in the Framework of International Organisations

Fons Coomans[1]

I. Introduction
II. The ICESCR and Its International Dimension
III. The General Legal Basis for International Obligations of States in the Field of Economic, Social and Cultural Rights
IV. Decisions and Policies of International Organisations that May Effect Economic, Social and Cultural Rights
  1. International Financial Institutions
  2. The World Trade Organisation
  3. The European Communities
  4. United Nations Sanctions
V. Human Rights Obligations of States as Members of International Organisations
  1. Obligations to Protect
  2. Obligations to Respect
  3. Obligations to Fulfil
VI. Concluding Remarks

---

1 This contribution is a revised and expanded version of F. Coomans, "Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights", in: F. Coomans/ M. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties*, 2004, 183 et seq.

A. von Bogdandy and R. Wolfrum, (eds.),
Max Planck Yearbook of United Nations Law, Volume 11, 2007, p. 359-390.
© 2007 Koninklijke Brill N.V. Printed in The Netherlands.

I. Introduction

Realisation of economic, social and cultural rights (hereafter: esc rights) essentially has a territorial scope: it normally takes place on the territory of states. On 19 April 2007, 156 states ratified or acceded to the International Covenant on Economic, Social and Cultural Rights (ICESCR)[2] which is the main universal treaty protecting these rights.

A State Party is under an obligation to take all appropriate measures to progressively realise the esc rights listed in the treaty (article 2 (1)). However, states do not exist in isolation. As members of the community of states they are dependent on international cooperation to cope with problems that go beyond national borders. The need for international cooperation as a key principle of present-day life comes very much to the fore in the era of globalisation in which we live. The process of globalisation is crucial for a proper understanding of the international dimensions of the realisation of esc rights.

Globalisation as an economic and social phenomenon is characterised by an increase in international transactions between a growing number of actors, such as companies, individuals (patterns of worldwide migration), international governmental organisations, non-governmental organisations and states. Also the nature of involvement of actors in this process is changing: we witness an increase in the role and responsibilities of private actors in economic life, a diminishing role of the state (trends towards privatisation), and a stronger involvement of international governmental organisations and international market forces in the economic and financial policy of states (financial and economic austerity and adjustment programmes propagated by the IMF and the World Bank).[3] The process of economic globalisation has also led to an unequal distribution of the positive effects of globalisation between people living in the North and those in the South.[4] In other words, the realisation of esc rights increasingly has international dimensions. In addition, trends towards deregulation and pruning of welfare services have put the realisation of esc rights at risk.[5]

---

2 UNTS Vol. 993 No. 14531.

3 See the Report *A Fair Globalization*, prepared by the (ILO) World Commission on the Social Dimension of Globalization, 2004, available at <www.ilo.org>.

4 A. Sen, "Ten Theses on Globalization", *New Perspectives Quarterly* 18 (2001), 62 et seq.

5 See D. Beetham, *Democracy and Human Rights*, 1999, 117.

Furthermore, since the end of World War II the nature of international law has changed dramatically. Not only did a law of cooperation between states develop side by side a law of co-existence.[6] Also the more recent process of globalisation led to a trend towards a wider interpretation of traditionally territorial related concepts, such as jurisdiction and national sovereignty in matters of human rights.[7]

What then is the relationship between developments towards globalisation and the universal protection of esc rights? The UN Committee on Economic, Social and Cultural Rights (CESCR) has noted that in itself globalisation as a social phenomenon is not incompatible with the idea of social, economic and cultural rights. However,

> "taken together, ... and if not complemented by appropriate additional policies, globalisation risks downgrading the central place accorded to human rights by the Charter of the United Nations and the International Bill of Human Rights in particular".[8]

In other words, the changed (and changing) nature and pattern of economic and financial transactions worldwide may jeopardise the enjoyment of esc rights in many countries. The challenge then is to make the ICESCR fit the era of globalisation, to reach beyond traditional concepts of state sovereignty in order to provide for international solidarity and achieve global justice.

When the treaty was drafted only states were the principal actors on the international plane. The role of the state as the principal actor responsible and accountable for the realisation of these rights is still paramount, but other actors (international organisations, companies) may also have an impact on the actual enjoyment or lack of enjoyment of these rights. The question then is how the state, as a State Party to the ICESCR, can be held responsible for the conduct of these non-state actors who often act extraterritorially, or whose conduct has extraterritorial effects. For example, if the World Bank intends to financially support the construction of a dam in a developing country, and if as a consequence of this project indigenous people face eviction from their land and homes, has a Western donor state an obligation under human rights

---

6 For a description of this development see, W. Friedmann, *The Changing Structure of International Law*, 1964.

7 Coomans/ Kamminga, see note 1; S. Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation*, 2006.

8 Statement by the Committee on Economic, Social and Cultural Rights on Globalisation and its Impact on the Enjoyment of Economic, Social and Cultural Rights, Doc. E/1999/22, 92.

law to oppose approval of this project by the competent body of the World Bank? Also, the state itself is an actor that increasingly acts outside its own territory. Such conduct may have human rights effects in another country. Does the state have human rights obligations due to an extraterritorial application of the ICESCR? What does international human rights law have to say about this?

The present contribution will deal with the development and application of international human rights law on esc rights in an extraterritorial context. It will focus on the conduct of states within the framework of international organisations and the activities of international organisations themselves.

II. The ICESCR and Its International Dimension

Article 2 (1) ICESCR refers to the obligation of every State Party,

> "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 …"[9]

The ICESCR does not mention territory or jurisdiction as delimiting criteria for the scope and application of the treaty.[10] Instead, it refers to the international or transnational dimensions of the realisation of esc rights. Therefore it is suggested that a certain extraterritorial (in the sense of international) scope was intended by the drafters and is part of the treaty.[11] There was consequently no need to limit explicitly the pro-

---

9 Emphasis added.

10 Compare article 2 (1) ICCPR which provides that, "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, (…)", Emphasis added. See on the scope of this provision, D. McGoldrick, "Extraterritorial Application of the International Covenant on Civil and Political Rights", in: Coomans/ Kamminga, see note 1, 41-72.

11 See M.C.R. Craven, *The International Covenant on Economic, Social and Cultural Rights – A Perspective on its Development*, 1995, 144. Craven quotes R. Cassin, who, at the time of drafting the Covenant, argued that, "by providing for recourse to international cooperation instead of allowing the enjoyment of rights to be put off, [the reference to international coop-

tection of esc rights to those people resident in the territory of a State Party only. It has been argued by one commentator that,

> "it is beyond doubt that States Parties are required to apply the Covenant within their territories and within the territory over which they have effective control".[12]

For example, with respect to the occupation of the Palestinian Territories by Israel, the CESCR has said that,

> "the Covenant applies to all areas where Israel maintains geographical, functional or personal jurisdiction", and that "the State's obligations under the Covenant apply to all territories and populations under its effective control".[13]

Israel, however, was of the opinion that "the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction".[14] The Committee did not agree with Israel and urged the government of that country,

> "to implement without delay its obligations under the Covenant and to desist from decisions and measures resulting in violations of the economic, social and cultural rights of the population living in the occupied territories".[15]

In its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the ICJ observed that although the ICESCR guarantees rights that are essentially territorial, it is not to be excluded that the treaty applies both to territories over which a State Party has sovereignty (Israel) and to those over which that state exercises territorial jurisdiction (the West Bank). The Court was of the view that as an occupying power, Israel exercises territorial jurisdiction over these territories and therefore it is bound by the

---

eration] filled the gap between what States could in fact do and the steps they would have to take to meet their obligations under the Covenant", Doc. E/CN.4/SR.216, 6 (1951).

12 M. Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, 2003, 274.

13 Concluding Observations on Israel, 4 December 1998, Doc. E/C.12/1/Add.27, para. 8.

14 Additional information by the government of Israel, Doc. E/1989/5/Add.14, para. 1.

15 Concluding Observations on Israel, 31 August 2001, Doc. E/C.12/1/Add.69, para. 15.

provisions of the ICESCR.[16] It concluded that the construction of the wall and the associated restrictive measures impede the liberty of movement of the inhabitants of the occupied territory and also their right to work, to health, to education and to an adequate standard of living as laid down in the ICESCR.[17]

A few other articles of the Covenant also have an explicit international dimension. For example, article 11 (2) provides that State Parties shall take measures through international cooperation that are necessary to improve methods of food production, conservation and distribution of food. In addition, State Parties shall take measures in order to ensure an equitable distribution of world food supplies in relation to need, thereby taking into account the problems of food-importing and food-exporting countries. Articles 22 and 23 emphasise the important role of various forms of international action and cooperation for the achievement of esc rights.

However, there is no clear understanding yet of the extraterritorial reach of the ICESCR. There is no case law that could shed light on this question, because of the non-existence of a complaints procedure under the Covenant. The Committee has referred repeatedly to so-called "international obligations" of State Parties towards other states in its General Comments.[18] For example, in the General Comment on the Right to Water, the Committee stated that,

> "steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries".[19]

The Committee has also identified the need to take into account esc rights as part of structural adjustment programmes and measures to deal with the debt crisis designed and adopted by states and UN agencies.[20] Occasionally the Committee has emphasised in its Concluding Obser-

---

16 Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, 136 et seq. (180, para. 112).

17 ICJ ibid., 191/192, para. 134.

18 See, for example, General Comment No. 12 on the Right to Food, Doc. E/C.12/1999/5, paras 36-41; General Comment No. 14 on the Right to Health, Doc. E/C.12/2000/4, paras 38-42 and General Comment No. 15 on the Right to Water, Doc. E/C.12/2002/11, paras 30-36.

19 Doc. E/C.12/2002/11, para. 33.

20 General Comment No. 2 on International Technical and Assistance Measures, Doc. E/1990/23. See in particular para. 9 of this General Comment.

vations that states from the North should make sure that projects for international (development) cooperation carried out in countries from the South contribute to the realisation of the rights listed in the ICESCR.[21] However, so far an overall discussion of the subject by the Committee from a legal perspective has not taken place.

III. The General Legal Basis for International Obligations of States in the Field of Economic, Social and Cultural Rights

A key issue to be discussed is the general legal basis for international obligations of states in the field of esc rights. Under general international law states have a duty to cooperate.[22] Also the idea of international cooperation for the promotion of human rights has a solid basis in international law.[23] As a minimum, the duty to cooperate would include the obligation not to undertake activities that will result in substantial harm to the rights of other states and their citizens. This idea has been codified, *inter alia*, in the Charter of Economic Rights and Duties of States. Article 24 of the Charter provides that,

> "All States have the duty to conduct their mutual economic relations in a manner which takes into account the interests of other countries. In particular, all States should avoid prejudicing the interests of developing countries".[24]

This would include a negative obligation to refrain from activities that might influence negatively the enjoyment of human rights in other countries. In addition, a positive obligation for states to contribute to the realisation of human rights in other countries may be derived from

---

21 Concluding Observations on Spain, 7 June 2004, Doc. E/C.12/1/Add.99, para. 27; Concluding Observations on Italy, 14 December 2004, Doc. E/C.12/1/Add.103, para. 33.

22 See article 1 (3) UN Charter and 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.

23 See Arts 55 and 56 UN Charter.

24 Charter of Economic Rights and Duties of States, A/RES/3281 (XXIX) of 12 December 1974.

the Declaration on the Right to Development.[25] This Declaration has as its main feature the joint responsibility of all states to contribute to the realisation of the right to development and the obligation of all states to cooperate to achieve that goal.[26]

More specifically, with respect to international human rights law, article 28 of the Universal Declaration of Human Rights provides that,

> "everyone is entitled to a social and *international* order in which the rights and freedoms set forth in this Declaration can be fully realized".[27]

Clearly this means an international order which is based on the idea that all states have a shared responsibility and obligation for realising such an order. With respect to esc rights the idea of international cooperation and a fair international order has been elaborated in arts 2 (1) and 23 ICESCR and the General Comments of the Committee. Mention should also be made of the preamble of the ICESCR which refers to,

> "the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms".

Reference may also be given to trends towards the formation of customary international law in the field of esc rights. Against the background of globalisation, states are more willing than before to adopt a shared responsibility for fighting global poverty. Official declarations by state representatives underscore such responsibilities and contribute to the development of customary international law in this field. For example, in the Millennium Declaration, UN Member States,

> "recognise that, in addition to our separate responsibilities to our individual societies, we have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level.

---

25 Declaration on the Right to Development, A/RES/41/128 of 4 December 1986.

26 This may be concluded from arts 3-6 of the Declaration. See, for example, article 4 (1) which provides that, "States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realisation of the right to development".

27 Emphasis added.

As leaders, we have a duty to all the world's people, especially the most vulnerable ..."[28]

Overall, one might say that international human rights should be qualified as overarching international norms to be respected by all states because of their membership in the UN. These norms may give rise to international (positive and negative) obligations for states on the basis of general international law and on the basis of being a party to the ICESCR and other relevant instruments. However, it should also be recognised that the notion of international obligations is in need of further clarification and specification.

IV. Decisions and Policies of International Organisations that May Effect Economic, Social and Cultural Rights

1. International Financial Institutions

Only states can become parties to the ICESCR. The treaty is not open to international organisations.[29] However, it is obvious that the availability of resources of a country to realise esc rights may be influenced by the strength or weakness of its international financial position and the agreements it may have concluded with the International Financial Institutions (IFI's). The impact of the IMF and the World Bank decisions, policies and programmes on governmental programmes and expenditure in developing countries is considerable in the sense that they often do affect negatively the enjoyment of esc rights.[30] Representatives of the IMF and the World Bank have stated many times that their organisations do not have obligations under the Covenant. To support

---

28 UN Millennium Declaration, adopted unanimously by the UN General Assembly, A/RES/55/2 of 8 September 2000, para. 2.

29 See, however, article 18 ICESCR, according to which ECOSOC may make arrangements with the UN specialised agencies in respect of their reporting to ECOSOC on the progress made in achieving the observance of the Covenant provisions falling within the scope of their activities. In the past, the ILO, UNESCO, FAO and WHO have informed the CESCR about ICESCR-related matters, but not the World Bank and the IMF.

30 See M. Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law*, 2003, Chapter III.

this view, they emphasise that article 24 ICESCR explicitly guarantees the independent position of the constitutions of the specialised agencies and their respective responsibilities, separate from the Covenant.[31] For example, the General Counsel of the IMF, Mr. Gianviti, has argued,

> "For its part, the Covenant is a treaty among States which contains obligations addressed to States. Neither by its terms nor by the terms of the Fund's relationship agreement with the United Nations is it possible to conclude that the Covenant is applicable to the Fund. Moreover, the norms contained in the Covenant have not attained a status under general international law that would make them applicable to the Fund independently of the Covenant".[32]

Neither the IMF nor the World Bank is a human rights agency. For example, the mandate of the IMF as laid down in its Articles of Agreement is limited to adopt and implement policies on the use of its resources that will assist Member States to solve their balance of payments problems.[33] The Articles of Agreement also restrict the ability of the Fund to deal with issues of social policy in its activities in Member States, because it is under an obligation to respect the domestic social and political policies of members.[34]

From a strictly legal point of view this seems to be the correct interpretation. However, it has been suggested by human rights scholars that the IMF and the World Bank have international legal obligations to take full responsibility to respect human rights in situations where the institutions' own projects, policies or programmes have a negative impact on the enjoyment of human rights.[35] The legal ground for this position

---

31 Article 24 ICESCR reads, "Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant".

32 F. Gianviti, *Economic, Social and Cultural Human Rights and the International Monetary Fund*, Doc. E/C.12/2001/WP.5, para. 56. See also para. 23.

33 IMF Articles of Agreement, article V, Section 3 (a). The Articles can be found under <http://www.imf.org/external/pubs/ft/aa/index.htm>.

34 IMF Articles of Agreement, see above, article IV, Section 3 (b).

35 See the Tilburg Guiding Principles on World Bank, IMF and Human Rights (paras 5 and 25), drafted by a group of experts, meeting at Tilburg University, the Netherlands, in October 2001 and April 2002, in: W. van Genugten/ P. Hunt/ S. Mathews (eds), *World Bank, IMF and Human Rights*, 2003, 247-255. See also, S. Skogly, *The Human Rights Obligations*

may be found in the fact that the IFI's are subjects of international law and consequently are bound by general rules of international law. These rules include the human rights provisions of the UN Charter (Arts 55, 56 and 1). The ICESCR should be seen as an authoritative interpretation of these provisions.[36] In this respect the Legal Counsel of the IMF admits that there may be an indirect link between IMF approved programmes in Member States and the Covenant in case a programme is so strict and harsh that it would lead to violations of social and economic rights and consequently to popular unrest or a lack of foreign financing. In such a case the programme may not be implemented.[37] In addition, the IMF and the World Bank are specialised agencies of the UN and thus obliged to contribute to furthering the purposes of the organisation, including the observance of human rights.

The World Bank is an intergovernmental organisation to promote economic growth and development. Its policy and activities are directed towards, *inter alia*, poverty reduction and better standards of living. It is not a human rights organisation, although achieving the purposes of the organisation may relate to the realisation of economic, social and cultural rights in particular. Although, in light of the World Bank's official mandate,[38] only economic considerations shall be relevant for its policy and decisions, one may notice a gradual shift towards an approach which reflects more attention to human rights concerns recently. On the occasion of the 50th anniversary of the Universal Declaration of Human Rights in 1998, the Bank published a booklet on the relationship between development and human rights and the role of the World Bank.[39] According to the Bank it contributes directly to the realisation of many rights that are part of the Universal Declaration by supporting access to primary education, health care, nutrition, sanitation and housing. The World Bank also believes that the realisation of civil and political rights and economic, social and cultural rights is impossible without development. Consequently,

---

of the World Bank and the International Monetary Fund, 2001; A. Clapham, *Human Rights Obligations of Non-State Actors*, 2006, 137-159.

36 Darrow, see note 30, 126-129, 136-137. See also Ph. Sands/ P. Klein, *Bowett's Law of International Institutions*, 2001, 459.

37 Gianviti, see note 32, para. 51.

38 See World Bank's Articles of Agreement, article IV, Section 10. The Articles of Agreement can be found under <http://siteresources.worldbank.org/EXTABOUTUS/Resources/ibrd-articlesofagreement.pdf>.

39 World Bank, *Development and Human Rights: The Role of the World Bank*, 1998.

> "creating the conditions for the attainment of human rights is a central and irreducible goal of development. By placing the dignity of every human being – especially the poorest – at the very foundation of its approach to development, the Bank helps people in every part of the world build lives of purpose and hope".[40]

Development is thus seen as a process of realising social and economic goals and providing specific goods that benefit the poor. These goals and goods are not recognised as rights, which would mean a rights-based approach giving rise to obligations for duty-holders. On the basis of extensive research and a number of interviews with World Bank (former) staff members, M. Darrow has concluded that in practice international human rights standards arise only selectively and usually only marginally in the framework of the Bank's programmes. Human rights norms have been of little practical relevance in the discharge of the Bank's social safeguard functions and assessment procedures. Also, human rights have been of little relevance for the research activities of the Bank and policy development on substantive themes.[41]

In 2003, the then General Counsel of the Bank established a Work Group of World Bank lawyers to study the legal framework applicable to the Bank's work in connection with human rights.[42] This internal process of analysis led to some changes in the traditional approach of the Bank towards human rights. Already in 2004 General Counsel Danino gave as his personal opinion that developments in the field of international human rights protection should be considered by the Bank as part of its decision-making process. He said,

> "in so far as human rights constitute a valid consideration for the investment process, they are properly within the scope of issues which the World Bank must consider when it makes its economic decisions".[43]

In January 2006, a Legal Opinion on Human Rights and the Work of the World Bank was adopted.[44] Its main feature is that it reflects a

---

40 World Bank, see above, 2.

41 Darrow, see note 30, 25.

42 See the contribution by General Counsel R. Danino, "The Legal Aspects of the World Bank's Work on Human Rights: Some Preliminary Thoughts", in: Ph. Alston/ M. Robinson (eds), *Human Rights and Development – Towards Mutual Reinforcement*, 2005, 509-524.

43 Danino, see above, 524.

44 See the paper by the present General Counsel, A. Palacio, "The Way Forward: Human Rights at the World Bank" (October 2006), available at

willingness of the Bank to consider explicitly the human rights dimensions of its activities. The Legal Opinion stated, *inter alia*,

> "The Articles of Agreement permit, and in some cases require, the Bank to recognize the human rights dimensions of its development policies and activities, since it is now evident that human rights are an intrinsic part of the Bank's mission".[45]

The present General Counsel Palacio added that,

> "there is a need for the recognition of the role of human rights as *legal principles*, which may inform a broad range of activities, and which may enrich the quality and rationale of development interventions, and provide a normative baseline against which to assess development policies and programmes".[46]

It remains to be seen, however, whether this new approach of the Bank also means that human rights standards, such as esc rights, actually impose restrictions on the decisions and programmes of the Bank.

Other UN officials and bodies have taken a much more outspoken position on the human rights obligations of international organisations. For example, the UN Special Rapporteur on the Right to Food has said that organisations, such as the World Bank and the IMF "are bound by international law with regard to the right to food".[47] Also the UN General Assembly, in a recent resolution on the right to food, called upon

---

<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21106614~menuPK:51062077~pagePK:34370~piPK:34424~theSitePK:4607,00.html>.

45 Palacio, see above.

46 Palacio, see note 44 (italics in original). The World Bank Inspection Panel may deal with human rights issues in an indirect way. It has the power to examine complaints by third parties who claim to be negatively affected by the programmes the Bank carries out in Member States. The Panel may present recommendations to the Board of Directors on whether the Bank has complied with its own Operational Policies, Procedures and Directives. These parts of the Bank's internal law, *inter alia*, relate to indigenous people, the environment and resettlement activities. They clearly have a link with human rights issues, but the Panel cannot apply human rights law, see K. De Feyter, *World Development Law*, 2001, 233-237.

47 Report of the UN Special Rapporteur on the Right to Food, Doc. E/CN.4/2006/44, para. 41. In the recommendations part of the report he adds that, "international organizations, such as the World Bank, IMF and WTO, with the power to shape the national policies of Governments must respect human rights and refrain from encouraging any policy, programme or project that will violate the right to food or water" (para. 52(*h*)).

international organisations to promote policies and projects that have a positive impact on the right to food and to avoid actions that could negatively affect the realisation of the right to food.[48]

2. The World Trade Organisation

The World Trade Organisation (WTO) was established in 1994 by states with the objective of entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations. However, states also recognised that relations in the field of trade should be conducted with a view to, *inter alia*, raising standards of living and ensuring full employment in a manner consistent with the respective needs and concerns of countries at different levels of economic development.[49] The WTO is not a specialised agency of the UN. Consequently it is not bound by the human rights provisions of the UN Charter.

WTO law on the one hand and international human rights law on the other have a different focus. WTO law primarily aims at facilitating and promoting international trade, while the objective of human rights law is to protect the human rights of individuals on the basis of obligations taken up by states. They are thus separate bodies of law and the interests of players in both fields of law often diverge. However, the WTO does recognise that the process of trade liberalisation should take into account non-trade issues, for instance in the field of agriculture.[50] These non-trade issues include the protection of human rights, such as the freedom from hunger, the right to adequate food and the continuous improvement of living conditions laid down in article 11 ICESCR. A relevant question in this respect is how obligations of states under WTO Agreements relate to their obligations under human rights treaties.[51] This question was raised by Mauritius, a WTO Member State, which argued that the text of the Agreement establishing the WTO,

---

48 A/RES/60/165 of 16 December 2005, para. 16.

49 Agreement Establishing the World Trade Organisation, 15 April 1994, Doc. LT/UR/A/2, Preamble.

50 Article 20 WTO Agreement on Agriculture.

51 See extensively on this subject, K. Mechlem, "Harmonizing Trade in Agriculture and Human Rights: Options for the Integration of the Right to

> "appears to have been carefully drafted so as to avoid countries having to make commitments which would contradict their obligations under other multilateral frameworks".[52]

In other words, WTO commitments may not conflict with pre-existing human rights obligations. However, the reference to human rights obligations in a WTO forum is the exception rather than the rule. Usually developing countries are rather eager to accept trade rules and preferences as part of WTO law, because it is beneficial to the country and in particular to imports and exports oriented companies. There is also very little talk in WTO circles about human rights obligations of Member States. This has also to do with the fact that observance of WTO law is subject to a strict regime of sanctions, while human rights law has to do without strong enforcement measures.

This difference in focus between WTO law and human rights law came very much to the fore when WTO bodies took decisions under its Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) on the subject of patents on essential medicines. These patents, usually in the hands of Western-based pharmaceutical companies, are protected according to strict rules laid down in the TRIPS Agreement. However, in November 2001, WTO Member States recognised the gravity of the public health problems affecting many developing countries, especially those resulting from HIV/AIDS, tuberculosis and malaria. Member States agreed,

> "that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, (…) we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all".[53]

Next, in August 2003 WTO member governments decided to implement this Declaration by making it easier for poor and needy coun-

---

Food into the Agreement on Agriculture", in: A von Bogdandy/ R. Wolfrum (eds), *Max Planck UNYB* 10 (2006), 127 et seq.

52 WTO Doc. G/AG/NG/W/36/Rev.1, 9 November 2000, 45, para. 17 (document presented by Mauritius).

53 WTO Ministerial Conference in Doha, 9-14 November 2001, Declaration on the TRIPS Agreement and Public Health, 14 November 2001, Doc. WT/MIN(01)/DEC/2, para. 4. See further F.M. Abbott, "The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health", *AJIL* 99 (2005), 317 et seq.

tries to import cheaper generic drugs made under compulsory licensing if these countries are unable to manufacture these medicines themselves.[54] This decision should make it easier for those countries to cope with the HIV/AIDS pandemic that constitutes a threat to public health. The decision waived a provision of the WTO-TRIPS agreement that stipulated that production under compulsory licensing must be predominantly for the domestic market. This hampered the ability of poorer countries that cannot produce medicines themselves to import cheaper products from other countries where medicines are patented.[55] It must be noted, however, that in the WTO decision itself there was no mention of the right to health; it was dealt with as a technical trade issue only, and certainly not as an international human rights obligation of Western Member States to promote access to essential medicines in poor countries.

There is clearly a tension between international human rights obligations of States Parties to the ICESCR on the one hand and rules on the protection of intellectual property rights under the TRIPS Agreement on the other.[56] Already in 2000 the UN Sub-Commission on the Promotion and Protection of Human Rights referred to "apparent conflicts" between the two legal regimes and reminded "all Governments

---

54 WTO General Council Decision WT/L/540, 30 August 2003. See on the implementation of this Decision, C.M. Correa, *Implementation of the WTO General Council Decision on Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, 2004, available at <http://www.who.int/medicines/>. This waiver decision got a permanent character by the Decision of the WTO General Council to make it an amendment of the TRIPS Agreement. See General Council Decision WT/L/641, (6 December 2005), and WTO Press Release 2005/426. See also on this topic the article by H.P. Hestermeyer, "Access to Medication as a Human Right", in: A. von Bogdandy/ R. Wolfrum (eds), *Max Planck UNYB* 8 (2004), 101 et seq.

55 WTO Press Release Press/350/Rev.1, Decision Removes Final Patent Obstacle to Cheap Drug Imports (30 August 2003), available at <http://www.wto.org>.

56 See Ph. Cullet, "Patents and Medicines: the Relationship Between TRIPS and the Human Right to Health", *Int'l Aff.* 79 (2003), 139 et seq. and L.R. Helfer, "Human Rights and Intellectual Property: Conflict or Co-Existence?", *NQHR* 22 (2004), 167 et seq.

of the primacy of human rights obligations over economic policies and agreements".[57] In the view of the CESCR,

> "it is incumbent upon developed States, and other actors in a position to assist, to develop international intellectual property regimes that enable developing States to fulfil at least their core obligations (in the field of economic, social and cultural rights) to individuals and groups within their jurisdictions".[58]

The former UN Commission on Human Rights also called upon states,

> "to conduct an impact assessment of the effects of international trade agreements with regard to public health and to the progressive realization of the right of everyone to the highest attainable standard of health".[59]

There is a need to find a flexible way that would contribute to striking a fair balance between the interests protected by both international intellectual property law and international human rights law. In this respect the WTO should do more to take into account human rights inspired arguments in its deliberations and decisions.[60]

3. The European Communities

If we take the European Communities as another example, the first thing that can be observed is that the Community has included respect for human rights as a condition for aid and cooperation in many agreements with third states, while little attention has been given to the observance of human rights in its external actions by the Community itself. Is the European Community under a legal obligation to comply with esc rights in its external activities? The question may be raised, for example, whether the policies adopted within the framework of the

---

57 UN Sub-Commission, Resolution on Intellectual Property Rights and Human Rights, Doc. E/CN.4/SUB.2/RES/2000/7, para. 3.

58 Statement by the Committee on Economic, Social and Cultural Rights on Human Rights and Intellectual Property, Doc. E/C.12/2001/15, para. 13.

59 UN Commission on Human Rights, *Access to Medication in the Context of Pandemics such as HIV/AIDS, Tuberculosis and Malaria*, 11 April 2005, Doc. E/CN.4/RES/2005/23, para. 14.

60 See for example, L.R. Helfer, "Towards a Human Rights Framework for Intellectual Property", 2006, available at <http://ssrn.com/abstract=891303>.

common agricultural policy and common commercial policy undermine the sustainability of local food production in developing countries by allowing subsidies to farmers from the North and impeding income generation by local farmers in the South by means of imposing high tariff barriers for agricultural products. Although the relationship with the obligations of State Parties under the ICESCR may be more indirect, there clearly is a concern about the human rights effects of these measures agreed upon by Member States and implemented by the EU institutions. In the area of agriculture and trade, the Community is competent with the exclusion of the Member States.[61] On the basis of article 281, Treaty Establishing the European Community (TEC), the Community has international legal personality. It is thus a subject of international law. Although neither the European Community, nor the European Union is a party to human rights treaties such as the ICESCR.[62] It can be argued that article 6 of the Treaty on the European Union may act as the legal basis for the Community to respect human rights in all its internal and external activities, including its agricultural and trade policy towards third states.[63] According to one author,

> "there will only be a breach of Article 6(2) EU if the Union's action has as a direct consequence the human rights violation in a third country".[64]

From the perspective of the indivisibility and equality of civil and political rights and esc rights, this conclusion may also be applicable in case of a violation of an esc right.

In the area of the EU common trade policy a Regulation was adopted which was meant to implement the WTO General Council

---

61 See article 34 and 132 TEC respectively. See also article III-228, III-230 and III-314 of the Treaty Establishing a Constitution for Europe, 29 October 2004.

62 However, all EU Member States have ratified or acceded to the ICESCR.

63 Article 6 Treaty on the European Union provides, "1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. 2. The Union shall respect fundamental human rights, as guaranteed by the European Convention on Human Rights and Fundamental Freedoms". See also article I-9 and III-292 Treaty Establishing a Constitution for Europe. The European Union has no legal personality. However, pursuant to article I-7 of the Treaty Establishing a Constitution for Europe the Union will have legal personality.

64 M.K. Bulterman, *Human Rights in the Treaty Relations of the European Community*, 2001, 73-74.

Waiver Decision of August 2003 on trade in essential medicines in the legal order of the European Communities. It allows manufacturers of generic pharmaceuticals, using a compulsory license, to produce patented medicines for export to countries that lack sufficient capacity to produce them.[65] Human rights considerations did not play a role when the draft Regulation was introduced by the European Commission and discussed in the European Parliament. However, EU Commissioner Bolkestein said that,

> "the WTO decision and our proposed Regulation can help save lives by helping countries in need to acquire affordable medicines, without undermining the patent system, which is one of the main incentives for the research and development of new medicines".[66]

In the European Parliament it was noted that the idea of solidarity with the have-nots in the developing countries was the basis for the Regulation.[67] As a consequence of this Regulation, Commissioner for Trade Mandelson expected a decrease in prices for medicines produced on the basis of a compulsory license for export to developing countries.[68] This might have a positive effect on the affordability of essential medicines for people with low incomes in developing countries.

In the area of development cooperation, the European Community and its Member States share legal powers. Community policy is complementary to the policy of the Member States.[69] According to article 177 (2) TEC, Community policy in the field of development cooperation shall contribute to the development and consolidation of the rule of law and respect for human rights. This is a clear indication that the Community has international human rights obligations in a particular area beyond the territorial scope of the Community itself. Such obligations are not limited to negative obligations to abstain from violations, but extend to positive obligations to actively contribute to the achievement of these goals.[70] Article 178 adds that the Community shall take into account the objectives of its development policy in the (other) policies that it implements and that are likely to affect developing coun-

---

65 Regulation (EC) 816/2006, 17 May 2006, on Compulsory Licensing of Patents on Pharmaceutical Products, *OJ* L 157/1, 9 June 2006.

66 EU Press Release IP/04/1332, 29 October 2004.

67 Doc. A6-0242/2005, 19 July 2005, page 76.

68 EU Press Release IP/05/1523, 1 December 2005.

69 Article 177(1) TEC.

70 Bulterman, see note 64, 92.

tries.[71] In addition, the important Cotonou Agreement between the Members of the African, Caribbean and Pacific Group of States, and the European Community and its Member States on trade and aid issues, contains a human rights clause, including an undertaking to respect human rights which shall underpin, on the basis of reciprocity, the domestic and international policies of the parties, and which constitutes the essential element of the agreement.[72] This agreement not only imposes obligations on ACP countries to observe human rights, but also on the European Community and its Member States to observe human rights standards in its cooperation with these countries. It thus has a reciprocal scope. This commitment to the promotion and advancement of human rights and the eradication of poverty as goals of the external action and policy of the Union is reaffirmed in the Treaty establishing a Constitution for Europe.[73]

4. United Nations Sanctions

Multilateral sanctions, adopted by the UN Security Council under Chapter VII of the UN Charter, give rise to special types of international coercive measures that may have serious human rights effects in the target state. Usually the purpose of such sanctions is to force the government of the target state to change its conduct, or to punish the government of the target state for its conduct that is in contravention of international law. Often UN sanctions are a countermeasure against human rights abuses by a regime, while at the same time sanctions may have a negative effect on the human rights of the population, but these effects are intended or taken for granted. The fact that sanctions may have a negative effect is part of the concept; however, it is important to look at the acceptability of the effects from a human rights perspective. In a way sanctions are indiscriminate, because the sanctioning states or body have no control over the target state. In a study for the UN Sub-Commission on the Promotion and Protection of Human Rights, Mr. Bossuyt has pointed out, for example, that the UN sanctions against

---

71 Compare article III-218 Treaty Establishing a Constitution for Europe.

72 Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou (Benin), 23 June 2000, [2000] *OJ* L 317/3 (Cotonou Agreement), article 9.

73 Article III-292 Treaty Establishing a Constitution for Europe.

Iraq have had deleterious effects on the living conditions of the Iraqi people. He was of the view that,

> "the sanctions regime against Iraq has as its clear purpose the deliberate infliction on the Iraqi people of conditions of life (...) calculated to bring about its physical destruction in whole or in part".[74]

This very critical study concludes that,

> "sanctions regimes that clearly violate international law, especially human rights and humanitarian law, need not be respected. This is especially true when the imposers are clearly on notice of those violations and have undertaken no effective modification".[75]

On the other hand, one could say that the initial violation of human rights by a regime is worse than the abuse through sanctions, and that consequently sanctions as a response are legitimate? Furthermore, one should bear in mind that sanctions can be used for propaganda purposes by the target state; the regime may overemphasise the negative human rights effects of the sanctions. The question therefore is whether it is possible to include in the sanction measures adopted by the Security Council safeguards and exemptions for the protection of minimum levels of those esc rights directly relating to the livelihood of people, such as the right to food, health and work, so-called 'smart' sanctions.[76] In 1997 the CESCR adopted a General Comment on the relationship between economic sanctions and respect for esc rights.[77] It recommends, *inter alia*, that esc rights must be taken fully into account when designing a sanctions regime. In addition, the body imposing the sanctions has an obligation to take steps in order to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country.[78] The Committee therefore indicated that economic, so-

---

74 "The adverse consequences of economic sanctions on the enjoyment of human rights", Working Paper prepared by Mr. M. Bossuyt, Doc. E/CN.4/Sub.2/2000/33, para. 72. One has to notice though that ironically the Oil for Food Programme was originally established in order to provide for the humanitarian needs of the Iraqi people according to S/RES/986 (1995) of 14 April 1995.

75 Bossuyt, see above, para. 109.

76 See A. Tostensen, "Are Smart Sanctions Feasible?", *World Politics* 54 (2002), 373 et seq.

77 General Comment No. 8 on the Relationship between Economic Sanctions and the Respect for Economic, Social and Cultural Rights, Doc. E/C.12/1997/8.

78 General Comment No. 8, see above, paras 12-14.

cial and cultural rights could give rise to international obligations for the international community, represented by the UN Security Council.

V. Human Rights Obligations of States as Members of International Organisations

This section will focus on the relationship between the conduct of states as members of international organisations and their obligations under the ICESCR. It is crucial to look at the nature and scope of international human rights obligations of states in more detail, notably from the perspective of (a) the nature of the right at stake and (b) the actual context and circumstances of the conduct, in particular whether the state acted in terms of its opportunity to influence the conduct of international organisations. It goes beyond the aim and scope of the present contribution to explore this in detail; however, a few ideas will be presented.

It has been suggested by some commentators to apply the typology of obligations (to respect, to protect, to fulfil), developed in the academic debate on human rights, to qualify and assess the international conduct of states in the area of esc rights.[79] The obligation *to respect* means a duty for the state to restrain from any action that might impede the realisation of esc rights in other countries. The obligation *to protect* implies an obligation for the state to ensure that non-state actors (such as international organisations) in which it exercises some degree of influence or control observe the enjoyment of esc rights in other countries. The obligation *to fulfil* means that (rich) states have a duty to provide some form of bilateral or multilateral assistance to needy people living in poor countries in order to realise their esc rights.

1. Obligations to Protect

A key issue is the alleged obligation of a state *to protect* the esc rights of people in another state from those decisions, programmes and policies of international organisations of which the former state is a member. Do (rich) states, as members of specialised agencies (IMF, IBRD, IDA), have an obligation as States Parties to the ICESCR, to uphold these

79 Craven, see note 11, 147-150; Sepúlveda, see note 12, 373-375.

treaty norms, when they take part in decision-making about lending and aid conditions for poor countries? One may think of the human rights effects of conditional lending policies of these agencies as part of Structural Adjustment Programmes or Poverty Reduction Strategy Papers. Such loans may be dependent on the reorganisation and reallocation of government expenditure and the budget of developing states, such as spending more resources on restructuring foreign debt. If such a reorganisation leads to cuts in spending for social services, the enjoyment of the right to health, housing and education of vulnerable groups in society may be at risk. For example, the then UN Special Rapporteur on the Right to Education, Ms. K. Tomaševski, has pointed out that the price of debt servicing in Uganda, in terms of domestic budgetary reallocations and export-promotion, was impoverishment of the population. She also referred to the conflicting types of international obligations the government of Uganda faced: debt repayment and human rights obligations.[80]

The view of the IMF in this respect is that the members of the Fund in their actions in the governing organs of the IMF,

> "are not free to give access to its resources for uses not permitted by the Fund's Articles of Agreement, or to divert resources entrusted to the Fund by some of its members to uses other than those stipulated by donors".[81]

However, in its General Comment on the Right to Health, the CESCR observed that,

> "States parties have an obligation to ensure that their actions as members of international organisations take due account of the right to health. (...) States parties which are members of international financial institutions, notably the IMF, the World Bank, and regional development banks, should pay greater attention to the protection of the right to health in influencing lending policies, credit agreements and international measures of these institutions".[82]

---

80 Report on a Mission to Uganda, Doc. E/CN.4/2000/6/Add.1, paras 24-29.

81 Gianviti, see note 32, para. 27.

82 General Comment No. 14, see note 18, para. 39. Compare also the Concluding Observations of the CESCR on this point. In its Observations on the United Kingdom, the Committee said that it, "encourages the State Party, as a member of international financial institutions, in particular the IMF and World Bank, to do all it can to ensure that the policies and decisions of those organisations are in conformity with the obligations of States parties under the Covenant (...)", see Doc. E/C.12/1/Add. 79, para. 26. See

It may be argued, however, that there is a lack of legal authority for the proposition that states that voted in favour of so-called "destructive acts" (in the sense of violating esc rights) may be held responsible for their voting behaviour. The arguments in support of this view are that the ICESCR does not have a jurisdiction clause and that states which voted in favour of a decision do not exercise control over the recipient state, nor over the international organisation. Actually, international organisations yield control to the states that contribute financially to the organisation, while at the same time states yield control to the organisation to execute its mandate. Therefore, in a way, there is a vacuum in the sphere of controlling the execution of the decisions of these organisations and a vacuum also in the sphere of accountability and responsibility. It is suggested, however, that states, as members of international organisations, which have also ratified the ICESCR, are bound to comply with their obligations under the Covenant in their capacity as State Parties, also when they act as members of the decision-making group in an international organisation.

For example, when Member States of the IMF and the World Bank decide upon policies, programmes and projects that impact upon the level of basic services in a developing state, they must take into account and respect the relevant national and international human rights instruments that apply to that state and to themselves. They may be held accountable for their acts or failure to act under article 2 (1) ICESCR as State Parties.[83] In this respect it is quite interesting to note that Congress in the United States, which is not a State Party to the ICESCR, passed a bill in 2000 opposing "user fees" on basic health care and edu-

---

also General Comment No. 15 on the Right to Water, Doc. E/C.12/2002/11, paras 35-36; General Comment No. 18 on the Right to Work, Doc. E/C.12/GC/18, para. 30.

83 The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para. 19, *NQHR* 15 (1997), 244 et seq. and Tilburg Guiding Principles, see note 35, para. 7 and para. 27. In 2001, the CESCR encouraged Germany, "as a member of international financial institutions, in particular the International Monetary Fund and the World Bank, to do all it can to ensure that the policies and decisions of those organizations are in conformity with the obligations of States parties to the Covenant, in particular the obligations contained in articles 2(1), 11, 15, 22 and 23 concerning international assistance and cooperation", Concluding Observations on Germany, Doc. E/C.12/1/Add.68, para. 33.

cation as part of lending programmes adopted by the IMF and the World Bank.[84]

International human rights obligations of Germany as a member of the World Bank were raised by *FoodFirst International Action Network (FIAN)*, an NGO that aims to promote the right to feed oneself, in the context of a World Bank supported project for a pipeline in Chad and Cameroon. This project was approved by the World Bank in 2000. Communities of people living in areas of the section of the pipeline experienced negative effects of the project. People lost land and physical access to forest resources (plants and animals) and were affected by dust-related air pollution. The German Executive Director, as a member of the Board of Directors of the Bank, voted in favour of approving the pipeline project. In FIAN's view, the primary responsibility for the negative human rights effects of the project lie with the government of Chad (a State Party to the ICESCR) and the World Bank. However, Germany is co-responsible, because it approved the project in the framework of the World Bank.[85] Another example of Germany's international human rights obligations relates to a project approved by the IFC in January 2006. It concerned an IFC loan to the US mining company Newmont for a gold mining project in the Ahafo South region in Ghana. FIAN informed the German authorities prior to the approval of the loan about violations of the right to food, housing, health and water that resulted from the activities undertaken by Newmont.[86] Thousands of people in the affected region lost access to land and their homes, they were not offered replacement land and some of them were resettled involuntarily. In addition, the mining company dammed a river which led

---

84 The "user fees" provision, (Sec. 596), is a part of the Fiscal Year 2001 Foreign Operations Appropriations Bill. It states that, "The Secretary of the Treasury shall instruct the United States Executive Director at each international financial institution (as defined in section 1701(2) of the International Financial Institutions Act) and the International Monetary Fund to oppose any loan of these institutions that would require user fees or service charges on poor people for primary education or primary health care, including prevention and treatment efforts for HIV/AIDS, malaria, tuberculosis, and infant, child, and maternal well-being, in connection with the institutions' lending programs", see <http://www.twnside.org.sg/title/user.htm>.

85 See U. Hausmann, *Germany's Extraterritorial Human Rights Obligations in Multilateral Development Banks*, 2006, 15-18, available at <www.fian.org>.

86 Hausmann, see above, 18-19.

to a loss of access to safe drinking water for local communities. Furthermore, stagnant water in certain areas caused an increase in the number of mosquitoes and raised the risk of malaria. The German Minister for Development Cooperation, who is the responsible minister for the IFC, decided to vote against the approval of the loan. In a letter to FIAN she mentioned, *inter alia*, involuntary resettlement as a reason for not approving the loan. The German Executive Director in the IFC was the only one who gave a negative vote; three other Executive Directors abstained (United States, Belgium, the Netherlands). It is not clear whether the German authorities explicitly used human rights standards as a touchstone for not approving the loan. It is also doubtful whether the German government did recognise its international human rights obligations under the ICESCR as a legal framework that is also applicable in decision-making in international financial organisations. However, detailed information provided by FIAN helped in informing the German government about the negative consequences of the project from a human rights perspective. It was willing to take up its responsibilities in this case, though most likely not its human rights obligations.

2. Obligations to Respect

It may be argued that states also have an obligation *to respect*. This obligation prohibits a state from directly interfering with the enjoyment of esc rights of persons in other countries. For example, on the basis of the obligation to respect a state should refrain from food embargoes or other coercive measures towards other states.[87] In addition, states should refrain from promoting trade and producer's subsidies (such as EU agricultural export subsidies) benefiting their own nationals which at the same time may be to the detriment of local traders and producers in developing countries.[88] With respect to sanctions it has been put forward by the CESCR that states and the international community must do everything that is possible to protect at least the core content of esc rights of the affected people in a target state, with special attention for the situation of vulnerable groups in that country. When the af-

---

87 See, for example, Doc. CHR/RES/2002/22 of 22 April 2002 on Human Rights and Unilateral Coercive Measures.

88 See the Preliminary Report of the UN Special Rapporteur of the Commission on Human Rights on the Right to Food, Mr. J. Ziegler, Doc. A/56/210, paras 72-87.

fected state is also a State Party to the ICESCR, it is doubly incumbent upon other states to respect and take into account the obligations arising from the Covenant.[89] De Wet argues that limitations to esc rights as part of UN sanctions are acceptable, provided that they are in accordance with the principle of proportionality and protect the core of the rights involved, while at the same time giving the Security Council flexibility in order to respond to breaches of and threats to international peace and security.[90] A parallel may be drawn with article 4 ICESCR, the limitations clause.[91] The nature of a right, mentioned in article 4 as a standard for the permissibility of limitations, should be understood as the essence or the very core of a right, that is that element without which a right loses its significance as a human right.[92] Article 4 clearly has a function to protect the rights of people, not to permit the state to impose all kinds of limitations. This provision was not meant to introduce limitations on rights affecting the subsistence, survival or integrity of people.[93] It is submitted that this interpretation should be applied in the same manner to encroachments upon esc rights which may result from a sanctions regime adopted by the Security Council.

3. Obligations to Fulfil

The most controversial issue is whether states have positive obligations to contribute to the realisation of esc rights in other countries, for instance by providing development aid or other forms of financial support. Stated differently, do states have international obligations *to fulfil*

---

89 General Comment No. 8, see note 77, paras 7, 8, 14.

90 E. de Wet, "Human Rights Limitations to Economic Enforcement Measures under Article 41 of the United Nations Charter and the Iraqi Sanctions Regime", *LJIL* 14 (2001), 277 et seq.

91 Article 4 reads, "The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the *nature* of these rights and solely for the purpose of promoting the general welfare in a democratic society", (Emphasis added.) Compare also article 5 (1) ICESCR.

92 See the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, para. 56, *HRQ* 9 (1987), 122 et seq.

93 Limburg Principles, see above, paras 46-47.

the rights in other countries? It has been argued that there exists a wider duty to aid those in need in other countries for governments and international organisations with the resources to do so. The ground of such a duty would be the general moral duty to help fulfil human needs.[94] Recently, it has been put forward by the International Council on Human Rights Policy that all states have transnational obligations, supplementary to their national obligations, in order to help poor people in other countries whose esc rights are unmet when this is due to the misconduct or inability of their own government. In the case of esc rights it is not always possible to identify a violator, because the state may be unable to fulfil its obligations due to a lack of sufficient resources. In such cases, violations of esc rights may trigger obligations of other states and international organisations to intervene and aid with the sole purpose of protecting the victims from further suffering. The "gravity of need" or the seriousness of the violation should determine the nature of assistance by the international community.[95] The legal basis for such an obligation may be found in the case law of the ICJ, according to which states owe certain obligations to the international community as a whole. These obligations *erga omnes* relate, *inter alia*, to the protection of the basic rights of the human person,

> "By their very nature, (...) they are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection".[96]

In its General Comment on article 2 (1), the CESCR stated that states have a duty to cooperate with other states for development and thus for esc rights. It adds that,

> "it is particularly incumbent upon those states which are in a position to assist others in this regard".[97]

General Comments, however, although authoritative interpretations of a treaty, do not bind State Parties. They have a soft law character. It might indeed be questioned whether the duty to cooperate also implies

---

94 See, for example, Beetham, see note 5, 129. Compare also J. Rawls, *The Law of Peoples*, 2000.

95 International Council on Human Rights Policy, *Duties Sans Frontières – Human Rights and Social Justice*, 2003, 19-21, 24-25, 39-40, available at <www.ichrp.org>.

96 Case Concerning the Barcelona Traction, Light and Power Company Ltd., ICJ Reports 1970, 3 et seq. (32, para. 33).

97 General Comment No. 3, para. 14 on the Nature of States Parties Obligations, Doc. E/1991/23.

an obligation to provide aid to assist in the realisation of esc rights in other countries. De Feyter argues that the already mentioned Declaration on the Right to Development does not imply an obligation for developed states to commit part of their resources to realise esc rights in other countries. The Declaration only embodies a progressive obligation for states to formulate international development policies.[98] Alston and Quinn, however, who did an in-depth analysis of the drafting history of article 2 (1), concluded that,

> "On the basis of the preparatory work it is difficult, if not impossible, to sustain the argument that the commitment to international cooperation contained in the Covenant can accurately be characterized as a legally binding obligation upon any particular state to provide any particular form of assistance. It would, however, be unjustified to go further and suggest that the relevant commitment is meaningless. In the context of a given right it may, according to the circumstances, be possible to identify obligations to cooperate internationally that would appear to be mandatory on the basis of the undertaking contained in Article 2(1) of the Covenant. Moreover, policy trends and events in the general area of international development cooperation subsequent to the adoption of the Covenant in 1966 may be such as to necessitate a reinterpretation of the meaning to be attributed today to Article 2(1)".[99]

Such (international) obligations may be applicable if a developed state enters into a bilateral or multilateral agreement with a developing state to financially assist the construction of hospitals or schools or to support a literacy project or a micro credit programme for rural women. Then there is a clear link with the implementation of a specific right (health, education, work), framed as part of a legally binding agreement between states or in the framework of an international organisation. An example of changing policy trends in the area of international (UN) development cooperation is the so-called 20/20 formula: the idea that,

---

98 De Feyter, see note 46, 23-24. See in particular article 4 (1) of the Declaration on the Right to Development.

99 Ph. Alston/ G. Quinn, "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights", *HRQ* 9 (1987), 156 et seq. (191).

> "interested developed and developing country partners could agree on mutual commitments to allocate, on average 20 per cent of their national budget, respectively, to basic social programmes".[100]

Whenever a state, on the basis of free consent, concludes such an agreement, it is justified to say that both states have an obligation to comply with such a commitment. That would mean that a donor state is under an obligation to allocate 20 per cent of its development aid to expenses for social programmes, providing the recipient state itself is also allocating 20 per cent of its own budget for social expenses. A similar proposal has been made by the then Independent Expert of the UN on the Right to Development, Mr. A. Sengupta. He suggested,

> "a compact between the donor countries of the OECD, the financial institutions and the concerned developing countries, to realise three basic rights – the right to food, the right to primary health care and the right to education – within a specific time period".[101]

Such an international agreement would give rise to obligations for the states that take part to provide assistance for the realisation of these rights in other states. It is important to note that international obligations of donor states are complementary to those of the developing states themselves to guarantee an adequate standard of living for their population.

From a more general perspective, the Committee has said that, as poverty is a global phenomenon, there are some core obligations resulting from esc rights that have a crucial role to play in national and international development policies. These core obligations establish an international minimum threshold. It is incumbent on all those actors who can assist to help developing countries respect this threshold,

> "if a national or international anti-poverty strategy does not reflect this minimum threshold, it is inconsistent with the legally binding obligations of a state party".[102]

In addition, the Maastricht Guidelines state that the failure of a state to take into account its international legal obligations in the field of esc rights when entering into bilateral or multilateral agreements with other

---

100 Agenda for Development, para. 93, approved by the UN General Assembly, A/RES/51/240 of 20 June 1997. This 20/20 formula was also part of the outcome of the World Summit for Social Development, held in Copenhagen in 1995.

101 Doc. E/CN.4/1999/WG.18/2, discussed by De Feyter, see note 46, 28-30.

102 Statement on Poverty and the ICESCR, Doc. E/C.12/2001/10, para. 17.

states, international organisations or multinational corporations is a violation of esc rights.[103]

Are there other forms of positive international obligations "to fulfil" the enjoyment of esc rights in other countries? Perhaps a good example are the efforts undertaken by some governments of developed states to promote access to cheap anti-HIV/AIDS medicines for developing countries in Africa and Asia. Canada was the first country that actively promoted such access. In May 2004, the Canadian legislature adopted an emergency law which makes it possible for Canadian producers of generic anti-AIDS medicines to provide such medicines at a cheap rate to countries with a serious AIDS problem, even if these medicines are protected by patents. This law is meant to implement the WTO-TRIPS waiver decision in the Canadian legal order.[104] When the Bill was considered in Parliament there was no reference to international human rights obligations of Canada emanating from the ICESCR. However, this may still be seen as a good example of a state, recognising the public health dangers of contagious diseases in developing countries, feeling a shared responsibility for contributing to the promotion of the health conditions of poor people in poor countries.

VI. Concluding Remarks

Overall, it may be concluded that the subject of international obligations of states as parties to the ICESCR is still in a stage of development. The legal framework is still "under construction": it is rudimentary and partly of a soft law nature. However, there are good reasons to subscribe to the conclusion that negative international obligations to re-

---

103 Maastricht Guidelines, see note 83, para. 15(*j*).

104 Bill C09, *An Act to Amend the Patent Act and the Food and Drugs Act (The Jean Chrétien Pledge to Africa)*, House of Commons, 3rd Sess., 37th Parliament, 52-53 Elizabeth II, 2004, entered into force on 14 May 2004. See also R. Elliot, "Step Forward, Backward, and Sideward: Canada's Bill on Exporting Generic Pharmaceuticals", *HIV/AIDS Policy and Law Review* 9-3 (December 2004), available at <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=844>; "UN Rights Expert Welcomes Canadian Initiative on Access to Low-Cost Drugs in Developing Countries", UN Press Release, 7 November 2003, available at <http://www.unhchr.ch/html/menu2/7/b/mhealth.htm>.

spect the enjoyment of esc rights are more tangible and probably stronger than positive obligations to protect and to fulfil.

It may be concluded that international obligations to respect are part of existing human rights law (*de lege lata*), while obligations to protect and to fulfil are still part of the law as it ought to be (*de lege ferenda*). There is clearly a need for further legal confirmation and progressive legal development of the moral idea that the ICESCR ought to be read as also implying international obligations of states to people in other countries who are in need of assistance in order to enjoy their basic esc rights.

The relevant bodies of international institutions and their Member States should become much more aware of and sensitive to the impact their policies and decisions may have on the enjoyment of esc rights in both Member States and in third countries. Therefore, the concept of international obligations should be further clarified and supported by state practice on a national level, in bilateral relations and in the framework of multilateral institutions. As international human rights obligations are often a political issue, it requires political will to accept them, because they limit the freedom of states to act abroad and in many cases other interests (economic, military, financial) are also involved. Finally there is a need for elaboration and application of international human rights obligations in the case law of courts and the quasi-jurisprudence of the UN human rights treaty bodies. In an era of globalisation and interdependence, there is a particular need for this.

The "Breakthrough" of the Right to Food: The Meaning of General Comment No. 12 and the Voluntary Guidelines for the Interpretation of the Human Right to Food

Sven Söllner[1]

I. Sources of the Right to Food
  1. Major Human Rights Instruments
  2. Humanitarian Law
  3 Declarations
  4. Regional International Law
  5. National Constitutions
II. General Comment No. 12
  1. State Obligations Under the Right to Adequate Food
    a. Respect
    b. Protect
    c. Fulfil
  2. The Normative Content of Article 11 ICESCR
    a. Adequacy
    b. Availability
    c. Accessibility
  3. The General Principles of the ICESCR
    a. "Maximum of Available Resources" and "Progressive Realisation"
    b. Minimum Core Content/Core Obligation
    c. Non-Discrimination
    d. Participation
    e. Extraterritorial Obligations

---

1 This article is based on a working paper written together with Jennie Jonsén for a Symposium in Mannheim (IBSA – Indicators for the Right to Food, 22 and 23 May 2006, Mannheim).

A. von Bogdandy and R. Wolfrum, (eds.),
Max Planck Yearbook of United Nations Law, Volume 11, 2007, p. 391-415.
© 2007 Koninklijke Brill N.V. Printed in The Netherlands.

III. Voluntary Guidelines
1. Background
2. Legal Status
3. Content
a. Main Content
b. Structure and Content
4. Significance

The right to food was finally established in international law in article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) as a legal binding norm, but it did not receive the necessary attention for a long time.

FoodFirst Information and Action Network (FIAN) was set up in 1986. As an NGO it focussed on the right to food; the Committee on Economic, Social and Cultural Rights (CESCR) was established as an expert body of ECOSOC and became operative in 1987. It started to improve the state reporting procedure of the ICESCR States parties. Finally the Office of the High Commissioner for Human Rights (OHCHR) began by promoting and coordinating the human rights efforts of the UN since 1993.

But from a legal point of view there was still the need to clarify the right to food. It was necessary to analyse the normative content of article 11 to guide States parties on their way to realise the right to adequate food. More than all other documents or commentaries *General Comment No. 12* on *The Right to Adequate Food* and the *Voluntary Guidelines to Support the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security* are of outstanding significance concerning the interpretation of the right to food.

I. Sources of the Right to Food

1. Major Human Rights Instruments

The right to food was first established in 1948 in the – non-binding, but universally recognised – Universal Declaration of Human Rights,[2] in

[2] A/RES/217 (III) of 10 December 1948; M. Haedrich, "Von der Allgemeinen Erklärung der Menschenrechte zur internationalen Menschenrechtsordnung", *JA* 31 (1999), 251 et seq.

article 25 and has since been spelt out in various declarations and treaties. But the most important binding guaranty of the right to food became and remained the ICESCR.

Article 11 ICESCR reads:

> "1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food … The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
>
> 2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
>
> (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
>
> (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need."

A systematic research reveals that quite a number of other international human rights instruments include norms that deal with the right to food. Among them are article 6 of the International Covenant on Civil and Political Rights of 1966; article 12 of the Convention on the Elimination of All Forms of Discrimination against Woman of 1979; article 24 (2) e) and article 27 of the Convention on the Rights of the Child of 1989 and para. 19 of the United Nations Millennium Declaration (2000).

2. Humanitarian Law

International humanitarian law is also regulating the supply of food.[3] But humanitarian law, as strictly binding law, is only applicable under certain circumstances, namely in armed conflicts.

3. Declarations

In para. 31 of the Vienna Declaration and Programme of Action of the 1993 World Conference on Human Rights states are called upon,

> "to refrain from any unilateral measure not in accordance with international law and the Charter of the United Nations that creates obstacles … and impedes the full realization of the human rights set forth in the Universal Declaration of Human Rights and international human rights instruments, in particular the rights of everyone to a standard of living adequate for their health and well-being, including food … The World Conference ... affirms that food should not be used as a tool for political pressure."[4]

The Rome Declaration on World Food Security of 1996 reaffirms the right of everyone to have access to safe and nutritious food, consistent with the right to adequate food and the fundamental right of everyone to be free from hunger. Its World Food Summit Plan of Action reaffirms in para. 12 that each state should contribute to the full enjoyment by all of their human rights in order to achieve the objective of food security for all. The United Nations Millennium Declaration required "to halve, by the year 2015, the proportion of the world's people whose income is less than one dollar a day and the proportion of people

---

[3] For example in article 7 Hague Convention (IV) respecting the Laws and Customs of War on Land (1907); arts 18, 20, 26, 28, 31, 46, 51 Geneva Convention Relative to the Treatment of Prisoners of War (1949); arts 15, 23, 36, 40, 49, 50, 51, 55, 59, 60, 61, 62, 76, 87, 89, 91, 100, 108, 127 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949); Para. 6 Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974) and arts 54, 69, 70 of the Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977); arts 5, 14, 18 of the Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1977).

[4] Doc. A/CONF.157/23 of 12 July 1993.

who suffer from hunger ..." and, "to promote gender equality and the empowerment of women as effective ways to combat poverty, hunger and disease and to stimulate development that is truly sustainable."

4. Regional International Law

Another scope of the right to food is regional international law. The most relevant instruments here are the regional bills of rights. Following the example of the Universal Declaration of Human Rights and the core international human rights instruments of the United Nations, these regional covenants are in a better position to define the important human rights aspects in the specific regions of the world, e.g. cultural or economic aspects. The right to food is protected among others in article 12 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, the so called Protocol of San Salvador (1988). Article 17 of the Cairo Declaration on Human Rights in Islam (1990) which states, "... the right of the individual to a decent living which will enable him to meet all his requirements and those of his dependents, including food ...". Article 34 of the European Charter of Fundamental Rights of the European Union of 2000 and article 15 of the Additional Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of 2000 entail a guaranty of social security and social assistance, respectively the right to food security.

5. National Constitutions

The right to food (either for the whole population or for vulnerable groups) can also be found in some national constitutions such as: Brazil, Colombia, Congo, Costa Rica, Cuba, Ecuador, Ethiopia, Guatemala, Guyana, Haiti, Iran, Malawi, Moldova, Namibia, Nicaragua, Nigeria, North Korea, Pakistan, Paraguay, Peru, the Philippines, Puerto Rico, South Africa, Sri Lanka, Suriname, Uganda, Ukraine, Macedonia and Russia. Furthermore, there are several constitutional provisions protecting a broader spectrum, such as an adequate standard of living, dignified life, or the right to social security which include the right to food.

II. General Comment No. 12

In 1999 the CESCR issued its General Comment No. 12 on the Right to Adequate Food.[5] This is currently the most authoritative interpretation of the right to food within the UN human rights system and reflects the present state of international law. However, it must be borne in mind that the CESCR has finalised since then six more General Comments on thematic issues, which interpret other rights enshrined in the Covenant, thereby describing further aspects of the enjoyment of these rights. Therefore the General Comments must be interpreted in a coherent manner.

1. State Obligations Under the Right to Adequate Food

The nature of the legal obligations of States parties is defined in article 2 of the ICESCR and has as well been dealt with in the Committee's General Comment No. 3 (1990).[6] States parties under the CESCR have three different levels of obligations, in particular to respect, protect and fulfil.[7]

a. Respect

Para. 15 of the Comment reaffirms that "the obligation to *respect* existing access to adequate food requires States parties not to take any measures that result in preventing such access."[8] The obligation to respect requires the state, and hence all its organs and agents, to abstain from doing anything that violates the integrity of the individual or infringes

---

5 Doc. E/C.12/1999/5 of 12 May 1999.

6 The nature of States parties Obligations, Doc. E/1991/23 of 1 January 1991.

7 The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 1997, para. 7, *NQHR* 15 (1997), 244 et seq.; M. Craven, *The International Covenant on Economic, Social, and Cultural Rights – A Perspective on its Development*, 1995, 109 et seq.; M.M. Sepúlveda Carmona, *The Obligations of the State under the International Covenant on Economic, Social and Cultural Rights*, 2002, 167 et seq.; W. Kälin/ J. Künzli, *Universeller Menschenrechtsschutz*, 2005, 100 et seq.; E. Riedel, "The Human Right to Water", in: K. Dicke/ S. Hobe/ K.U. Meyn/ A. Peters/ E. Riedel/ H.J. Schütz/ C. Tietje (eds), *Weltinnenrecht – Liber amicorum Jost Delbrück*, 2005, 593 et seq.

8 Emphasis in original.

on his or her freedom to use the material resources available, which best satisfy the personal basic needs.[9]

b. Protect

The obligation to protect requires measures by the state to ensure that enterprises or individuals do not deprive the access to adequate food. The full realisation of the right to food obliges States parties to protect every human being against restrictions from third parties. State parties have to guarantee with all appropriate means the protection of the affected population.

c. Fulfil

The obligation to fulfil requires the state to take the measures necessary to ensure for each person opportunities to obtain satisfaction of those needs, according to the right to food, which cannot be secured by personal efforts.[10] Much more than the obligation to respect and protect, this obligation is dependent on the availability of resources. The obligation to fulfil (facilitate) means the state must pro-actively engage in activities intended to strengthen people's access to and utilisation of resources and means to ensure their livelihood, including food security. The obligation to fulfil (promote) – that can not be found in General Comment No. 12 but in all the following General Comments – requires States parties to ensure that the right to food is taken into consideration in the conduct of public affairs and in any significant decision – making processes. The obligation to fulfil (promote) obliges the respective State party also to take steps to ensure that there is appropriate education concerning an adequate nutrition (e.g. breastfeeding and micronutrients). Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, states have the obligation to fulfil (provide) that right directly. This obligation is also true for victims of natural or other disasters.

---

9 A. Eide, "National Sovereignty and International Efforts to Realize Human Rights", in: A. Eide/ B. Hagtvet (eds), *Human Rights in Perspective*, 1992, 5 et seq.

10 A. Eide, "Economic, Social and Cultural Rights as Human Rights", in: A. Eide/ C. Krause/ A. Rosas (eds), *Economic, Social and Cultural Rights*, 2nd edition, 2001, 24 et seq.

2. The Normative Content of Article 11 ICESCR

As mentioned above, the right to adequate food is enshrined in article 11 ICESCR. Article 11 contains two rights,

> "the right of everyone to an adequate standard of living ... including adequate food ...", in article 11 para. 1,
>
> and the "fundamental right of everyone to be free from hunger", in article 11 para. 2.

It may be noted that the right to freedom from hunger is the only right in the Covenant termed "fundamental". This attribute was meant to highlight the essential meaning of this right for the enjoyment of all other economic, social and cultural as well as civil and political rights.

Para. 1 is noticeably much broader than para. 2. Strictly speaking the right to freedom from hunger only recognises the justified claim to food in order to prevent hunger and imposes the corresponding core obligations to take the necessary action to mitigate and alleviate hunger as provided in para. 2, even in times of natural or other disasters.

The right to adequate food, on the other hand, is a part of the right to an adequate standard of living. Para. 6 of the Comment warns that,

> "The *right to adequate food* shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients."[11]

This sentence of the Comment refers to its definition of the normative content linked to the right to adequate food in the preceding sentence of para. 6, namely that,

> "The right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement."

a. Adequacy

The normative content of the human right to adequate food in Comment No. 12 is, *inter alia* developed around the notion of adequacy. Adequate food must be "sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given cul-

---

11 Emphasis in original.

ture."[12] Adequacy includes satisfaction of dietary needs, free from adverse substances and acceptability. The Comment states that "the notion of *sustainability* is intrinsically linked to the notion of adequate food or food *security*, implying food being accessible for both present and future generations."[13] "Adequacy" is to a large extent determined by prevailing social, economic, cultural, climatic, ecological and other conditions, while sustainability incorporates the notion of long-term availability and accessibility.

Satisfaction of dietary needs is the positive qualitative side of the right to food. Dietary needs require a mix of nutrients for physical and mental growth, development and maintenance depending on the respective occupation, gender, or age. As para. 9 states it,

> "Measures may therefore need to be taken to maintain, adapt or strengthen dietary diversity and appropriate consumption and feeding patterns, including breast-feeding, while ensuring that changes in availability and access to food supply as a minimum do not negatively affect dietary composition and intake."

Food must be free from adverse substances. This demand is the negative qualitative side of the right to food. Adverse substances include those that originate through contamination or adulteration in the food chain, but also naturally occurring toxins.

Cultural and consumer acceptability implies the need also to take into account, as far as possible, perceived non nutrient-based values attached to food and food consumption and informed consumer concerns regarding the nature of accessible food supplies. The acceptability is very closely linked to the rights enshrined in article 15 ICESCR and this interaction will be highlighted.

b. Availability

Para. 12 of the General Comment specifies the availability of food,

> "*Availability* refers to the possibilities either for feeding oneself directly from productive land or other natural resources, or for well-functioning distribution, processing and market systems that can move food from the site of production to where it is needed ..."[14]

---

12 Para. 8.

13 Para. 7.

14 Emphasis in original.

Long-term availability points to the ecological limitations of food production and distribution.

c. Accessibility

"*Accessibility* encompasses both economic and physical accessibility," according to para. 13 General Comment.

Food is economically accessible for a person or community if the person or community has access to food as a result of its economic activities in the widest sense. These economic activities can be direct food production based on access to natural productive resources (land, water, forest, pastures, fishing grounds) and other resources and means of production. Without means for the procurement of food, economic access to food is impossible. The normative content containing both economic and physical access to food implies therefore the entitlement to access, the means for its procurement such as natural resources and other resources (skills, knowledge, markets etc.). The Comment mentions a few groups whose economic access to food is particularly threatened,

> "Socially vulnerable groups such as landless persons and other particularly impoverished segments of the population may need attention through special programmes." "A particular vulnerability is that of many indigenous population groups whose access to their ancestral lands may be threatened." "Victims of natural disasters, people living in disaster-prone areas and other specifically disadvantaged groups may need special attention ...".[15]

> "Economic accessibility implies that personal and household financial costs associated with the acquisition of food for an adequate diet should be at a level that the attainment and satisfaction of other basic needs are not threatened or compromised."[16]

In contrast to the economic accessibility of food, the physical accessibility of food ignores whether or not the accessed food is an effect of economic activity, entitlement or acquisition pattern. It puts the emphasis on the mere question of immediate access. "Physical accessibility implies that adequate food must be accessible to everyone ..." Physical accessibility of food is unconditional, just as the right to an adequate standard of living in article 11 is unconditional. Access to food, is in

---

15 Para. 13.

16 Ibid.

particular, not conditional on economic activities or specific merits (whether or not people "deserve" aid). If a person could buy food, then food is obviously accessible to this person. If a person could not access or buy food (or could do so only under unacceptable hardships affecting the enjoyment of other human rights), food is not physically accessible to this person.

Some groups will probably not be in a position to access food. Such groups "including physically vulnerable individuals, such as infants and young children, elderly people, the physically disabled, the terminally ill and persons with persistent medical problems, including the mentally ill".[17] Such a situation would trigger states obligations as described below.

Ever since General Comment 13,[18] the CESCR added "non-discrimination" as a new aspect to the accessibility principle. Non-discriminating accessibility means, food must be accessible to all, including the most vulnerable or marginalised sections of the population, in law and in fact, without discrimination on any of the prohibited grounds.

Accessibility includes the right to seek, receive and impart information concerning food issues. The information has a special meaning for the issue of hidden hunger,[19] with regard to information on the nutritional substance of food. Access to information also applies to knowledge and awareness about the right to food and related rights among right holders, i.e. where to claim the right to food when violated.

3. The General Principles of the ICESCR

a. "Maximum of Available Resources" and "Progressive Realisation"

The full realisation of the right to adequate food does not need to be fulfilled immediately with the entering into force of the Covenant (which would be too much to expect from many governments). The right to food must however be realised progressively to the maximum

---

17 Ibid.

18 General Comment No. 13, The Right to Education (1999), Doc. E/C.12/1999/10 of 8 December 1999.

19 Hidden hunger does not refer to the overt and obvious hunger of poor people who are unable to feed themselves, but to the more insidious hunger caused by eating food that is cheap and filling, but deficient in essential vitamins and micro-nutrients.

of available resources. These principles have been defined in article 2 para. 1 of the Covenant and also pointed out by the Committee in its General Comment No. 3, para. 10. The Covenant states,

> "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 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."[20]

This implies that states have to prove that they have used the maximum of the resources available to ensure the right to food for its population. The General Comment states that,

> "in determining which actions or omissions amount to a violation of the right to food, it is important to distinguish the inability from the unwillingness of a State party to comply. Should a State party argue that resource constraints make it impossible to provide access to food for those who are unable by themselves to secure such access, the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations."[21]

To achieve progressively the right to food imposes an obligation to move as expeditiously as possible towards this goal.[22] Obligations which can be met immediately may be demanded immediately from states. This includes all obligations to respect the economic and physical access to adequate food. Taking the steps progressively (rather than immediately) is only acceptable due to lack of resources and this can occur only under the obligations to fulfil and (to some extent) the obligation to protect.[23]

> "A state claiming that it is unable to carry out its obligation for reasons beyond its control therefore has the burden of proving that this

---

20 Article 2 para. 1 ICESCR.

21 General Comment, para. 17.

22 Ibid. para. 14.

23 Craven, see note 7, 131 et seq.; K. Klee, *Die progressive Verwirklichung wirtschaftlicher, sozialer und kultureller Menschenrechte: eine Interpretation von Art. 2 Abs. 1 des internationalen Pakts für wirtschaftliche, soziale und kulturelle Rechte*, 2000, 213 et seq.; A. Bierweiler, "Summary of Discussion", in: E. Riedel (ed.), *Social Security as a Human Right: Drafting a General Comment on Art. 9 ICESCR – Some Challenges*, 2007, 183 et seq.

is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food."[24]

b. Minimum Core Content/Core Obligation

In a situation of insufficient resources to protect and fulfil the full normative content of the right to food, some priority content of the right to adequate food has to be met first. This priority setting relates also to states that might not be resource-poor, but have so far failed to fully implement the normative content. The terms of minimum core content/obligation emerged from the need to clarify further what can be expected from states immediately and what can only be expected progressively. In some General Comments, such as General Comment No. 12 the CESCR uses the concepts "core content" and "core obligations" in parallel. Whereas the term "core content" is not precisely defined, "core obligation" is defined in General Comment No. 3 as that States parties "have a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels" of each of the rights spelt out in the Covenant. Therefore, "core obligation" is the more appropriate term to use in identifying what States parties have to do as a minimum, while the term "core content" seems to reduce the scope of the right.

For a long time it was considered that the "core obligation" derived from the notion of "the fundamental right ... to be free from hunger", as stated in article 11 para. 2 of the ICESCR, and not the provision made in article 11 para. 1 recognising the right of everyone to an adequate standard of living, including adequate food. Out of the two provisions in article 11, the CESCR then formulated, in its General Comment No. 12, two different levels of "core" provisions.

(1) The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture and (2) the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.

This definition does not offer sufficient clarity. First core obligations that relate to article 11 para. 2 are defined, and then a broader definition is given of the "core content" of the right to adequate food which is principally equivalent to the overall normative content of the right to

---

24 General Comment para. 17.

adequate food. Thus, there is no definition of "core content" spelt out, only "core obligation".

Parts of the core obligations are also spelt out in the provisions in paras 6 and 12 of the Comment. "The *right to adequate food* shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients." Furthermore, "States have a core obligation to take necessary action to mitigate and alleviate hunger […] even in times of natural or other disasters."[25] This means that even at the core obligation level, states have to make sure that the right to food is more than the right to be fed; food must also have a certain quality and be nutritionally adequate and safe as well as accessible in a way that respects dignity. It must also be expected from governments that the most severe situations should be addressed and as soon as possible be overcome.

As no clear definition exists about the notion of "core content", there is still a debate on how to use this term. Many authors within the economic, social and cultural rights area use the concept differently; some avoid using the term, as it can be seen as reducing a broader understanding of "adequate food" to a very minimum. Nevertheless, the "core obligation" gives a concrete requirement on what governments should focus on. Necessary steps have to be taken immediately, but for the full realisation of the normative content, all steps cannot be taken at the same time.

c. Non-Discrimination

One of the corner-stones for human rights is the principle of non-discrimination. The non-discrimination principle has to be applied immediately in spite of resources and of level of development. The principle is stated in article 2 para. 2[26] of the ICESCR and defined and specified in relation to the right to food in para. 18 of the Comment:

---

25 General Comment para. 6, emphasis in original.

26 "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin property, birth or other status." Non-discrimination is further specified in article 3 that demands, "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."

> "… any discrimination in access to food, as well as to means and entitlements for its procurement, on the grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant."

Discrimination can *de jure* be incorporated into the legal system, in goals for polices or in institutions that benefit certain groups at the expense of others. It can also *de facto* be shown in the results and effects of certain polices. In para. 19 of the Comment violations by the states or other entities related to discrimination are defined as "(…) denial of access to food to particular individuals or groups, whether the discrimination is based on legislation or is pro-active (…)."

In the chapter dealing with strategies for the implementation at the national level the Comment emphasises (paras 21-26) the kind of actions states have to take to avoid discrimination when implementing the right to food.

> "The strategy should give particular attention to the need to prevent discrimination in access to food or resources for food. This should include: guarantees of full and equal access to economic resources, particularly for women, including the right to inheritance and the ownership of land and other property, credit, natural resources and appropriate technology; measures to respect and protect self-employment and work which provides a remuneration ensuring a decent living for wage earners and their families (as stipulated in article 7 (a) (ii) of the Covenant); maintaining registries on rights in land (including forests)."[27]

d. Participation

Participation is another fundamental principle for human rights and should be applied when the rights are being interpreted and developed, as well as when states develop their programs for realising the rights. If the groups concerned participate in programs and decisions related to human rights it is more likely that people's needs will be met. Participation as a human right is established in article 25 lit. (a) of the ICCPR, as well as the Limburg Principles. The General Comment reaffirms the importance of participation,

---

27 General Comment para. 26.

> "The formulation and implementation of national strategies for the right to food requires full compliance with the principles of accountability, transparency, people's participation, decentralization, legislative capacity and the independence of the judiciary."[28]

e. Extraterritorial Obligations

The primary responsibility to ensure the right to food lies with the state. But the extraterritorial obligations of states, have also been stressed by *inter alia*, the CESCR. They include the obligations to respect, protect and fulfil the right to food of citizens in other countries. The Committee clarifies that states,

> "should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required."[29]

This means that states should, at the very least, endeavour to ensure that their own policy choices (e.g. international trade policies) do not negatively affect the right to food of citizens in other countries.[30]

International cooperation is expressed most strongly in the commitment to the right to food, under article 1 para. 2, arts 11 and 23 of the ICESCR. The CESCR states that international cooperation for the realisation of economic, social and cultural rights is an obligation of all states, in accordance also with Articles 55 and 56 of the UN Charter and well-established principles of international law. The importance of States parties to recognise the essential role of international cooperation is also emphasised in the above mentioned Rome Declaration of the World Food Summit and the Voluntary Guidelines for the implementation of the right to adequate food.

It is also well established that States parties should refrain from food embargoes which endanger the access to food in other countries as well as using food as an instrument of political and economic pressure in another country. To respect the right to food thus means that states, with regard to extraterritorial obligations, should,

---

28 Ibid. para. 23.

29 Ibid. para. 36, as well as General Comment No. 15 paras 30-36, The Right to Water (2002), Doc. E/C.12/2002/11 of 20 January 2003.

30 Second Submission of Jean Ziegler, Special Rapporteur on the Right to Food to the Intergovernmental Working Group for the Voluntary Guidelines on the Right to Adequate Food, para. 15.

> "refrain at all times from food embargoes or similar measures which endanger conditions for food production and access to food in other countries. Food should never be used as an instrument of political and economic pressure."[31]

Besides respect-bound obligations, State parties are also obliged to ensure that private actors from their own country do not contribute to violations of human rights in other countries.[32] The obligation to fulfil requires the state according to para. 36 to cooperate internationally and "ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end." In other words, states must cooperate in creating an environment where the right to food can be realised. Food aid should, as far as possible, be provided in ways which do not adversely affect local producers and local markets and products included in international food trade or aid programmes must be safe and culturally acceptable to the recipient population.[33]

As outlined by the CESCR states should ensure that their actions as members of international organisations take account of the right to food. States should take their obligations into consideration when they act within such organisations, including the IMF, World Bank and the World Trade Organisation. The Comment calls in para. 41 for greater attention to the protection of the right to food in lending policies and credit agreements and in international measures to deal with the debt crisis, ensuring, for example, that the right to food is protected in the structural adjustment programmes.[34] This suggests, for example, that agreements concerning trade liberalisation should not hinder another country's capacity to ensure the full realisation of the right to food.

---

31 Para. 37, as well as General Comment No. 8, The Relationship between Economic Sanctions and Respect for Economic, Cultural and Social Rights (1997) Doc. E/C.12/1997/8 of 12 December 1997; the Vienna Declaration and the Voluntary Guidelines.

32 Para. 36.

33 Para. 39.

34 As also outlined in General Comment No. 2 para. 9, International Technical Assistance Measures (1990) Doc. E/1990/23.

III. Voluntary Guidelines[35]

1. Background

At the outset, a code of conduct on the right to food was planned as an instrument to reduce the number of undernourished people world-wide by half by the year 2015. Due to the opposition of some states the idea of a binding codex was abandoned in favour of mere guidelines. The Voluntary Guidelines aim at the implementation of the human right to food on an international and national level[36] in order to achieve the goal stated at the World Food Summit. With the Guidelines, states would receive appropriate guidance in order to support efforts to achieve the progressive realisation of the right to adequate food. In the long run, the implementation of the Guidelines should improve world-wide food security by enforcing the (human) right to food. On 24 November 2004, the FAO Council adopted the Voluntary Guidelines during its 127th session. The Guidelines are intended to provide governments with a practical instrument for the implementation of the right to adequate food nationally and for the fulfilment of their obligations with regard to the ICESCR.

2. Legal Status

The Voluntary Guidelines are sometimes described as "soft law", i.e. gradually emerging patterns of behaviour, which lack a legally binding quality.[37] The notion of soft law was invented for some of the supposedly legally relevant pronouncements formulated in international organisations and amongst states.[38] Soft law does not constitute a source of international law. However, the creation of soft law is not completely insignificant because it may form the basis for a long-standing practice and thus eventually lead to customary international law. Soft law is difficult to classify by way of legal terminology due to the fact that it is

---

35 The entire title is: *Voluntary Guidelines to Support the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security*.

36 Voluntary Guidelines, Section I, No. 1.

37 P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th edition, 1997, 54.

38 E. Riedel, "Standards and Sources", *EJIL* 2 (1991), 59 et seq.

not legally binding, but typically on the cusp of binding standards of international law. Accordingly, states often behave in line with a soft law rule even before this turns into a true legal obligation. As a general rule, consensus as to the content of a certain behaviour can be established more easily, if that behaviour is not required under international law, i.e. in the phase before this behaviour becomes a binding standard of international "hard law".[39]

The Voluntary Guidelines are expected to have exactly such an effect. They can offer a useful contribution to the creation of customary international law, because they constitute soft law which might be followed by a conduct which becomes accepted as international law. But the Voluntary Guidelines cover a combination of binding and non-binding content, as they are only partly declaratory. Thus, the Voluntary Guidelines cannot be declared as "soft law", the notion of "zebra law" is more suitable for their legal classification.[40]

3. Content

a. Main Content

Member States of the FAO reaffirm "the right of everyone to have access to safe and nutritious food."[41] Member States should orient themselves towards the Voluntary Guidelines in order to align their policies more intensively with the goal of food security. The Voluntary Guidelines offer a detailed catalogue of measures, which provide a basis for the implementation of the right to adequate food: democracy, the rule of law, measures for the economic development and strategies of food security are outlined, besides the questions of efficient market systems and a legal framework for the protection of biological diversity and sustainability. The Voluntary Guidelines are a road map for the necessity to guarantee every human being the possibility to either secure one's nutrition through one's own work or through access to social security benefits.

---

39 The so-called "limited anticipatory effect", compare Malanczuk, see note 37, 55.

40 Riedel, see note 38, 59.

41 Voluntary Guidelines, preface No. 2.

Finally, the Guidelines embody voluntary commitments of the rich states, providing financial development assistance up to 0.7 per cent of the GDP,[42] which was neglected for decades.

b. Structure and Content

The Voluntary Guidelines as a whole are divided into three sections:

Part I of the Voluntary Guidelines includes a preface and introduction. The preface mentions the previous history, developing history and the goals of the Voluntary Guidelines in detail. The introduction deals with the basis of the right to adequate food in international law as well as with the precise content of the right to adequate food and its implementation by food security. This section recognised the obligations of States parties to the ICESCR for the first time to respect, protect and fulfil the right to adequate food. Part II contains the actual 19 Guidelines,[43] which immediately or indirectly promote the gradual implementation of the right to adequate food:

Guideline 1 stresses the necessity of democratic structures, the meaning of Good Governance for the stabilisation of individual rights and for the achievement of general prosperity, the adherence to human rights and the importance of the rule of law.

Guideline 2 recommends measures for economic development, including the promotion of economic development as support for political food means, the social and economic evaluation of the national food situation, the provision of supplies of healthy food, strategies against hunger and poverty, social reforms and the fight against rural and urban problems.

Guideline 3 describes suitable strategies for the implementation of the right to food. Such strategies begin with an evaluation of the corresponding national legislation and contain non-discrimination strategies to fight poverty by providing basic services for the poorest. Further strategies are to aim at an increase in productivity, consultations with the civil society, gender specific arrangement of the strategies and support of related national as well as regional strategies.

Guideline 4 deals with the national market systems. The markets may be optimised by the creation of appropriate institutions and the support of civil food security. Consumer protection, regional and

---

42 Guideline 19.1 in conjunction with Section III No. 12.

43 Which are divided into sub-Guidelines.

transnational markets, measures for individual protection as well as the free social market economy, supply systems and compliance with human rights of the third generation should be strengthened.

Guideline 5 encourages activities for the establishment and reinforcement of appropriate institutions, for the coordination of their activities, their transparency, their co-operation with respective institutions of the civil society as well as measures against corruption.

Guideline 6 which is formulated in a concise way aims at granting all stakeholders subjective rights.

Guideline 7 outlines the need to recognise the right to adequate food and to ensure access to effective remedies, including access to justice. It describes a proper legal framework, for instance the consideration of a direct legal realisation of the right to adequate food, suitable information for this right, as well as an enhancement of the legal situation of women.

Guideline 8 tries to clarify the access to financial resources. This access may be particularly granted for vulnerable groups with specific problems of access. Furthermore, a promotion of agriculture, access to research results, enforcement of the rights of women and programs for access and appropriate use of agricultural land are recommended. The promotion of work, improvement of access to the labour market, security of land tenure, the access to water, the meaning of the genetic variety for food and agriculture, the ecological preservation of natural resources and the promotion of services are emphasised.[44]

Guideline 9 contains measures for food security and for consumer protection, in particular food-control systems, the standardisation of food, the creation of a coordinating committee for food, the compliance with the hygiene regulations of food production, the health instruction of food business operators, as well as development assistance and cooperation with the civil society.

Guideline 10 advises Member States to take some special nourishment measures, for instance the special consideration of a balanced diet, specific food and nutrition needs of ill people, the promotion of breastfeeding and baby food. Furthermore information about balanced nutrition, the avoidance of discriminating food practices and the cultural acceptance of food play a vital role.

Guideline 11 stresses the role of education as a basis for appropriate nutrition. It is important to increase awareness concerning the human

---

44 Special titled sub-Guidelines.

rights in general and the right to adequate food in particular. Thus, relevant investments should be made, a discrimination-free primary education is to be guaranteed, and secondary education shall strengthen the individual's consciousness of the right to adequate food. Furthermore, housing conditions and food preparation should be improved. Accordingly, the administration as well as the civil society shall be included and trained, in order to create and strengthen awareness of the right to adequate food.

Guideline 12 entails separate budgetary resources that are to be made available in a transparent way, in particular considering vulnerable groups. Furthermore an enabling legal and economic environment for savings and investments should be established.

Guideline 13 promotes once more the need for a special consideration of the situation of vulnerable groups. To achieve this, the system of "Food Insecurity and Vulnerability Information and Mapping Systems" (FIVIMS)[45] is recommended. Differentiated analysis for vulnerable groups and a fair selection of the assignment are highly demanded. Finally, it is stressed that food should be distributed to women to strengthen their position in society and ensure that the food is used to meet the household's food requirements.

Guideline 14 recommends creating suitable safety nets. As social welfare structures, these are to guarantee a self-sufficient, non-discriminating food supply for the population. National actions endangering food supply are always to be coupled with food assistance. Safety nets are to consider the right to adequate food appropriately to be supported by accompanying and supplementing measures and to be carried out in cooperation with the relevant international and civil organisations.

Guideline 15 discusses international food aid. Apart from an optimisation of food aid and food-aid transactions, states and relevant non-state actors are to guarantee the access to food aid, to consider specific situations and humanitarian principles and coordinate international food aid.

Guideline 16 deals with natural and man-made disasters. It is very clearly stressed[46] that food should never be used as a means of political and economical pressure. Furthermore, the obligation of occupying powers to supply food and the protection of the humanitarian person-

---

45 Established after the World Food Summit.

46 Guideline 16.1 is the only "voluntary" guideline mentioning a strict prohibition.

nel is based on the basis of already established international humanitarian law. Sufficient nutrition for refugees and internally displaced persons is to be guaranteed, as well as an appropriate behaviour of the states with regard to disasters, a mechanism of early warning systems and an evaluation of the food situation in emergencies.

Guideline 17 provides a basis for monitoring the implementation of the Voluntary Guidelines. States are to create appropriate monitoring mechanisms for the evaluation of the effectiveness of the undertaken measures concerning the food situation. Guideline 17.3, in particular, describes the possibility to assess the progressive realisation of the right to food with appropriate indicators. These indicators are to be applied explicitly for the evaluation of certain political measures and instruments, as well. Moreover, vulnerable groups attract special attention. States are to deal with the already gathered information.

Guideline 18 describes the co-operation between and the promotion of national human rights institutions concerning the implementation of the right to adequate food.

Finally Guideline 19 specifies the international dimension of the right to food. This Guideline refers, in particular, to the following Section III emphasising the meaning of the definitions of the World Food Summit within the context of the Millennium Declaration.

Section III describes international measures, actions and commitments. First, it mentions the significance of international co-operation in the context of the conferences and the international alliance against hunger. Even if the states are primarily responsible for their own territory, international co-operation is stressed. The states are to avoid measures opposing international law, the UN Charter or the social and economic development of states.

The role of developed countries and international organisations for the support of the developing countries is stressed. Developed and developing countries are requested to intensify their partnership by means of technical co-operation in order to overcome obstacles to food security. International trade is stressed as an effective instrument to attain prosperity and food security. Within the agricultural system, restrictions and distortions of competition are to be corrected and prevented. The obligations and recommendations of the Sao Paolo Consensus are stressed. The foreign debts of poor states are to be fought, in order to generate resources for the fight against hunger. It is planned to support developing countries by public development assistance in the context of

the Monterrey Consensus.[47] International food assistance should be accompanied by measures for the progressive realisation of the right to adequate food. All states, companies and organisations involved are to realise food security through a coordinated procedure. Finally, the promotion and protection of the right to adequate food by human right organs and specialised agencies is stressed, as well as the international reporting to the Committee on World Food Security.

4. Significance

Through the Voluntary Guidelines states succeeded for the first time – according to the human rights approach – to prepare and adopt an international set of rules to achieve food security on a multilateral level. This step is praised in different comments as a "break-through", an "important lever for the human rights work" or "pioneer work", as an "important normative step of the community of states on the way to a world without hunger" or by the statement that "human rights arms are sharpened."

Such an evaluation surprises at first sight, because of the lack of legal enforceability of the Voluntary Guidelines. After all, international law was not modified with the adoption of the Voluntary Guidelines, since the Voluntary Guidelines do not create new rights or obligations. States are simply encouraged to apply the Voluntary Guidelines when developing their strategies, policies, programmes and activities. However, all facets of this code must be included in a legal evaluation.

To start with, the Voluntary Guidelines are a blueprint for a legally binding implementation of the right to adequate food. Furthermore, it is to be expected that the Voluntary Guidelines will also be consulted for the interpretation of the existing international law guarantees of the right to food.[48] As described above, the "announcement effect" of the Voluntary Guidelines as soft law is to be considered. Soft law is able to affect customary international law, and, besides, as a tool that has been tested in the field – it can constitute a model for hard law, for instance a binding code of conduct.

Nevertheless, rather than legal implications, the Guidelines will become important as a political tool for the implementation of the right to

---

47 The Monterey Consensus is to give answers to the questions of development policy of the globalisation.

48 Especially article 11 para. 2 ICESCR.

adequate food. Accordingly, all Member States of the FAO must justify a departure from the route towards realisation of the right to food on the international as well as on the national level. The Voluntary Guidelines are therefore to be regarded as confirmation of the political will to achieve effectively the realisation of the right to adequate food. For this purpose legislators will frequently have to play an active role, so that the Voluntary Guidelines will result in laws which serve as indicators for the implementation of the right to adequate food.

The LL.M. thesis being published below is the third in a series written in connection with a project introduced in 2004, by the Faculty of Law of the University of Heidelberg and the Universidad de Chile with scientific support from the Max Planck Institute for Comparative Public Law and International Law and the Institute for International Studies at the Universidad de Chile.

The project offers a one year Ph.D. course (International Law – Trade, Investments and Arbitration).

Chairs of the project are Prof. Rüdiger Wolfrum and Prof. Francisco Orrego Vicuña.

The Nationality of Juridical Persons in the ICSID Convention in Light of Its Jurisprudence

University of Heidelberg, Max Planck Institute for Comparative Public Law and International Law and the University of Chile,
March 2006

Ricardo Letelier Astorga

Thesis Advisor: Professor Hernán Salinas Burgos

Table of Contents

I. Introduction
II. The Nationality of Juridical Persons in International Law
    1. Historical Background
    2. Concept
        a. Features
        b. Legal Provisions
III. The Wording of Article 25 para. 2 lit. b) of the ICSID Convention
    1. Text of the Article
    2. Nationality Rules Applicable to Juridical Persons
    3. Interpretation of the Provision
IV. Case Study
    1. Banro American Resources (2000)
    2. Autopista Concesionada de Venezuela (2001)
    3. Champion Trading Company (2003)
    4. Tokios Tokelés (2004)
V. Conclusions

A. von Bogdandy and R. Wolfrum, (eds.),
Max Planck Yearbook of United Nations Law, Volume 11, 2007, p. 417-472.
© 2007 Koninklijke Brill N.V. Printed in The Netherlands.

I. Introduction

Foreign investment has always been considered a crucial issue in order to boost economic growth for all countries around the world. This statement is more accurate when talking about developing nations. In this field, foreign investment is deemed one of the keys to achieving a higher stage of development allowing peoples to escape poverty.

After World War II, in a new climate of cooperation and goodwill, the victorious countries created several international institutions aimed at strengthening international economic ties. This new international order, concerned with economic issues, was known as the *Bretton Woods System*. Its name came from the place in New Hampshire, United States, where the representatives of 44 nations met in 1944. This conference gave birth to the International Monetary Fund (IMF) and the World Bank (International Bank for Reconstruction and Development, IBRD). The main task of the latter was to provide assistance for reconstruction in the post war period. Later, this organization changed its emphasis focusing on development. Latin American countries mainly encouraged this updated vision. In this context, the World Bank was fully aware of the importance of capital flows from developed to developing countries one of whose main goals was private foreign investment. Quantitatively, foreign investment is responsible for a significant part of the total capital flows between these two groups. On the other hand, political risk is one of the main factors that discourage the flow of private foreign capital to developing nations.

At the beginning of the sixties, the World Bank decided to make a contribution in this area which aimed at resolving any conflicts which had arisen between host state and foreign investors in order to create a better environment for foreign investments in developing countries. Instead of making a recommendation for an international agreement about this matter to its members, the World Bank chose to assume the task itself creating an entity within its organization's ambit.[1] The mission of this entity would be to serve as a forum before which the host state and the foreign investor could settle, through conciliation and arbitration, their disputes related to investment matters while maintaining the investor's right to go before the host state judiciary if he wanted to. After several meetings of experts which were held on a regional basis, the likelihood of an international convention on this issue appeared fea-

---

1 A. Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 1972, Vol. II, 345 et seq.

sible. This convention, according to the Board of Governors of the World Bank, should be drafted "taking into account the views of member governments and shall keep in mind the desirability of arriving at a text which could be accepted by the largest possible number of governments."[2]

Finally, on 18 March 1965, the Executive Directors submitted the convention to the members of the Bank for their consideration, signature and ratification together with a report. On 14 October 1966, the Convention on the Settlement of Investment Disputes between States and the Nationals of Other States entered into force after its ratification by 20 countries, and the International Centre for Settlement of Investment Disputes (ICSID) came into being.

One of the most important features of the ICSID Convention (hereinafter the Convention) was the position of equality between the states and the investors whenever a dispute arose. In such case the investor could begin the procedure before the ICSID with no further requirements or intervention of its state of nationality. This fact had two important consequences: firstly, it gave a strong support to the growing trend that considered the individual as a subject of international law. Secondly, by putting the host state in a position of equality with the investor the latter was able to bypass the problems stemming from diplomatic protection. Though this concept diminished in importance throughout the 20th century, it still played an important role regarding individuals' claims against states, when the Convention was signed, as will be analyzed below.

In the beginning, Latin America was the only region as a whole which rejected the Convention. This rejection was mainly based on political reasons due to the endorsement given by Latin American countries to the *Calvo Doctrine*. This doctrine, originally developed in the 19th century by an Argentine diplomat and scholar, acquired high importance during the first decades of the following century, when important natural resources of the respective countries were exploited by multinational corporations of developed nations. Likewise, it was a reaction to the "prompt, adequate and effective" compensation for the expropriation of foreign investments embodied by the *Hull Formula*, that was strongly supported by the United States and other developed

---

2 Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, available at <http://www.worldbank.org/icsid>. The Convention is available under <http://www.worldbank.org/icsid/basicdoc/basicdoc.htm>.

nations. The *Calvo Doctrine* affirmed that the rules governing the jurisdiction of a country over aliens and the collection of indemnities should apply equally to all nations, regardless of size. It further stated that foreigners who held property in Latin American states and who had claims against the governments of such states should apply to the courts within such nations for redress instead of seeking diplomatic intervention.[3] Therefore, Latin American rulers were reluctant to become part of agreements that meant a waiver of the *Calvo Doctrine* allowing jurisdiction of international courts over disputes on property located inside their boundaries but owned by foreigners. Moreover, the division of the world into two ideological blocs during the Cold War period and the struggles staged for this reason also contributed to a climate of confrontation on the economic front.

The end of the Cold War brought several consequences not only political but also economic. One of the most important was the emergence of a certain international consensus on deeming the free market economy as the best economic system. Latin American states and other countries changed their vision about international arbitration in the foreign investment field and the *Calvo Doctrine* lost its importance.

In this new scenario, since the beginning of the nineties, the ICSID judicial mechanism has acquired an increasing importance because it has been viewed as the more appropriate framework to resolve the disputes on investment matters. The importance of the ICSID is reflected both in the large number of countries which became parties to the Convention in recent years and in the growing number of disputes taken before the ICSID judiciary in the same period. Currently, more than 150 nations have ratified the Convention, a number similar in importance to the WTO membership. The main vehicles to access before the ICSID are Bilateral Investment Treaties (BITs), which contain provisions regarding arbitration. According to an UNCTAD survey, the number of BITs has increased from 385 in 1989 to 2,265 in 2003, encompassing 176 countries.[4] On the other hand, the number of pending cases before ICSID Tribunals grew from 14 at the end of 1997 to 85 at the end of 2004.[5]

---

3 Calvo Doctrine, Encyclopedia Britannica Premium Service, available at <http://www.britannica.com/eb/article-9018741>.

4 Quantitative data on bilateral investment treaties and double taxation treaties, available at <http://www.unctad.org>.

5 S. Alexandrov, "The 'baby boom' of the treaty-based arbitrations and the jurisdiction of ICSID tribunals: shareholders as 'investors' and jurisdiction

With this background, it is possible to assert that the effectiveness of the ICSID in the investment field is as important as the success of the WTO judicial body to resolve trade disputes in order to strengthen the global economic system.

Due to its importance, the members of the Convention must be efficient to identify and remove any flaw which could undermine the judicial mechanism devised in its clauses.

In the area of the jurisdiction requirements, one matter where certain doubts have arisen is that of the nationality of juridical persons. Chapter II of the Convention, article 25, refers to this topic. Para. 1 of this article states that, "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a *national of another Contracting State* …." (emphasis added). According to its para. 2 lit. b) "National of another Contracting State" means, "*any juridical person which had the nationality of a Contracting State other than the State party to the dispute* …." (emphasis added).[6] The basic requirement is thus that the dispute must involve a contracting state and a juridical person who is a national of another contracting state. However, the Convention does not define the concept of nationality in connection with juridical persons. Therefore, regarding the ICSID jurisdiction, this matter depends on the provisions freely agreed by the parties in the BITs. In turn, these instruments embody the visions that have been developed by the doctrine.

International law has mainly dealt with the nationality of juridical persons in the diplomatic protection field. Here, several theories have been devised like the place of incorporation or the *siège social*. These theories leave ample room for different interpretations.

Bearing this in mind, one of the latent risks of such interpretations is that they would be used in a manner that would go against the provisions and purposes of the Convention. A situation which embodies this assertion is to evade the jurisdiction of national courts in a domestic conflict by seeking for redress through an ICSID Tribunal. This is, precisely, the case denounced by Prof. Prosper Weil, President of the ICSID Arbitral Tribunal, in his dissenting opinion on the decision on ju-

---

ratione temporis, in: id., *The Law and Practice of International Courts and Tribunals 4,* 2005, 19–59, 20 et seq.

6 ICSID Convention, see note 2.

risdiction issued in the *Tokios Tokelés* case.[7] Though this case will be analyzed further below, the essential facts are the following:

- The claimant was a publishing enterprise established under the laws of Lithuania at the beginning of the nineties, 99 per cent of whose shares were owned and controlled by Ukrainian nationals.

- It submitted its dispute with Ukraine to the ICSID in 2002 under a BIT signed in 1994 between both governments.

- It alleged that certain governmental authorities in Ukraine had taken a series of measures violating the BIT in respect of its wholly owned subsidiary in Ukraine, Taki spravy.

- The majority vote deemed that the claimant was an "investor" of Lithuania under article 1(2)(b) of the Ukraine-Lithuania BIT based on its state-of-incorporation. This article defines the term "investor," with respect to Lithuania, as "any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations."[8]

Furthermore, it stated that the definition of corporate nationality in the Ukraine-Lithuania BIT was consistent with the Convention rejecting thus the argument of the respondent that the real claimants were in fact Ukrainian nationals pursuing an international arbitration against their own government.

- The Tribunal decided by a majority vote that the dispute was within the jurisdiction of the ICSID and the competence of the Tribunal.

- The decision on jurisdiction was issued in April 2004. The case on the merits is still pending before the ICSID.

Prof. Prosper Weil underscored the danger that in his view entails the interpretation made by the majority vote as follows, "There can be no question of leaving unconditionally to the parties the task of determining the scope of application of the Convention along with the rights and duties it places upon both parties. This would frustrate the system by putting its extent in the hands of the parties and at their discretion, thus making the provisions of its Chapter II, and more particularly of its central and crucial article 25, a purely optional clause." The final paragraph of his vote points out, "To sum up, The ICSID mechanism

---

7 Tokios Tokelés v. Ukraine ICSID Case No. ARB/02/18, available at <www.worldbank.org/icsid/cases>.

8 Tokios Tokelés v. Ukraine, see note 7, para. 28.

and remedy are not meant for, and are not to be construed as, allowing- and even less encouraging-nationals of a State party to the ICSID Convention to use a foreign corporation, whether preexistent or created for that purpose, as a means of evading the jurisdiction of their domestic courts and the application of their national law. It is meant to protect- and thus encourage-international investment. It is regrettable, so it seems to me, to put the extraordinary success met by ICSID at risk by extending its scope and application beyond the limits so carefully assigned to it by the Convention. This might dissuade Governments either from adhering to the Convention or, if they have already adhered, from providing for ICSID arbitration in their future BITs or investment contracts."[9]

The foregoing paragraphs have a twofold goal: firstly, to make clear the crucial role for the international economic system that the ICSID plays nowadays; secondly, to disclose a possible fault in the provisions of the Convention.

Both elements were the reasons to choose this topic.

This work is based on the statements of Prof. Prosper Weil's dissenting opinion and the dangers that he foresaw for the effectiveness of the ICSID judiciary.

This thesis aims at verifying those statements, especially the one related to the discretionary character of the ICSID provisions for the members of the Convention in the field of corporate nationality. The analysis could help to identify possible improvements of the Convention in this area.

The above mentioned factors were used to formulate the following hypothesis: the lack of a clear definition about the nationality of juridical persons in the Convention allows a discretionary interpretation of this issue.

The hypothesis will be verified outlining theoretical concepts and studying practical application.

The thesis will deal with the historical background of the nationality of juridical persons, its features, theories on the subject and legal provisions. Then focusing on the wording of article 25 para. 2 lit. b) of the Convention. Followed by an analysis of four recent cases brought before ICSID Tribunals where the nationality provisions of the Convention have been applied.

---

9 Tokios Tokelés v. Ukraine, see note 7, Dissenting Opinion, para. 28 and 30.

II. The Nationality of Juridical Persons in International Law

1. Historical Background

In the international context, corporate nationality is a concept tied to that of natural persons and stemming from it. The main field where it has been developed is in diplomatic protection affairs. On the other hand, unlike the situation of natural persons, municipal law systems do not deal with this subject. Hence, there are no provisions related to the nationality of corporations in most national legislations.[10]

Accordingly, the concept and features of diplomatic protection will be analyzed first. Next, I will focus on the findings concerning the nationality of juridical persons in this area.

The doctrine of diplomatic protection was born as a consequence of the emergence of state responsibility for injury to aliens. This notion appeared mainly because of the piracy actions, and it was first developed in the 18th century. Already *Emer de Vattel* stated in his book *Le Droit des gens ou les principes de la loi naturelle*, that "anyone who mistreats a citizen directly offends the State. The sovereign of that State must avenge its injury, and if he can, force the aggressor to make full reparation or punish him, since otherwise the citizen would simply not obtain the main goal of civil association, namely, security."[11]

At the beginning of the 20th century it was generally accepted that state responsibility arose due to wrongful acts or omissions which caused injury to aliens involving the responsibility of the state to which such acts and omissions were attributable. In this way, although a state was not obliged to admit aliens, once it had done so, it was under an obligation towards the aliens' state of nationality to provide a degree of protection to their persons or properties in accordance with an international minimum standard of treatment due to aliens.

At the same time, the only subjects of international law were the states and no role was assigned to the individuals on this ground. Therefore, once accepted by the state to act on behalf of one of its nationals in an international claim, this became its own claim leaving aside

---

10 I. Brownlie, *Principles of Public International Law*, 2003, 407-408.

11 Quoted by Mohamed Bennouna in his Preliminary Report on Diplomatic Protection to the International Law Commission, 1998, available at <www.un.org/law/ilc/reports>.

the individual's rights which were in its origin. Several consequences derived from this approach to the issue. The discretionary power of the state both to espouse the claim and to dispose the compensation and the crucial role of the political authority were among them.[12]

Regarding jurisprudence, the leading case that embodies this classical stance about diplomatic protection is the *Mavrommatis Concessions* case (1924). Here, the PCIJ stated that "by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights-its right to ensure, in the person of its subjects, respect for the rules of international law."[13]

In an attempt to codify certain matters of international law, Chapter V of the Report of the ILC of 2000 proposed the following elements to describe diplomatic protection, "means action taken by a State against another State in respect of an injury to the person or property of a national caused by an internationally wrongful act or omission attributable to the latter State." It also stated that in exceptional circumstances diplomatic protection may be extended to a non-national.[14]

According to international law, one of the key requirements for exercising diplomatic protection is an effective bond of nationality between the aggrieved party and the state which makes the claim. The main statement in this respect was laid down by the ICJ in the *Nottebohm* case in the following terms, "According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."[15] Thus, not only the aggrieved party must be a national of the claimant state but also he or she must have a "genuine connection" with that state in order to entitle the latter to bring an international claim. This requirement is also applicable to juridical persons.[16]

---

12 F. Orrego Vicuña, "Changing Approaches to the Nationality of Claims in the Context of Diplomatic Protection and International Dispute Settlement", in: S. Sclemmer-Schulte (ed.), *Liber Amicorum Ibrahim F.I. Shihata*, 2001, 503 et seq.

13 Mavrommatis Palestine Concessions case, Greece v. Great Britain, PCIJ Series A No. 2, available at <www.icj-cij.org/icjwww/idecisions/icpij/A02>.

14 Available at <www.un.org/law/ilc/reports>.

15 ICJ Reports 1955, 4 et seq. (23).

16 Brownlie, see note 10, 465.

In the field of corporate nationality, the most important and emblematic case and a landmark in this matter was the *Barcelona Traction, Light and Power Company, Limited* case ruled by the ICJ.

This case arose between Belgium and Spain due to a bankruptcy ruling in Spain of Barcelona Traction, a company incorporated in Canada. The object of the Belgium suit was to seek reparation for the damage alleged by this country because Belgian nationals were the owners of the overwhelming majority of the company's shares. Belgium contended that the bankruptcy was the outcome of actions of Spanish authorities allegedly contrary to international law. The Court deemed that Belgium was not entitled to exercise diplomatic protection of shareholders in a Canadian company with respect to measures taken against that company in Spain.

This stance has been severely criticized by the scholars because it left shareholders without any protection under international law. However, this analysis will be concentrated on the statements about nationality contained in the adjudication.

One of the most important paragraphs of the sentence related to this issue is the following,

"In allocating corporate entities to States for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals. The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments. This notwithstanding, further or different links are at times said to be required in order that a right of diplomatic protection should exist. Indeed, it has been the practice of some States to give a company incorporated under their law diplomatic protection solely when it has its seat (*siège social*) or management or centre of control in their territory, or when a majority or a substantial proportion of the shares has been owned by nationals of the State concerned. Only then, it has been held, does there exist between the corporation and the State in question a genuine connection of the kind familiar from other branches of international law. However, in the particular field of the diplomatic protection of corporate entities, no absolute test of the 'genuine connection' has found general acceptance. Such tests as have been applied are of a rela-

tive nature, and sometimes links with one State have had to be weighed against those with another."[17]

This statement outlined the main criteria for determining the nationality of juridical persons at the international level.

The first method to attribute nationality is that of the place of incorporation, that is to say, the state under whose law the company is established.

The *siège social* is the second method. It is understood as the state where the corporation has its seat or centre of administration.

The third method in this field is related to the control or substantial interest. This allocates the nationality of the company on the state of the shareholders who own a majority or a substantial proportion of its shares. This criterion requires the use of the "piercing the veil" formula, namely to see behind the façade of the corporation in order to identify who are the owners of it. Thus, shareholders' nationality prevails over the one of the state of incorporation in case they do not concur.

The existence of a "corporate veil" has to do with the distinct legal personality of the corporation. The company is a legal entity separate from its shareholders with its own rights and obligations under the law.

At least two consequences derive from this feature: shareholders are entitled to avoid liability for the obligations undertaken by the company, and they keep safe their personal assets because the investment risk is reduced solely to the interest that they hold in the company.

On the other hand, as long as this formula preserves the personal interests of the shareholders and their liability for the obligations of the company, it should not enable them as individuals to enforce the company's rights. Otherwise, the corporate veil would remain to shield shareholders from liability, and it would be lifted only if they need to enforce the company's rights.

Regarding diplomatic protection, the ICJ identified in the *Barcelona Traction* ruling at least two situations where it is possible to lift the corporate veil allowing diplomatic protection for shareholders. The first one is the case of a corporation that has ceased to exist. The second one refers to a state incapable of taking action on behalf of the company.[18] A third case, related to the exercise of this right by the state of the share-

---

17 ICJ Reports 1970, 3 et seq. (42, para. 70).

18 See note 17, 40, para. 64.

holders when the state of incorporation is the respondent, was not clearly upheld by the adjudication.[19]

Nineteen years later, another case before the ICJ changed its vision about the nationality of juridical persons in the diplomatic protection field.

This was the *Elettronica Sicula S.p.A.* (*ELSI)* case which was brought by the United States against Italy under their Treaty of Friendship, Commerce and Navigation (FCN) of 1948.

ELSI was a company incorporated under the laws of Italy whose owners were two American companies, Raytheon and Machlett. The company experienced serious financial trouble at the end of the sixties, and its managers decided to close the main factory of the company located in Sicily. This would mean the layoff of several dozens of workers. Prior to the closing, the Italian authorities seized the factory with all its assets. Finally, the company was declared bankrupt. The bankruptcy procedure took several years and the subsequent liquidation left no monetary surplus for the former American owners. The U.S. exercised diplomatic protection on behalf of the *ELSI* shareholders due to the violations of the FCN treaty allegedly committed by the Italian authorities. In this way, the shareholders of a foreign company were protected by their state (the U.S.) against the state of incorporation (Italy). Based on the provisions of the treaty related to foreign investment, the ICJ ruled that such provisions conferred rights on the shareholders even in respect of acts committed against the corporation.[20]

In spite of the fact that the claimant lost the case due to the lack of evidence about certain factual matters, the Court deemed that there was a genuine connection between the company and the state of nationality of the shareholders. Thus, the ICJ granted the United States the right to exercise diplomatic protection on behalf of the shareholders, as long as the company whose rights were at stake was incorporated in the defendant state, a frequent situation when talking about foreign investment.

Although ELSI was a wholly owned subsidiary of the American companies and thus they faced the entire damage produced by the measures of the Italian authorities, the drift in this field has been to diminish the rate of the shares required to enable diplomatic protection for shareholders. This rate is generally associated with the control of the company, namely 50 per cent. Professor Orrego Vicuña stated that

---

19 See note 17, 48, para. 92.

20 ICJ Reports 1989, 15 et seq.

"Control of a foreign company by shareholders of a different nationality, generally expressed in a fifty percent ownership of its capital stock or such other proportion needed to control the company, may entitle the State of nationality of such shareholders to exercise diplomatic protection on their behalf or otherwise to consider the company as having its nationality."[21]

At the same time, diplomatic protection can be exerted by the home state of the shareholders not only when the state of incorporation is the defendant but also when the state of incorporation is unable or unwilling to exercise such protection.

In brief, it is possible to assert that the consolidated trend in this matter implies the emergence of the real interest remaining behind the investment putting aside the legal form adopted to carry it out. In this way, to entitle the shareholders' state with the right of diplomatic protection is the recognition of the underlying economic interests in an investment made through a corporation.

Therefore, the fact that the nationality of the shareholders of a given company is a valid method to establish a genuine connection with a state in order to exercise diplomatic protection regarding their corporate rights, is well established nowadays.

However, as stated before, the widespread adhesion to the free economic system once the Cold War ended, which states saw as an unavoidable step to benefit from the global economy, spurred the increasing process of cross-border economic activities and, in particular, of foreign investment. The essential goal in this respect is to create an adequate framework in order to protect economic interests regardless of their nationality. In this context, in recent years it has been possible to witness a steady development in international law aimed at lowering the requirements for exerting claims by foreign shareholders as such, departing from the criteria applied in the diplomatic protection field. This development is embodied not only in state practice, mainly through BITs, but also in judicial findings, especially from the ICSID judiciary.

By widening the scope of the term "investment" of article 25 para. 1, the ICSID Arbitral Tribunals have developed a significant jurisprudence which facilitates the access to the judicial mechanism of the Convention even to foreign shareholders, who have a minority share in the locally incorporated company. This recognition was made for the first

---

21 Orrego Vicuña, see note 12, 525.

time in the *Lanco* case of 1998.[22] This stance has recently been backed by rulings issued in claims against Argentina in the *Enron* and *CMS* cases, where American companies owned near to 30 per cent of the shares in local corporations created as vehicles for their investments. The former states that, "there is nothing contrary to international law or the ICSID Convention in upholding the concept that shareholders may claim independently from the corporation concerned, even if those shareholders are not in the majority or in the control of the company."[23] Finally, in another recent decision, an ICSID Tribunal supported the entitlement of a shareholder for bringing a claim with only a 5 per cent holding of shares.[24]

2. Concept

Generally speaking, the definition of nationality is regulated by national law. This statement was recognized by the Hague Convention on Nationality (1930) in its article 1, which stated, "It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality."[25]

In other words, each state was entirely free to determine who was going to be considered one of its nationals, and there were no generally binding rules concerning acquisition and loss of nationality. Accordingly, the determination made by each state granting its own nationality did not necessarily have to be accepted by the others without question. Likewise, diplomatic protection could not be invoked against a state of which the injured party was also a national, since the person in question was also considered by that state as its citizen. As long as several prob-

---

22 Alexandrov, see note 5, 30.

23 See Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction, paras 39-40 and CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Decision on Jurisdiction, para. 55, available at <www.asil.org/ilib/Enron.pdf>.

24 See Champion Trading Company and Ameritrade International, Inc. v. Arab Republic of Egypt, ICSID Case No. ARB/02/9, Decision on Jurisdiction, available at <www.worldbank.org/icsid/cases>.

25 Convention on Certain Questions relating to the Conflict of Nationality Laws, available at <www.law.dal.ca/kindredinflaw/conflictofnationality>.

lems regarding double nationality of national persons arose, especially in diplomatic protection claims, international law had to confront this issue. Different international tribunals issued several rulings regarding nationality during the 20th century.[26] To bypass the problems stemming from double nationality, the principle of "effective nationality" emerged.

The clearest definition of nationality was given by the ICJ in the *Nottebohm* case, "nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."[27]

The genuine connection between the state and its nationals, underscored in this definition, is the above mentioned principle of "effective nationality."

Though the *Nottebohm* case involved a natural person, this definition is also applicable to juridical persons. According to *Brownlie* "The borrowing of a concept developed in relation to individuals is awkward in some respects but is now well established."[28]

a. Features

Three main features can be highlighted in this concept.

1.) Nationality is a legal bond. The entire regulation of this matter is submitted to domestic law.

2.) It requires a genuine connection between both parties. This concept has been already explained in depth.

3.) It implies the existence of reciprocal rights and duties.

b. Legal Provisions

In the field of international relations, many treaties refer to the nationality of companies for different purposes.

At the beginning, this issue was addressed by commercial treaties aimed at creating standards of treatment regarding individuals or companies of the contracting parties. In this context for instance, the Treaty

---

26 E.g., the Canevaro case (1912), the Salem case (1932) and the Mergé claim (1955) analyzed in: D.J. Harris, *Cases and Materials on International Law*, 1998.

27 ICJ Reports, see note 15.

28 Brownlie, see note 10, 407.

of Commerce, Establishment and Navigation between the United Kingdom and Iran (1959) dealt with this issue in the following terms,

"The term 'companies':

means all legal persons except physical persons;

'in relation to a High Contracting Party' means all companies which derive their status as such from the law in force in any territory of that High Contracting Party to which the present Treaty applies;

'in relation to a country' means all companies which derive their status as such from the law in force in that country."[29]

Nevertheless, this issue has acquired greater importance during the last decade due to the economic integration process. Both multilateral agreements and bilateral arrangements usually have provisions regarding the nationality of juridical persons. Because of its steady proliferation, BITs have probably become the most fruitful source of definitions in connection with this matter.

These instruments generally follow some of the three criteria outlined above or a combination of them.

By way of example, several treaty provisions will be quoted.

According to Chapter Two of the Chile-United States Free Trade Agreement signed in 2003,[30] "enterprise" means "any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture, or other association", and "enterprise of a Party" means "an enterprise constituted or organized under the law of a Party." Thus, the method used to attribute nationality in this case is the place of incorporation.

Article B-01 of the Chile-Canada Free Trade Agreement contains a provision in the same terms.[31]

Other treaties set higher requirements for entitling companies with their benefits.

The Energy Charter Treaty,[32] a multilateral instrument, states in its article 1,

"(7) 'Investor' means:

---

29 Quoted at Brownlie, see note 10, 408.

30 Available at <www.direcon.cl>.

31 See note 30.

32 Available at <www.encharter.org/upload/1/TreatyBook-enpdf>.

(a) with respect to a Contracting Party:

(i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;

(ii) a company or other organization organized in accordance with the law applicable in that Contracting Party;

(b) with respect to a "third state", a natural person, company or other organization which fulfils, mutatis mutandis, the conditions specified in subparagraph (a) for a Contracting Party."

However, article 17 of the Treaty adds another requirement in order to take advantage of its stipulations by saying,

"(1) Each Contracting Party reserves the right to deny the advantages of this Part to:

a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized."

This instrument establishes a twofold condition for companies of the member states. Firstly, it applies the place of incorporation criterion. Secondly, it adds a substantial business activity formality when the company is owned or controlled by nationals of a third state.

Likewise, the U.S. BIT Draft Model[33] issued in 2004, in its article 1, defines an "enterprise of a Party" in the following terms, "means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party *and carrying out business activities there*" (emphasis added).

Some countries add the *siège social* or seat test to the place of incorporation as a double nationality requirement.

For instance, article 1 of the BIT signed in 1995 between Hong Kong and France [34] provides,

"(3) 'investors' means:

(b) in respect of the Republic of France:

(i) physical persons possessing French nationality;

(ii) any legal person constituted on French territory in accordance with French legislation and having its head office on French territory, or any legal person controlled directly or indirectly by French

---

33 Available at <www.bilaterals.org/article.php3?id_article=137>.

34 Available at <www.unctadxi.org/templates/DocSearch.aspx?id=779>.

nationals or by legal persons having their head office on French territory and constituted in accordance with French legislation (hereinafter referred to as 'companies')."

Regarding the control or substantial interest method, Switzerland is one of the countries whose BITs have consistently resorted to it.

Thus, the Switzerland-Albania BIT,[35] signed in 1992, refers to this matter pointing out,

"Art. 1 Definitions

For the purposes of the present Agreement:

(1) The term 'investor' designates, with regard to each Contracting Party:

(a) the natural persons that, according to the legislation of that Contracting Party, are considered as its nationals;

(b) the legal entities, including the companies, the incorporated companies, the individual corporations or other organizations, that are constituted or organized in accordance with the legislation of that Contracting Party, and which have their seat, at the same time as their real economic activities, in the territory of the same Contracting Party;

(c) *the legal entities established in accordance with the legislation of any country that are controlled, directly or indirectly, by nationals of that Contracting Party or by legal entities having their seat, together with their real economic activities, in the territory of that Contracting Party*" (emphasis added).

Similar provisions are contained in Swiss BITs with Latvia, Lithuania and Vietnam.

Nevertheless, the place of incorporation still is the most popular formula regarding the nationality of juridical persons in the BITs.[36]

To conclude this section:

First, most legislations around the world do not have provisions regarding corporate nationality.

Second, international law has mainly dealt with this issue in the diplomatic protection field.

---

35 Available at <www.unctadxi.org/templates/DocSearch.aspx?id=779> Unofficial translation.

36 Alexandrov, see note 5, 36.

Third, there are at least three ways in international law to attribute nationality to juridical persons. These are based on the place of incorporation, the *siège social* or seat and the control or substantial interest of the company.

Fourth, the last way requires the lifting of the corporate veil, to see behind the façade of the corporation in order to identify who are the owners of it.

Fifth, as occurs with natural persons, the nationality of juridical persons requires a genuine connection between the state and the company.

Sixth, there has been a consistent trend to lower the requirements about nationality in order to facilitate a prompt and expedite access to the mechanism of diplomatic protection for shareholders. This feature means a recognition of the underlying economic interests in a foreign investment. Thus, the home state is allowed to exercise this right on behalf of shareholders who have the control of a company, generally represented by 50 per cent of the shares.

Seventh, it is well established at the international level that shareholders can resort to their home state for diplomatic protection in three cases:

a.) When the state of incorporation is the defendant state.

b.) When the state of incorporation is unable to exercise diplomatic protection.

c.) When the state of incorporation is unwilling to exercise such protection.

Eighth, the worldwide belief in the advantages of the free economic system has encouraged a fast development of formulas to protect foreign investment, leaving aside the criteria of diplomatic protection. ICSID findings have accomplished an important role in this area entitling minority shareholders of locally incorporated companies to look for protection before its judicial mechanism.

Ninth, the clearest definition of nationality at the international level was given in the *Nottebohm* case. This stated that nationality is a legal bond which has at its core a social fact of attachment, i.e. a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. Hence, a legal bond, a genuine connection between the parties and the existence of reciprocal rights and duties, are the features of nationality.

Tenth, due to their number, BITs have become the most fertile source of definitions regarding the nationality of juridical persons.

These instruments are framed by the criteria of incorporation, *siège social* and control, or some combinations of them.

Having developed a panoramic vision of the nationality of juridical persons in the realm of international law, the next Chapter will be devoted to the provisions concerning this issue in the ICSID Convention.

III. The Wording of Article 25 para. 2 lit. b) of the ICSID Convention

1. Text of the Article

Chapter II of the Convention, entitled "Jurisdiction of the Centre", includes arts 25, 26 and 27. While the first one is the key provision in this matter, the last two refer to the exclusion of other remedies when the parties resort to the ICSID arbitral procedure and to the exercise of the diplomatic protection mechanism in this context.

Article 25 provides,

"(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) "National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of article 28 or paragraph (3) of article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as

a national of another Contracting State for the purposes of this Convention.

(3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.

(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1)."[37]

In this text the most particular feature of ICSID clearly appears, namely the mixed nature of the dispute that involves a state and a national of another state. No forum of this kind existed prior to the creation of this entity.

From the text of article 25 it follows that four requirements must be fulfilled to bring a case before the judiciary of the Convention:

1.) A legal dispute;

2.) Arising directly out of an investment;

3.) Between a contracting state and a national of another contracting state, that is to say, the investor;

4.) Which the parties have consented in writing to submit to the ICSID.

This article sets out the core jurisdictional framework establishing two kinds of requirements. On the one hand, certain conditions pertaining to the nature of the dispute (*ratione materiae*) are outlined. On the other hand, attributes for the parties' eligibility (*ratione personae*) are also developed. The former are embodied by a legal dispute and the fact that it arises directly from an investment. The latter encompass the status of a contracting state and the quality of being national of another contracting state. Therefore, the nationality of the parties to the dispute is a requirement *ratione personae*.

The Convention kept silent about the meaning of the first two requirements mentioned: a legal dispute arising directly out of an invest-

---

37 ICSID Convention, see note 2.

ment. However, the Executive Directors' report confirmed that a legal dispute did not refer merely to a conflict of interests.[38]

Notwithstanding the fact, that in both cases it was very difficult to agree to a common definition bearing in mind the great variety of legal systems represented by the delegates to the World Bank meetings, the main reasons behind this omission seem to be other issues. The voluntary character of the Convention on the one hand and the belief that the precise delimitation of ICSID jurisdiction should be left to the parties' discretion on the other, outweighed the arguments of those who supported the idea of stipulating specific concepts for both terms.

In connection with the scope of the word "investment", a proposition was made at an early stage of the meetings in order to fix a minimum amount avoiding insignificant claims. However, this attempt was quickly abandoned.[39]

Concerning the nationality requirement, the Convention did not define the meaning of this term for natural persons, neither did it for juridical ones. In this sense, individuals' nationality is regulated by national law as previously stated. Accordingly, BITs usually refer to municipal law regarding this issue.[40]

With regard to the nationality of natural persons, it must be stated that the requirements stipulated for them are higher than those stated for juridical persons. In the first case the nationality attribute must be present both on the date when the parties consented to submit the dispute to conciliation or arbitration and on the date when the request was registered. In the second case this formality has to be fulfilled exclusively on the former date.

Paragraph 3 of arts 28 and 36 is identical, and refers to the duties of the Secretary-General in case of a request for conciliation or arbitration. In both cases he shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre.

Individuals are also subject to a double negative condition as long as they cannot have the nationality of the state party to the dispute not

---

38 Report of the Executive Directors, see note 2, para. 26.

39 C. Schreuer, *The ICSID Convention: A Commentary*, 2001, 123.

40 E.g., U.S. BIT Draft Model, Chapter One, article 1, see note 33, which defines "national" as follows: "(a) for the United States, a natural person who is a national of the United States as defined in Title III of the Immigration and Nationality Act."

only on the date of their consent for conciliation or arbitration but also on the date of registration of the request. This provision bars the chance of taking a case before the ICSID for those natural persons who are parties to a dispute even if they have double nationality. This feature was emphasized by para. 29 of the Executive Directors' report in the following terms, "It should be noted that under clause (a) of article 25 (2) a natural person who was a national of the State party to the dispute would not be eligible to be a party in proceedings under the auspices of the Centre, even if at the same time he had the nationality of another State. This ineligibility is absolute and cannot be cured even if the State party to the dispute had given its consent."[41]

Likewise, the parties are allowed to treat juridical persons of the host state as foreigners for the purposes of the Convention, whereas this is not allowed in the case of natural persons. Though this situation will be analyzed further below, the main reason for adopting this provision was the usual condition of host states in order to require that foreign investments must be channeled through locally incorporated companies. A strict application of the criterion issued for natural persons would have left beyond the scope of the Convention an important number of instruments used as foreign investments vehicles.[42]

While the draft of the rules related to the nationality of individuals took up a significant part of the agenda of the delegates, its importance in practice has been rather secondary due to the low number of cases where natural persons have been the investors involved. The great majority of cases witnessed in ICSID Tribunals have included juridical persons.[43]

The Convention also lacks a definition of juridical persons, even though certain attempts were made in this respect as is explained later in this article. The convenience of a wide range for the autonomy of the parties in this area, bearing in mind the voluntary character of the Convention, explains this situation.

Over and above these requirements is the consent of the parties, which they must express in writing. The importance of consent was underscored in the report of the Executive Directors by saying "Consent of the parties is the cornerstone of the jurisdiction of the Centre."[44]

---

41 Report of the Executive Directors, see note 2.

42 Broches, see note 1, 358-359.

43 Schreuer, see note 39, 266.

44 Report of the Executive Directors, see note 2, para. 23.

A crucial attribute of consent is its irrevocable nature once given. According to *Aron Broches*, founding father of the Convention and former Secretary-General of the ICSID, this could be the most important provision of the Convention, and was intended to avoid a gap that would have thwarted the goals pursued with the creation of this entity.

Multiple examples can be found where agreements between governments and foreign investors, which included arbitration clauses, collapsed as a consequence of unilateral withdrawals of those governments entailing, thus, the end of the arbitration mechanism.[45]

Because consent of both parties does not necessarily have to be given simultaneously, as explained below, this irrevocability operates only from the moment when the consent is completed. This assertion has been supported by the ICSID jurisprudence.[46]

Consent of states is twofold. Firstly, they have to become members of the Convention. Secondly, they have to agree on submitting a specific dispute or certain categories of disputes to the ICSID. Nowadays, this injunction is mainly fulfilled through BITs, though other vehicles are also available. National legislation provisions and stipulations in multilateral agreements are among them.[47] BITs usually contain a compromissary clause submitting in advance disputes arising from the investment to the ICSID judiciary.

However, it must be underlined that all the ways previously mentioned amount to an offer made by the host state to the investor in order to access the ICSID mechanism. Only when the investor accepts the offer has the consent between the parties been perfected. Thus, the consent of the latter is normally given by means of a request to the ICSID proceedings. In this way, consent to the ICSID does not need to be simultaneous, nor is it, in practice, most of the time. Additionally, it can also be given once the dispute has emerged either by one or by both parties.

---

45 Broches, see note 1, 352.

46 Schreuer, see note 39, 254-256, quoting Holiday Inns v. Morocco and Alcoa Minerals of Jamaica v. Jamaica among others.

47 Schreuer, see note 39, 193-225.

2. Nationality Rules Applicable to Juridical Persons

Article 25 para. 2 lit. b) refers to this matter defining "National of another Contracting State" as "any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."

This proviso rules two different cases. The first one is the general rule in this topic, whereas the second one is an exception on which the parties can freely agree.

The first case encompasses any juridical person which had the nationality of a contracting state other than the state party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration.

The second case includes any juridical person which had the nationality of the contracting state party to the dispute on the date when the parties consented to submit such dispute to conciliation or arbitration and which, because of foreign control, the parties have agreed, should be treated as a national of another contracting state for the purposes of the Convention.

Therefore, these two kinds of juridical persons are entitled to submit requests for conciliation or arbitration in the ICSID environment.

However, as mentioned above, article 25 kept silent about the concept of nationality for the purposes of the Convention regarding both juridical persons and individuals.

An attempt was made during the meetings sponsored by the World Bank to define this term. The Preliminary Draft offered a double criterion for this purpose. This document, which was sent to the Regional Consultative Meetings, described a national of a contracting state as a natural or juridical person possessing the nationality of any contracting state, including a company "which under the domestic law of the State is its national" and any company "in which the nationals of that State have a controlling interest."[48] In turn, a "company" was defined as "any association of natural or juridical persons, whether or not such associa-

48 Broches, see note 1, 359.

tion is recognized by the domestic law of the Contracting State concerned as having juridical personality."[49]

This text reveals that, in a primary stage of the draft, both incorporation and control were deemed valid formulas for attributing nationality.

Notwithstanding this fact, the provision was subject to strong criticism by those who rejected the idea that a company created in accordance with the legislation of the host state could access the ICSID even in exceptional circumstances. On the other hand, it was also criticized by those who believed that "controlling interest" was too imprecise a term, capable of creating certain trouble in the case of companies incorporated in the host state but controlled by many different shareholders of several countries.[50]

For these reasons, the proposition was finally left aside, and neither the Revised Draft nor the Convention contained stipulations on this subject.[51]

As in other situations previously stated, the drafters of the Convention considered that its voluntary character made it possible to leave this point at the discretion of the parties. In other words, it is up to the parties to determine the requirements that a company must accomplish for being treated as a foreigner within the framework of article 25. *Broches* underscored this point by saying, "the parties should be given the widest possible latitude to agree on the meaning of 'nationality' and any stipulation of nationality made in connection with a conciliation or arbitration clause which is based on a reasonable criterion should be accepted."[52]

Accordingly, article 25 was intended to fix the outer limits of that instrument leaving ample room to the parties to establish what kind of disputes may be submitted to conciliation or arbitration under the ICSID mechanism.

The parties' will, in this respect, is generally expressed in the treaty where they agreed to submit their differences to that mechanism. The treaty contains statements about those matters on which the Convention remained silent. Thus, in these instruments we can usually find

---

49 Quoted by Schreuer, see note 39, 276.

50 Broches, see note 1, 359-360.

51 Schreuer, see note 39, 278.

52 Broches, see note 1, 361.

definitions regarding "investment", "nationality", "company" or other concepts that are part of the jurisdictional requirements of article 25.

With these elements at hand, it is possible to perceive ICSID jurisdiction as a double circle where the inner one is embodied by the stipulations of the treaty submitting the controversies between the parties to this entity, while the outer one is constituted by the provisions of the Convention related to this subject. The parties are only enabled to set regulations narrower than those of the Convention. Provisions which exceed its framework are not allowed.

In this way, the jurisdiction of a given ICSID Tribunal will depend on the fulfillment of both categories of requirements, namely those contained in the treaty and the general ones of article 25. The tribunal must equally examine if there exists consent in connection with the specific dispute, and if the nature of the dispute and the parties comply with the norms of the above mentioned provision.[53]

This feature acquires greater importance for two reasons. The ICSID judicial bodies are the judges of their own competence as stated in arts 32 and 41 of the Convention. Likewise, the faculties of the Secretary-General devised in arts 28 and 36 to reject registration are restricted to a single case, that is to say, when the dispute is manifestly outside the jurisdiction of the Centre.

Departing from the rule stated in the *Barcelona Traction* case, whose scope he restricted exclusively to the diplomatic protection field, *Broches* pointed out that the Commission or Tribunal should favor giving effect to the agreement between the parties by adopting a more functional approach, taking into account not only formal criteria such as incorporation but adopting a broader approach which would give effect to economic realities such as ownership and control.[54]

3. Interpretation of the Provision

As an introduction, it is useful to remember that the first instrument where the parties refer to this matter is the agreement which submits the differences between them to the ICSID. There, we can find a variety of provisions which deal with the nationality of juridical persons. The

---

53 Alexandrov, see note 5, 25.

54 Broches, see note 1, 361.

traditional criteria of incorporation, *siège social* and control are generally used as well as mixed formulas of them.[55]

When the consent is based on foreign investment frameworks created by national legislations, these norms include definitions in this respect.

Regarding the wording of article 25, most scholars agree that it accepts, in a rather implicit way, either incorporation or incorporation and *siège social* as the valid formulas for attributing nationality. This stance is supported by several facts.

Since the first part of article 25 para. 2 lit. b) establishes the general rule in this matter ("any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration"), the second part becomes an exception ("any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention").

Since the word "nationality" appears twice in this paragraph, it is likely that it has the same meaning in both cases. At the same time, if a juridical person, national of the host state, can be treated as a foreigner because of foreign control, this implies necessarily that the mechanism for attributing the host state nationality is other than control. For instance, the company can have this nationality due to incorporation or *siège social* and be treated as an alien because of control.

Thus, control constitutes the exception in this field and some of the other possible methods constitute the general rule.[56]

This conclusion can also be supported applying the general rules of interpretation of treaties contained in article 31 of the Vienna Convention on the Law of Treaties, regarding good faith and the ordinary meaning given to the terms in the light of its object and purpose.[57]

Moreover, scholars rely on the interpretations of article 25 made by ICSID Tribunals which uniformly pointed at incorporation or *siège social* as the accepted criteria in this matter.

---

55 See under II. 2. b.

56 Schreuer, see note 39, 278.

57 UNTS Vol. 1155 No. 18232.

One finding that highlighted this point was issued in *SOABI v. Senegal* in the following terms,

"As a general rule, States apply either the head office or the place of incorporation criteria in order to determine nationality. By contrast, neither the nationality of the company's shareholders nor foreign control, other than over capital, normally govern the nationality of a company, although a legislature may invoke these criteria in exceptional circumstances. Thus, 'a juridical person which had the nationality of the Contracting State party to the dispute', the phrase used in article 25 (2) (b) of the Convention, is a juridical person which, in accordance with the laws of the State in question, had its head office or has been incorporated in that State."[58] Other rulings in the same direction were stated in *Kaiser Bauxite v. Jamaica* and *SPP v. Egypt*.[59]

With this background, Prof. *Schreuer* asserted that "The overwhelming weight of the authority, outlined above, points towards the traditional criteria of incorporation or seat for the determination of corporate nationality under Art. 25 (2) (b)."[60]

However, it is important to keep in mind, despite the clearness of the paragraph quoted above, that the finding of *SOABI v. Senegal* was issued in 1984, more than 20 years ago, in one of the first cases decided by an ICSID Tribunal, and not only international law but also the ICSID jurisprudence have witnessed important changes and new developments in the last two decades.

Whether the two criteria mentioned above, namely incorporation and *siège social*, should be the acceptable ones is a point that has not been decided yet by the scholars, and it is possible to find different opinions in this area.[61]

At this point it is advisable to hear the authoritative voice of *Broches*. He shared the point of view of other scholars in order to acknowledge that article 25 implicitly assumes incorporation as a criterion of nationality, but he rejected that this was the exclusive formula in this field.[62] Accordingly, he fostered a more flexible approach aimed at making it possible to encompass economic realities such as ownership and control. The ICSID judiciary should generally endorse its jurisdiction

---

58 Schreuer, see note 39, 280; also quoted by Alexandrov, see note 5, 35.

59 Schreuer, ibid., 279-280.

60 Schreuer, ibid., 281.

61 Schreuer, ibid., 278-279.

62 Broches, see note 1, 361.

when interpreting investment agreements unless this position allows the parties to use the Convention for purposes for which it was clearly not intended.[63]

It is important to realize that these opinions were given 34 years ago, when the world was divided into two blocs in political terms, foreign investment was a rather controversial subject, and many countries declined, for ideological reasons, to sign the Convention. Moreover, the ICSID jurisprudence at that time was a purely theoretical thing since the first case was brought before this entity in 1972, and the first adjudication was issued several years later.

The second part of article 25 para. 2 lit. b) contains an exception in the nationality field. This exception refers to an agreement of the parties in order to treat as a national of another contracting state, for the purposes of the Convention, a juridical person of the host state controlled by aliens.

The clear intention to restrict the framework of the Convention to the dispute between a state and nationals of other states, as is pointed out in its preamble, is one of the reasons for this provision. In other words, the conflicts between a state and its citizens are outside the scope of the ICSID and must be solved by other means, usually national courts. On the other hand, the requirements of the host state in order to transfer foreign investments by means of locally incorporated companies is the other reason for such a statement. The risk of leaving, without standing before the ICSID mechanism, an important number of foreign investors was carefully considered during the meetings. Thus, the Preliminary Draft granted this right even to the investors who had double nationality, one of them that of the host state. Similarly, this document attributed nationality to companies not only by way of the incorporation method but also by means of the control test. Both ideas were later abandoned due to resistance of the delegates. Regarding juridical persons, *Broches* proposed a draft which combined two formulas previously discussed, namely the parties' agreement and the controlling interest. This solution was finally adopted.[64]

The formalities of this agreement were not specified in the text. Whereas consent to ICSID jurisdiction must be expressed in writing, according to article 25 para. 1, no similar requirement was stated regarding the agreement on nationality. This fact allows parties to have

---

63 Broches, see note 1, 361.

64 Schreuer, see note 39, 291-292.

some leeway about the way in which they express their consent. In this way, an explicit and an implicit agreement are equally acceptable. This conclusion has been supported by the ICSID jurisprudence upholding implicit agreements on several occasions. Even the sole existence of an arbitration clause giving jurisdiction to the ICSID has been deemed enough evidence of the existence of such agreement.[65]

In connection with the meaning of "control", in a first phase it pointed at an effective control or dominant position of foreign shareholders in order to meet this requirement.[66] However, as the ICSID jurisprudence has evolved towards a more flexible approach which gives direct standing to foreign shareholders even if they have a minority share in the local company, this matter has lost its importance. This change was possible by interpreting the term "investment" stated in article 25. Although the Convention did not define the word, the ownership of shares was one of the cases intended to fall under its scope. The same conclusion can be drawn from BITs with ICSID arbitral clauses since most of them include, as a kind of investment, shares and other interests in local companies.[67] The trend followed by the ICSID jurisprudence in this respect was described by Prof. *Schreuer* commenting on the adjudication in *Klöckner v. Cameroon* with these words,

"By substituting the foreign controller for the local company, the Tribunal bypassed the entire question of nationality and hence of foreign control. The tendency of tribunals to look beyond the identity of the company named in the consent agreement and to accept jurisdiction in respect of unnamed parent companies […] could make the question of control over a local company at a particular time largely irrelevant."[68]

Whether the contracting state, whose nationality the parties have agreed to attribute to the juridical person of the host state because of foreign control, must be identified or not is not entirely clear. While a positive identification is advisable for practical reasons, some ICSID sentences have ruled in the opposite direction.[69]

---

65 Schreuer, ibid., 297-299, quoting Amco v. Indonesia, Klöckner v. Cameroon and Letco v. Liberia.

66 Schreuer, see note 39, 313.

67 Alexandrov, see note 5, 28.

68 Schreuer, see note 39, 329.

69 Schreuer, ibid., 301-305.

This situation has diminished its importance in recent years as there are few countries which have not entered into the Convention. However, among them are some important receivers of foreign investment like Brazil, Mexico and Russia. The latter signed the Convention in 1992, but its ratification is still pending.[70]

In sum, this Chapter has dealt with the meaning of nationality regarding juridical persons within the framework of the ICSID Convention set out in article 25 para. 2 lit. b). The main findings in this respect are the following,

first, the general requirements of that article regarding jurisdiction are four,

1.) A legal dispute;

2.) arising directly out of an investment;

3.) between a contracting state and a national of another contracting state, that is to say, the investor;

4.) which the parties have consented in writing to submit to the ICSID.

Second, the Convention does not define several terms contained in this provision, like legal dispute, investment, juridical person and nationality. In the latter case, this silence includes natural and juridical persons alike.

Third, the main reason behind this fact was the belief that the precise delimitation of ICSID jurisdiction should be left to the parties' discretion. Thus, the article fixed only the outer limits of the Convention.

Fourth, consent of the parties is a key requirement of the provision, and it is irrevocable once given. Consent of states includes both the ratification of the Convention and the agreement to submit specific disputes to the ICSID. The latter is mainly fulfilled through BITs. The investor usually gives his consent by resorting to the ICSID proceedings.

Fifth, article 25 para. 2 lit. b) regulates the nationality of juridical persons establishing a general rule and an exception. The first one encompasses any juridical person which had the nationality of a contracting state other than the state party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration. The second one includes any juridical person which had the nationality of the contracting state party to the dispute on the date when the parties consented to submit such dispute to conciliation or arbitra-

---

70 See List of Contracting States at the ICSID web site.

tion and which, because of foreign control, the parties have agreed should be treated as a national of another contracting state for the purposes of the Convention.

Sixth, interpreting article 25, most scholars accept that incorporation or incorporation and *siège social* embody the general rule for attributing nationality. Control constitutes the exception in this field. *Broches* pointed out a flexible criterion in this point looking for encompassing economic realities such as ownership and control, but underlining that an interpretation favoring ICSID jurisdiction should avoid being used against the objectives of the Convention.

Seventh, the ICSID jurisprudence has uniformly interpreted article 25 supporting incorporation and *siège social* as the prevailing criteria on the nationality ground.

Eighth, the exceptional situation outlined in the second part of article 25 pursued two goals. The first was to restrict the framework of the Convention exclusively to the disputes between a state and the nationals of other states. The second was to comply with the requirement of the host state in order to transfer foreign investments by means of locally incorporated companies.

Ninth, the exceptional situation explained in the previous paragraph has lost its importance as long as the ICSID judiciary, interpreting the term "investment", has given direct standing to foreign shareholders even if they have a minority share in the locally incorporated company.

Against this background, the next Chapter will analyze the practical application of the norms referred to juridical persons by the ICSID Tribunals in several cases heard during the last few years.

IV. Case Study[71]

1. Banro American Resources (2000)

a.) The facts: an American company, *Banro American Resources*, hereinafter BAR, registered in the state of Delaware, resorted to the ICSID in 1998 against the Democratic Republic of the Congo (the Congo). BAR was a wholly-owned subsidiary of *Banro Resource Corporation*, a company registered in Ontario, Canada. The dispute concerned the alleged

---

71 All the quotations made in this Chapter have omitted the footnotes of the related findings.

expropriation by the Congo of the assets of SAKIMA, a subsidiary of BAR established and existing under the laws of that country in violation of a mining convention between the Congo, on the one hand, and *Banro Resource Corporation* and SOMINKI, on the other (the Mining Convention). SOMINKI had originally entered into a mining convention with the Congo for the exploration and development of mining rights in two Congo provinces. When the mining convention was due to expire, SOMINKI, *Banro Resource Corporation* and the Congo entered into a new convention, the Mining Convention, transferring to SAKIMA the mining concessions. The Mining Convention contained an ICSID arbitration clause for disputes between the parties arising out of the Mining Convention. In July 1998, the Congolese Government revoked the decrees which had approved the Mining Convention and the creation of SAKIMA due to alleged irregularities in the dissolution of SOMINKI and the creation of SAKIMA. In August 1998, *Banro Resource Corporation* transferred its SAKIMA shares to BAR, which thereby became the majority shareholder. BAR brought before the ICSID a request for arbitration against the Congo. SAKIMA joined as a requesting party in the proceeding. The request was registered by the Secretary-General of ICSID two months later.

Since before the constitution of the Tribunal the defendant raised objections referring to jurisdiction, the Tribunal decided to suspend the proceeding on the merits and focused on these objections.

Finally, the award was rendered on 1 September 2000, declining jurisdiction by a majority of the members of the Arbitral Tribunal.

b.) The ruling: although the problem posed in this case stemmed from the fact that Canada, the country of incorporation of *Banro Resource Corporation*, was not a member of the Convention and most of the adjudication dealt with the diplomatic protection topic, certain important considerations related to both the criteria of ICSID Tribunals in jurisdictional matters and the nationality of juridical persons in this context can be underscored.

Paragraph [7] of the ruling stated,

"A second approach would be to go beyond procedural appearances and to view the actual Claimants in these arbitration proceedings as the parent company of Banro American, namely Banro Resource, with SAKIMA acting in such a case as the Congolese subsidiary of Banro Resource. In other words, 'the veil' of the group's structure would be 'pierced' to reveal the parent company as the actual Claimant in this proceeding. This approach, which would have the advantage of allow-

ing the financial reality to prevail over legal structures, would also be consistent with the press releases published on Banro Resource's website, which describe the measures adopted by the Congolese Government as targeting Banro Resource …"

Paragraph [9], in turn, provided,

"The Tribunal has nevertheless considered that the issue of its jurisdiction in the present dispute cannot be limited to an analysis of the provisions of the Mining Convention. It has asked itself whether the jurisprudence of the ICSID tribunals does not require a certain flexibility regarding the identification of the Claimant for the purpose of determining the jurisdiction of the Tribunal."

Paragraph [10] added,

"Indeed, ICSID tribunals faced with such an issue have rarely proven to be formalistic. This was the case, in particular, in two situations: when the request was made by a member company of a group of companies while the pertinent instrument expressed the consent of another company of this group; and when, following the transfer of shares, the request came from the transferee company while the consent had been given by the company making the transfer."

Paragraph [11] pointed out,

"These few examples demonstrate that in general, ICSID tribunals do not accept the view that their competence is limited by formalities, and rather they rule on their competence based on a review of the circumstances surrounding the case, and, in particular, the actual relationships among the companies involved. This jurisprudence reveals the willingness of ICSID tribunals to refrain from making decisions on their competence based on formal appearances, and to base their decisions on a realistic assessment of the situation before them."

Paragraph [12] declared,

"It is for this reason that ICSID tribunals are more willing to work their way from the subsidiary to the parent company rather than the other way around. Consent expressed by a subsidiary is considered to have been given by the parent company, the actual investor, whose subsidiary is merely an 'instrumentality.' The extension of consent to subsidiaries that are not designated or not yet created, even following a transfer of shares, is less readily accepted."

The final part of para. [14] asserted,

"Beyond a literal analysis of the relevant provisions of the ICSID Convention and the Mining Convention, beyond the choice between a

realistic and a formalistic approach regarding the jurisdiction of ICSID tribunals, they are considerations that fall within the scope of public international law that take the present case outside the jurisdiction of the Centre and the Tribunal. This latter element requires particular attention on the part of the Tribunal."

Finally, para. [25] affirmed,

"The Tribunal is fully aware of the need for a judicial regulation of the relationships arising out of foreign private investments. It is thus, with reluctance, that the Tribunal declared that it had no competence. It felt, however, that it was essential to maintain the fundamental consensual characteristic of the ICSID mechanism conferred by the Washington Convention, with regard to the host State, the foreign investor or the State of which the investor is a national. The ICSID mechanisms will be all the more efficient and effective if the conditions to their applications provided by the relevant texts are better respected."[72]

2. Autopista Concesionada de Venezuela (2001)

a.) The facts: in December 1996, *Autopista Concesionada de Venezuela, C.A. (AUCOVEN)*, a company incorporated under the laws of Venezuela, concluded a concession agreement with the Ministry of Infrastructure of that country for the construction and maintenance of two major highways, linking Caracas to La Guaira. At the time of the agreement, *AUCOVEN* was controlled by ICA, a Mexican subsidiary of ICA Holding. In June, 1998, following a request by *AUCOVEN*, the Ministry of Infrastructure authorized the transfer of 75 per cent of *AUCOVEN's* shares to *ICATECH Corporation (ICATECH)*, a United States company. This authorization was given after ICA Holding accepted to financially guarantee the fulfillment of the concession agreement.

In June, 2000, *AUCOVEN* submitted a request for arbitration against Venezuela invoking the ICSID arbitration clause contained in the 1996 concession agreement. The Secretary-General of the ICSID registered the request in the same month.

Once the Tribunal was constituted, Venezuela raised some objections regarding jurisdiction. The Tribunal decided to suspend the proceeding while a determination on the issue of jurisdiction was pending.

---

72 Available at <www.worldbank.org/icsid/cases>.

Venezuela's objections to jurisdiction mainly focused on two provisions of the Convention, article 25 para. 2 lit. b) and article 27.

Reasoning about the exception stated in article 25 para. 2 lit. b) in order to give the status of a foreigner to a juridical person which has the nationality of the host state, Venezuela argued that the conditions of the provision were not met in this case. The defendant outlined two main arguments to support its position. Firstly, it contended the standing of *AUCOVEN* to initiate an ICSID proceeding since this company was in fact controlled by ICA Holding. In turn, ICA Holding was incorporated under the laws of Mexico, a non-member state of the convention. Furthermore, Mexican officials had sent written communications and held meetings with Venezuelan officials, this amounted to Mexico's diplomatic intervention confirming ICA Holding's direct interest in *AUCOVEN*. Secondly, Venezuela asserted that it had not consented to treat *AUCOVEN* as a national of the United States because its consent to ICSID jurisdiction, stated in the arbitration clause, depended on a transfer of actual control to a national of another contracting state.

The Tribunal, in a decision issued in September 2001, deemed that it had jurisdiction. This decision was mainly based on the finding that the criteria chosen by the parties to define foreign control were reasonable.

b.) The ruling: on the ground of the requirements of article 25 of the Convention and based on *Broches'* statements, it provided in para. 97, "The drafters of the Convention deliberately chose not to define the terms 'legal dispute' 'investment', 'nationality' and 'foreign control'. In reliance on the consensual nature of the Convention, they preferred giving the parties the greatest latitude to define these terms themselves, provided that the criteria agreed upon by the parties are reasonable and not totally inconsistent with the purposes of the Convention."

Analyzing the exception of article 25 para. 2 lit. b) para. 105 stated, "The Convention does not require any specific form for the agreement to treat a juridical person incorporated in the host state as a national of another Contracting State because of foreign control."

Expounding the possible criteria on nationality and following *Broches'* and *Schreuers'* texts, para. 107 asserted, "According to international law and practice, there are different possible criteria to determine a juridical person's nationality. The most widely used is the place of incorporation or registered office. Alternatively, the place of the central administration or effective seat may also be taken into consideration."

Paragraph 109 added, "However, as stated by Aron Broches, the purpose of article 25 (2) (b) being to indicate 'the outer limits within

which disputes may be submitted to conciliation or arbitration under the auspices of the Centre', the parties should be given 'the widest possible latitude' to agree on the meaning of nationality. Any definition of nationality based on a 'reasonable criterion' should be accepted."

In the field of foreign control, para. 110 affirmed, "Like the other objective requirements of article 25 of the ICSID Convention, foreign control is not defined. Article 25 (2) (b) does not specify the nature, direct, indirect, ultimate or effective, of the foreign control."

Paragraph 114 pointed out, "Given the autonomy granted to the parties by the ICSID Convention, an Arbitral Tribunal may not adopt a more restrictive definition of foreign control, unless the parties have exercised their discretion in a way inconsistent with the purposes of the Convention."

Paragraph 116 expressed, "On the basis of the foregoing developments, it is the task of the Tribunal to determine whether the parties have exercised their autonomy within the limits of the ICSID Convention, i.e. whether they have defined foreign control on the basis of reasonable criteria. For this purpose, the Tribunal has to review the concrete circumstances of the case without being limited by formalities. However, as long as the definition of foreign control chosen by the parties is reasonable and the purposes of the Convention have not been abused (for example in cases of fraud or misrepresentation), the Arbitral Tribunal must enforce the parties' choice."

Studying the parties' agreement contained in Clause 64, para. 119 declared, "As a general matter, the arbitral Tribunal accepts that economic criteria often better reflect reality than legal ones. However, in the present case, such arguments of an economic nature are irrelevant. Indeed, exercising the discretion granted by the Convention, the parties have specifically identified majority shareholding as the criterion to be applied. They have not chosen to subordinate their consent to ICSID arbitration to other criteria."

Paragraph 120 added, "As a result, the Tribunal must respect the parties' autonomy and may not discard the criterion of direct shareholding, unless it proves unreasonable."

The final paragraph is also interesting, "Finally, the Tribunal is aware that the ICSID award in *Banro* (*Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema, S.A.R.L. v. the Democratic Republic of the Congo* (Case No. ARB/98/7)) reached a different conclusion. However, the circumstances in *Banro* were different too. In *Banro* the transfer of shares was not subject to the approval of the Gov-

ernment and, more importantly, the parties had not contractually defined the test for foreign control. As a result of these differences, the Arbitral Tribunal is of the opinion that an analogy between *Banro* and the present case is inapposite."[73]

3. Champion Trading Company (2003)

a.) The facts: in 1992, a treaty between the United States of America and the Arab Republic of Egypt concerning the Reciprocal Encouragement and Protection of Investments entered into force.

In 2002, the shareholders of the *National Cotton Company (NCC)*, a cotton trading and processing company incorporated in Egypt, contended that this country had violated the treaty by taking a series of measures in the cotton industry affecting their investment. The shareholders of *NCC* were two American companies and three brothers who were born in the United States. In turn, both American companies were owned by the same three individuals and their parents. The father was born in Egypt and later became a citizen of the United States. The mother was American. Neither the father nor the mother were part of the proceedings.

Accordingly, the five claimants brought the case before the ICSID. The request for arbitration was registered in August of the same year. In March, 2003, the respondent raised objections to the jurisdiction of the Tribunal, which the latter decided to deal with as a preliminary matter.

These objections were twofold. On the one hand, they contended that the individuals acting as claimants, three brothers who were described as United States nationals in the request for arbitration, in fact also held Egyptian nationality. However, dual nationality was not accepted by article 25 para. 2 lit. a) of the Convention as described above. Thus, they had no right to access the ICSID arbitration mechanism.

On the other hand, the respondent also objected that the corporate claimants, two companies incorporated in the state of Delaware, did not fit in with the requirements of the treaty to qualify as United States companies. The treaty required that natural persons who are United States nationals had a substantial interest in a company in order to see it as a United States corporation. In this way, since the majority of the

---

73 Available at <www.worldbank.org/icsid/cases>.

shareholders in the corporate claimants were dual American and Egyptian nationals, the criterion of "substantial interest" had not been demonstrated.

b.) The ruling: in connection with the objection related to the individuals' nationality, the Tribunal stated in para. 3.4.1 the following, "All three individual Claimants were born in the United States of America as sons of Dr. Mahmoud Ahmed Mohamed Wahba, born at Kafr-El-Sheikh, Egypt, on February 12, 1941 and Mrs Susanne Patterson Wahba, born in Minnesota, USA, on June 24, 1944." "The Parties are in agreement that a child born of an Egyptian father, either within or outside Egypt, automatically acquires at birth Egyptian nationality if at that time the father holds Egyptian nationality."

"It is uncontested that Dr. Mahmoud Wahba, on March 27, 1997, applied for an Egyptian personal identity card (Exhibit D90) and that he received the identity card. It is also not contested that he carried the Egyptian passport No 287, issued by the Consulate of the Arab Republic of Egypt in the United States of America in 1992, and that he used this passport extensively for travels to Egypt, at least between the period of 1995 and 1997."

"The Arbitral Tribunal therefore comes to the conclusion that at the time the three individual Claimants were born their father still possessed his Egyptian nationality and that therefore under Egyptian law the three individual Claimants upon birth automatically acquired the Egyptian nationality." "The Tribunal therefore holds that it does not have jurisdiction over the claims of the three individual Claimants."

Related to the two corporate claimants, the Tribunal issued a short statement in para. 3.4.2, "According to article I (b) of the Treaty 'Company of a Party' means a company duly incorporated, constituted, or otherwise duly organised under the applicable laws and regulations of a Party or its subdivision in which

(i) natural persons who are nationals of such Party ....

(ii) …

(iii) have a substantial interest."

Article 25 para. 2 lit. b) of the Convention states, the term "National of another Contracting State" is defined as "any juridical person which had the nationality of a Contracting State other than the State party to the dispute …."

It is not disputed that *Champion Trading Company* was incorporated in the state of Delaware on 24 July 1995 and *Ameritrade Interna-*

tional Inc. was likewise incorporated in the state of Delaware on 20 May 1992.

According to the uncontested statement of the claimants, the shareholders of both companies are the natural persons Mahmoud Wahba, Susanne Patterson Wahba, James T. Wahba, John B. Wahba and Timothy T. Wahba and each of these five individuals holds 20 per cent of the capital of each company.

Neither the treaty nor the convention contain any exclusion of dual nationals as shareholders of companies of the other contracting state, contrary to the specific exclusion of article 25 para. 2 lit. a) of the Convention regarding natural persons.

The respondents did not adduce any precedents or learned writings according to which dual nationals could not be shareholders in companies bringing an ICSID action under the treaty.

The Tribunal therefore holds that it does have jurisdiction over the claims of the two corporate claimants.[74]

4. Tokios Tokelés (2004)

a.) The facts: the claimant, *Tokios Tokelés*, was a business enterprise established under the laws of Lithuania. It was founded as a cooperative in 1989, and, by 1991, had been registered as a "closed joint-stock company." The claimant was engaged primarily in the business of advertising, publishing and printing in Lithuania and outside its borders. In 1994, *Tokios Tokelés* created Taki spravy, a wholly owned subsidiary established under the laws of Ukraine. Taki spravy was in the business of advertising, publishing, and printing, and related activities in Ukraine and outside its borders.

Tokios Tokelés, submitted its dispute with Ukraine to the ICSID under the 1994 Agreement between the Government of Ukraine and the Government of the Republic of Lithuania for the Promotion and Reciprocal Protection of Investments, which entered into force in 1995 (the Treaty). It alleged that certain governmental authorities in Ukraine had taken a series of measures violating the Treaty in respect of its subsidiary in Ukraine, Taki spravy, in which *Tokios Tokelés* had made investments. The claimant contended that these measures, mainly pertaining to tax investigations, were in fact retaliation for a publication issued

---

74 See note 72.

by Taki spravy concerning a Ukrainian opposition politician in January 2002.

When the dispute arose, three Ukrainian nationals owned 99 per cent of the shares in *Tokios Tokelés*, and a national of Lithuania owned the remaining one percent.

The claimant's request for arbitration was registered by the ICSID in December 2002. Subsequently, the respondent raised objections to the jurisdiction of the Tribunal, which the Tribunal decided to deal with as a preliminary matter.

These objections mainly pertained to the claimant's nationality and its investment. The respondent first observed that the claimant was owned and controlled 99 per cent by Ukrainian nationals and further argued that it did not have any substantial business activities or its *siège social* in Lithuania. The respondent thus stated that the real claimants were in fact Ukrainian nationals pursuing an international arbitration against their own government, which would be inconsistent with the object and purpose of the Convention. It therefore requested that the Tribunal "pierce the corporate veil" to determine the nationality of the claimant based on that of its predominant shareholders and managers.

Likewise, the defendant contended that, even if the claimant were a Lithuanian investor, it did not make an "investment" in Ukraine because it did not show that the source of capital originated outside Ukraine and that, in any event, an investment was not made in accordance with the laws and regulations of Ukraine as required by the Treaty.

The Tribunal dismissed the arguments of the defendant and, by a majority vote issued in April 2004, decided that the dispute was within the jurisdiction of the Centre and the competence of the Tribunal.

b.) The ruling: regarding the nationality of the claimant, paras 21 and 22 established,

> "The Respondent does not dispute that the Claimant is a legally established entity under the laws of Lithuania. The Respondent argues, however, that the Claimant is not a 'genuine entity' of Lithuania first because it is owned and controlled predominantly by Ukrainian nationals. There is no dispute that nationals of Ukraine own ninety-nine percent of the outstanding shares of Tokios Tokelés and comprise two-thirds of its management. The Respondent also argues, but the Claimant strongly contests, that Tokios Tokelés has no substantial business activities in Lithuania and maintains its *siège social,* or administrative headquarters, in Ukraine. The Respondent

> contends, therefore, that the Claimant is, in terms of economic substance, a Ukrainian investor in Lithuania, not a Lithuanian investor in Ukraine.
>
> The Respondent argues that to find jurisdiction in this case would be tantamount to allowing Ukrainian nationals to pursue international arbitration against their own government, which the Respondent argues would be inconsistent with the object and purpose of the ICSID Convention. To avoid this result, the Respondent asks the Tribunal to 'pierce the corporate veil,' that is, to disregard the Claimant's state of incorporation and determine its nationality according to the nationality of its predominant shareholders and managers, to what the Respondent contends is the Claimant's lack of substantial business activity in Lithuania, and to the alleged situs of its *siège social* in Ukraine."

On the ground of nationality of juridical entities under article 25 of the Convention, para. 25 stated, "Thus, we begin our analysis of this jurisdictional requirement by underscoring the deference this Tribunal owes to the definition of corporate nationality contained in the agreement between the Contracting Parties, in this case, the Ukraine-Lithuania BIT."

About the definition of "Investor" in the BIT, para. 28 pointed out,

> "article 1 (2) (b) of the Ukraine-Lithuania BIT defines the term 'investor', with respect to Lithuania, as 'any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations'."

The ordinary meaning of "entity" is "[a] thing that has a real existence." The meaning of "establish" is to "[s]et up on a permanent or secure basis; bring into being, found (a … business)." Thus, according to the ordinary meaning of the terms of the treaty, the claimant is an "investor" of Lithuania if it is a thing of real legal existence that was founded on a secure basis in the territory of Lithuania in conformity with its laws and regulations. The treaty contains no additional requirements for an entity to qualify as an "investor of Lithuania."

In the same field, para. 31 explained,

"The object and purpose of the Treaty likewise confirm that the control-test should not be used to restrict the scope of 'investors' in article 1(2)(b). The preamble expresses the Contracting Parties' intent to 'intensify economic cooperation to the mutual benefit of both States' and 'create and maintain favourable conditions for investment of investors of one State in the territory of the other State.' The Tribunal in *SGS*

v. Philippines interpreted nearly identical preambular language in the Philippines-Switzerland BIT as indicative of the treaty's broad scope of investment protection. We concur in that interpretation and find that the object and purpose of the Ukraine-Lithuania BIT is to provide broad protection of investors and their investments."

Reasoning on the consistency of article 1 para. 2 of the BIT with the Convention, the first part of para. 42 provided,

"In our view, the definition of corporate nationality in the Ukraine-Lithuania BIT, on its face and as applied to the present case, is consistent with the Convention and supports our analysis under it. Although article 25 (2) (b) of the Convention does not set forth a required method for determining corporate nationality, the generally accepted (albeit implicit) rule is that the nationality of a corporation is determined on the basis of its *siège social* or place of incorporation."

Accordingly, para. 46, in its first part, asserted, "The use of a control-test to define the nationality of a corporation to *restrict* the jurisdiction of the Centre would be inconsistent with the object and purpose of article 25(2) (b)."

Next, the adjudication analyzed the doctrine of "veil piercing". In this respect, paras 53 and 54 expounded, "Finally, we consider whether the equitable doctrine of 'veil piercing', to the extent recognized in customary international law, should override the terms of the agreement between the Contracting Parties and cause the Tribunal to deny jurisdiction in this case."

The seminal case, in this regard, is *Barcelona Traction.* In that case, the ICJ stated, "the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law." In particular, the Court noted,

"[t]he wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations."

Accordingly, the first part of para. 55 affirmed, "The Respondent has not made a *prima facie* case, much less demonstrated, that the Claimant has engaged in any of the types of conduct described in *Barcelona Traction* that might support a piercing of the Claimant's corporate veil."

In turn, the last part of para. 56 added, "The Claimant manifestly did not create Tokios Tokelés for the purpose of gaining access to ICSID arbitration under the BIT against Ukraine, as the enterprise was founded six years before the BIT between Ukraine and Lithuania entered into force. Indeed, there is no evidence in the record that the Claimant used its formal legal nationality for any improper purpose."

Bearing in mind all these elements, para. 71 declared, "The Tribunal concludes that the Claimant is an 'investor' of Lithuania under article 1 (2) (b) of the BIT and a 'national of another Contracting State', under article 25 of the Convention."

The last paragraphs of the sentence are dedicated to study and dismiss the objections of the defendant related to the term "investment". The latter contended that the claimant had not made an investment covered by the BIT between Lithuania and Ukraine.

In this sense, the first part of para. 78 expressed, "We conclude that, under the terms of the BIT, both the enterprise Taki spravy and the rights in the property described in the above-referred 'Informational Notices', are assets invested by the Claimant in the territory of Ukraine. The investment would not have occurred but for the decision by the Claimant to establish an enterprise in Ukraine and to dedicate to this enterprise financial resources under the Claimant's control. In doing so, the Claimant caused the expenditure of money and effort from which it expected a return or profit in Ukraine."

Moreover, para. 79, in its first part, stated, "The Tribunal's finding under the BIT is also consistent with the ICSID Convention. The broad definition of 'investment' in the Lithuania-Ukraine BIT is typical of the definition used in most contemporary BITs."

c.) The dissenting vote of Prof. Prosper Weil, referring to the purpose of the Convention, paras 4 and 5 explained,

"The Convention, for its part, refers in its Preamble to 'the possibility that from time to time disputes may arise in connection with … investment between Contracting States and nationals of other Contracting States.'

[W]hile such disputes, so the Preamble states, would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases; that is why it has been regarded as appropriate to establish 'facilities for international arbitration … to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire'.

Accordingly, article 25 para. 1 of the Convention establishes the jurisdiction of the Centre over disputes 'between a Contracting State … and a national of another Contracting State ….' Over other disputes the Centre has no jurisdiction."

"From this it appears that the ICSID arbitration mechanism is meant for *international* investment disputes, that is to say, for disputes between States and *foreign* investors. It is because of their *international* character, and with a view to stimulating private *international* investment, that these disputes may be settled, if the parties so desire, by an *international* judicial body. The ICSID mechanism is not meant for investment disputes between States and their own nationals. This is in effect not disputed by the Claimant since in its Opening Statement it declared that:

> … this Convention has as its express purpose the encouragement of international private investment. We can agree with the Respondent that the ICSID Convention prohibits a host State from being sued by its own nationals with the single exception of the circumstances foreseen by the second clause of article 25 (2) (b)."

Regarding the case at stake, he asserted in para. 10,

"It is, I think, the first time that an ICSID tribunal has to address the specific problem of a dispute opposing to State A (Ukraine) a corporation which has the nationality of State B (Lithuania) but which is controlled by citizens of State A (Ukraine) – so much so that the dispute, while formally meeting the condition of being between a Contracting State and a national of another Contracting State, is in actual fact between a Contracting State and a corporation controlled by nationals of that State. In some instances, there may be doubts about whether the corporation is, or is not, to be regarded as being controlled by nationals of the respondent State, and a choice will then have to be made between various possible criteria. In the present case, however, where Tokios Tokelés is indisputably and totally in the hands of, and controlled by, Ukrainian citizens and interests, there is no evading the issue of principle."

The first part of para. 11 added,

"The Decision rests on the idea that the Ukrainian origin of the capital invested by Tokios Tokelés in Taki spravy and the Ukrainian nationality of Tokios Tokelés' shareholders and managers are irrelevant to the application of both the Convention and the BIT. What is relevant and decisive, according to the Decision, is the fact that the investment

has been made by a corporation of Lithuanian nationality, whatever the origin of its capital and the nationality of its managers."

Paragraph 13 stated,

"The Decision thus accepts, as a matter of principle, that the provisions of the BIT governing the jurisdiction of the ICSID tribunals can be given effect only within the limits of the jurisdiction defined in the Convention. It refers to that effect to Broches' well-known phrase that the Convention determines the 'outer limits' of the jurisdiction of the ICSID and its tribunals. In other words, it is within the limits determined by the basic ICSID Convention that the BITs may determine the jurisdiction and powers of the ICSID tribunal, and it is not for the Contracting Parties in their BIT to extend the jurisdiction of the ICSID tribunal beyond the limits determined by the basic ICSID Convention. From this it follows that, while the Contracting Parties to the BIT are free to confer to the ICSID tribunal a jurisdiction narrower than that provided for by the Convention, it is not for them to extend the jurisdiction of the ICSID tribunal beyond its determination in the Convention."

Accordingly, the first sentences of para. 14 affirmed,

"To decide the jurisdictional issue the Decision should, therefore, have checked *first* whether the Tribunal has jurisdiction under article 25 of the Convention-interpreted, as the Decision recalls, in light of its object and purpose-and *then*, in a second stage, whether it has jurisdiction *also* under the bilateral investment treaty. It is only if the tribunal had reached the conclusion that it has jurisdiction under the Convention that it would have had to examine whether it has jurisdiction *also* under the BIT. This, however, is not how the Decision proceeds."

Paragraph 17 posed the key issue, "The central question before the Tribunal was thus as follows: Does Tokios Tokelés meet the requirement of having, for the purposes of the Convention, the nationality of Lithuania-in which case the Tribunal has to affirm its jurisdiction-, or is it to be regarded for the purposes of the Convention as being an Ukrainian corporation because it is indisputably under Ukrainian control-in which case the Tribunal has no jurisdiction?"

In turn, para. 19 declared,

"This raises the single most important issue which lies at the heart of my dissent. As observed earlier, the silence of the Convention on the criterion of corporate nationality does not leave the matter to the discretion of the Parties.

According to article 31 of the Vienna Convention on the Law of Treaties, which the International Court of Justice has repeatedly described as the expression of customary international law, '[a] treaty shall be interpreted … in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.' It is indisputable, and indeed undisputed, that the object and purpose of the ICSID Convention and, by the same token, of the procedures therein provided for are not the settlement of investment disputes between a State and its own nationals. It is only the international investment that the Convention governs, that is to say, an investment implying a transborder flux of capital. This appears from the Convention itself, in particular from its Preamble which refers to 'the role of private international investment' and, of course, from its article 25. This appears also from the passages in the *Report of the Executive Directors* quoted above. As Professor Schreuer writes:

The basic idea of the Convention, as expressed in its title, is to provide for dispute settlement between States and foreign investors …

Disputes between a State and its own nationals are settled by that

State's domestic courts …

The Convention is designed to facilitate the settlement of investment disputes between States and nationals of other States. It is not meant for disputes between States and their own nationals.

The latter type of dispute is to be settled by domestic procedures, notably before domestic courts.

The ICSID mechanism and remedy are not meant for investments made in a State by its own citizens with domestic capital through the channel of a foreign entity, whether preexistent or created for that purpose. To maintain, as the Decision does, that 'the origin of the capital is not relevant' and that 'the only relevant consideration is whether the Claimant is established under the laws of Lithuania' runs counter to the object and purpose of the whole ICSID system."

Paragraph 28 confronted the view chosen by the majority vote as follows,

"Paragraph 82 [of] the Decision states that Ukraine, Lithuania and other Contracting Parties chose their methods of defining corporate nationality and the scope of covered investment in BITs with confidence that ICSID arbitrators would give effect to those definitions. That confidence is premised on the ICSID Convention itself, which leaves to the reasonable discretion of the parties the task of defining key terms. We would be loathe to undermine it.

While it may be for private parties within the framework of a private, purely commercial, contractual relationship 'to chose their methods of defining corporate nationality,' this does not hold true to the same extent when the application of the ICSID Convention is involved. The restrictions imposed on, and the rights accorded to, the parties by the Convention are based on the nationality of the party other than the 'Contracting State,' and it cannot be assumed that the parties are free to dispose at will of these restrictions and rights by playing with the definition of corporate nationality. In particular, article 26 provides that, unless otherwise stated, consent of the parties to arbitration under the Convention is exclusive of any other remedy, and article 27 prohibits a Contracting State from giving diplomatic protection, or bringing an international claim, in respect of a dispute which one of its nationals and another Contracting State have consented to submit, or have submitted, to arbitration under the Convention, unless the State party to the dispute fails to honor the award rendered in that dispute. Chapter II of the Convention ('Jurisdiction of the Centre'), which, in the words of the *Report of the Executive Directors,* defines 'the limits within which the provisions of the Convention will apply and the facilities of the Centre will be available', is the cornerstone of the system. Even assuming that the definition of these 'limits'-in particular, the definition of the key term 'national of another Contracting Party'-is left to the discretion of the Parties, this, as the Decision recognizes, holds true only insofar as this discretion is 'reasonable'… There can be no question of leaving unconditionally to the parties the task of determining the scope of application of the Convention along with the rights and duties it places upon both parties. This would frustrate the system by putting its extent in the hands of the parties and at their discretion, thus making the provisions of its Chapter II, and more particularly of its central and crucial article 25, a purely optional clause. This, in my view, is unacceptable. This, however, is what the Decision does."

Paragraph 30 concluded,

"To sum up: The ICSID mechanism and remedy are not meant for, and are not to be construed as, allowing-and even less encouraging-nationals of a State party to the ICSID Convention to use a foreign corporation, whether preexistent or created for that purpose, as a means of evading the jurisdiction of their domestic courts and the application of their national law. It is meant to protect and thus *encourage-international* investment. It is regrettable, so it seems to me, to put the extraordinary success met by ICSID at risk by extending its scope and application beyond the limits so carefully assigned to it by the Conven-

tion. This might dissuade Governments either from adhering to the Convention or, if they have already adhered, from providing for ICSID arbitration in their future BITs or investment contracts."[75]

The main findings of this Chapter are the following:

First, ICSID arbitral tribunals have dealt with the nationality of juridical persons in several cases during the last years.

Second, the rulings have shown that the ICSID judiciary relies entirely on the parties' autonomy on the ground of the definitions of corporate nationality. However, two limits can be identified in this respect: when those definitions are not reasonable and when they go against the purposes of the Convention.

Third, when interpreting the provisions of BITs or other instruments where the parties have given their consent, the tribunals are prone to accept jurisdiction rather than to deny it.

Fourth, in general, the ICSID judiciary does not restrict its conclusions in the jurisdiction field guided by formal appearances. Instead, its decisions are made based on a realistic assessment of the situation.

Fifth, the previous statement also embodies the view that economic criteria often better reflect reality than legal ones.

Sixth, ICSID rulings have uniformly interpreted the general rule of article 25 by applying either incorporation or *siège social* as the acceptable criteria set by this provision.

Seventh, ICSID jurisprudence has seen stipulations of article 25 as the outer limits of its jurisdiction regarding juridical persons' nationality.

Eighth, at least twice in recent years ICSID tribunals have dealt with proceedings where the defendants were contracting states and the claimants foreign companies with investments in those states but owned by nationals of the defendants.

Ninth, the first of these cases was *Champion Trading Company and others v. Arab Republic of Egypt*, where the corporate claimants were owned by individuals who had double nationality, that is to say, American and Egyptian nationality. The second one was *Tokios Tokelés v. Ukraine,* where the overwhelming majority of the shares of the claimant belonged to Ukrainian nationals.

---

75 See note 72.

Tenth, in both cases the adjudication supported the jurisdiction of the arbitral tribunals based on the provisions of the BITs regarding nationality which stipulated the incorporation criterion in this respect. Moreover, in at least one of these cases a request for piercing the corporate veil overruling the stipulations of the treaty was denied.

Eleventh, the last of these cases was decided against the opinion of the President of the Tribunal who issued a strong dissenting opinion contesting the jurisdiction of the tribunal due to the nationality of the claimant' shareholders.

V. Conclusions

This work has reviewed the main elements on the ground of the nationality of juridical persons both in the realm of international law and, specifically, in the framework of the ICSID Convention.

In the first area, it is possible to assert that the issue of corporate nationality has been developed in the diplomatic protection field where three formulas to attribute corporate nationality were devised. These formulas are based on the place of incorporation, the *siège social* and the control of the company. The last one requires identifying who are the owners of it piercing the corporate veil.

Likewise, there has been a consistent trend to lower the requirements about nationality in the diplomatic protection field allowing a prompt and expedite access to this mechanism for shareholders. This fact implies a recognition of the underlying economic interests in a foreign investment.

However, the globalization of the free economic system has left behind the criteria of diplomatic protection, demanding the creation of new formulas to protect foreign investment. The ICSID mechanism has a crucial role in this new scenario since it is seen as the more appropriate forum to solve the disputes on investment matters maintaining a fair balance between the states and the investors.

Entering in the ICSID framework, the Convention remained silent on the issue of corporate nationality. The main reason for this approach was the belief that the precise delimitation of the ICSID jurisdiction should remain in the hands of the parties, bearing in mind the voluntary character of the convention. Thus, this instrument fixed only the outer limits in this matter.

The precise scope of the parties' consent is usually contained in the BITs or other instruments which submit the investment disputes to the ICSID. Lately, these treaties have become the most fertile source of definitions about the nationality of juridical persons in the international context applying some of the three above mentioned criteria or combinations of them.

Although article 25 para. 2 lit. b) of the Convention does not define the nationality of juridical persons, it regulates this matter establishing a general rule and an exception. Interpreting this provision, scholars point at incorporation or *siège social* as the general rule as long as control was expressly established as the exception. This position has been confirmed by the ICSID jurisprudence.

At the same time, this jurisprudence has relied entirely on the parties' autonomy on the ground of the definitions of corporate nationality with two limits: when those definitions are not reasonable and when they go against the purposes of the convention. Moreover, the arbitral tribunals have interpreted the instruments which contain the parties' consent favoring jurisdiction.

An other feature of the ICSID judiciary is that its conclusions in the jurisdiction field are based on realistic assessments of the situation rather than on formal appearances. This fact enables that real economic interests can emerge.

A dispute where the defendant was a contracting state and the claimant a foreign company with investments in this state but owned by nationals of the defendant is a new phenomenon, since only in two cases to date have the ICSID Tribunals dealt with this situation. In both cases the adjudications favored jurisdiction based on the parties' autonomy expressed in the provisions of the BITs regarding nationality.

As stated in the Introduction, the purpose of this article was to verify whether the lack of a definition about the nationality of juridical persons in the Convention allows a discretionary interpretation of this issue.

Despite the silence of article 25 in this matter, I do believe that the nationality of juridical persons is not a discretionary matter.

This conclusion stems from the analysis made throughout this work. This analysis reflects two clear things: on the one hand, the interpretation of article 25 necessarily leads to a general rule embodied by incorporation or *siège social* and an exception typified by control. On the other hand, the ICSID Tribunals have uniformly supported this scope in their findings.

This assertion is upheld by abundant evidence in the scholars' context and in the judicial field. However, other reflections are also possible.

In my opinion, it is clear that the indisputable trend in the economic field of modern international law is to maintain that substance prevails over form. Thus, the real interests behind the investment can emerge.

Probably, this tendency began departing from the vision stated in the *Barcelona Traction* case which embodied the opposite stance. The dangers of a formalistic approach were underlined in that case by the fact that the real victims of the measures of Spain, that is to say the Belgian shareholders, were left without shelter by the ICJ.

This trend has been expressed both in the field of diplomatic protection lowering the requirements for resorting to this mechanism and in the area of the ICSID Convention allowing direct standing to foreign shareholders of locally incorporated companies among other developments.

Having left behind the ideological conflicts about its existence and purposes and with a large number of new member states, the convention has to face new challenges looking at the future.

These challenges are more likely to appear due to the increasing number of cases steadily taken before the ICSID judiciary.

Thus, disputes which involve companies incorporated abroad but owned by nationals of the host state pursuing international arbitrations against the latter, is one of these challenges.

This situation can occur, for instance, when nationals of a country do not trust their judicial authorities which encourage them to invest by means of companies incorporated in a state member of ICSID. In this way, the chance to protect their investments by resorting to the ICSID mechanism will always be open.

As seen before, until now this situation has occurred in the ICSID environment on only two occasions. Nevertheless, as long as those who want to take advantage of the Convention in order to invest in their own countries realize that its norms can be easily bypassed, new disputes regarding this subject are foreseeable.

The ICSID judiciary must be fully aware of this risk, which clearly falls outside of the scope of the Convention. In this sense, new formulas that let substance prevail over form must appear.

For instance, the adjudication in the *Tokios Tokelés* case based its reasoning for denying the veil piercing on the same criteria stated in the

Barcelona Traction case 34 years before.[76] Because the damage caused to the Belgian shareholders stemmed precisely from the rejection of the Court to devise new situations where the veil piercing could be applied, further developments in this field were encouraged.

Accordingly, if the protection of shareholders experienced great advances after the *Barcelona Traction* case not only in the diplomatic protection field but also in international law as a whole, we should expect similar improvements to preserve the essential role of ICSID, namely its character as a forum to arbitrate international disputes.

In spite of the fact that most of the scholars have upheld the majority vote in the *Tokios Tokelés* case, this is an interesting warning about the dangers that can darken the future of the Convention.[77]

In sum, further advances are likely to occur in the area of the nationality of juridical persons in the ICSID context during the next years to preserve both substance over form and the international status of the Convention.

---

76 See paras 53 and 54 of the sentence reproduced in Chapter IV.

77 E.g., G. Wisner/ N. Gallus, "Nationality Requirements in Investor State-Arbitration", *The Journal of World Investment and Trade* 5 (2004), 927 et seq. (942-944), and note 5, 37-40.

Book Reviews

Steven Wheatley: Democracy, Minorities and International Law
Cambridge University Press, 2005, XXII + 201 pages, ISBN 0-521-84898-9

As most international lawyers will probably agree, it takes courage for an author to embark, in a book of less than 200 pages, on an examination of both the position of ethno-cultural groups and the meaning of democracy in international law; particularly when, as in the present case, an interdisciplinary approach has been chosen which aims at expanding the scope of the work, at least in part, beyond a purely legal analysis of the issues involved.

It is not only the immense amount of existing scholarly literature on minority rights, self-determination, and democratic governance (the main substantive issues dealt with in Wheatley's book), which seem to make such an endeavour a fairly daunting task, but also – and perhaps even more so – the fact that many of the relevant *termini* and concepts at stake ("minorities", "peoples", "self-determination", "democracy") are still largely undefined – or at least under-defined – in contemporary international law. Nevertheless, Steven Wheatley, of the University of Leeds, took on this difficult task – and generally succeeds in rising to the challenge.

As explained by the author in the introduction, the major concern of his work is to consider the contribution that international law may make to the resolution of cultural conflicts – that is, political disputes between the members of different ethno-cultural groups – particularly in democracies. Ethno-cultural groups are defined as "groups of persons, predominantly of common descent, who think of themselves as possessing a distinctive cultural identity, which may be based on a particular religion and/or language, and who evidence a desire to transmit their culture to succeeding generations" (page 2). This working definition certainly has its charms. It is broad enough to encompass various

A. von Bogdandy and R. Wolfrum, (eds.),
Max Planck Yearbook of United Nations Law, Volume 11, 2007, p. 473-491.
© 2007 Koninklijke Brill N.V. Printed in The Netherlands.

groups recognised, however indeterminately, as minorities, national minorities, indigenous peoples, and peoples in international law and, thus, allows for a holistic approach to the legal and normative question raised by the author. Yet, his related stipulation that these groups are not amenable to an "objective distinction", may, when applied to specific rights afforded to these groups by international law, cause conceptual problems. We shall return to this in a moment.

The book is divided into three substantive Chapters, supplemented by an introduction and a concluding Chapter. In *Chapter 1* the author examines the protection afforded by the international system to "ethnocultural minorities". Translated into the language of the present international legal regime in this area, this means that the focus here is on the rights of "persons belonging to national or ethnic, religious and linguistic minorities" to enjoy their own culture, to profess and practise their own religion, and to use their own language, individually and in community with the other members of their group. Wheatley does not indulge too long in the historic evolution of minority protection on the international plane, which essentially started with the League of Nations' scheme of minority protection treaties after World War I, but rather tackles head on the relevant international legal instruments developed in the era of the United Nations.

Unsurprisingly, article 27 of the International Covenant on Civil and Political Rights, including its interpretation by the Human Rights Committee, is thereby at the centre of the debate. Due attention is also given to the principles contained in the formally non-binding 1992 UN Declaration on Minorities, adopted by the United Nations' General Assembly, as well as the more detailed standard-setting regime in the field of minority protection set up in Europe under the auspices of the Council of Europe and the OSCE.

No legal scholar dealing with the protection of minorities on the international plane can escape the perennial debate surrounding the quest for a generally accepted definition of the term "minority". Wheatley, too, delves into the discussion of this contentious issue and provides the reader with a comprehensive analysis and critique of the well-known definitions proposed by Francesco Capotorti and (later) Jules Deschênes.[1] His conclusion, however, that minorities are "imagined

---

1 F. Capotorti, *Study on the Rights of Persons belonging to Ethnic, Religious, and Linguistic Minorities*, Doc. E/CN.4/Sub.3/384/Add.1-7 (1977), para. 568; J. Deschênes, *Proposal concerning the Definition of the Term 'Minority'*, Doc. E/CN.4/Sub.2/1985/31 (1985), para. 181.

communities" (a concept originally coined by Benedict Anderson)[2], which exist "because they fall within the scope of application of Article 27 of the International Covenant on Civil and Political Rights" (page 30), seems to be somewhat foreshortened and does not contribute much to disentangle international law's definition dilemma in this area.

While, in the respective global and regional instruments, the protection afforded to minorities is generally dealt with in the language of individual rights, their effective realisation necessarily depends on the ability of minority groups to maintain their culture, language or religion. From this position, Wheatley develops his concept of a "right to cultural security", which essentially requires states to establish an adequate domestic regime for the protection of minority cultures.

According to the author, international instruments concerning minorities recognise both a negative and a positive aspect of the right to cultural security. Thus, states are not only required to allow persons belonging to minorities to maintain and develop their own ethnic, cultural, linguistic and religious identity; they also have to protect, through appropriate legislative and other measures, "their" minorities and create favourable conditions for the promotion of their identity. Although he views the right of cultural security, thus understood, as accepted by the international community, Wheatley also acknowledges the shortcomings of present international law in this area. Not only does it refrain from precisely defining the beneficiaries of such a right, it also recognises only few positive commitments indicating how exactly this right is to be realised within states. Of course, the same may be said of a further right afforded by international law to certain ethno-cultural collectives, in this case referred to as "peoples": the right to self-determination, which is dealt with in *Chapter 2* of the book.

In line with any modern treatment of the subject, Wheatley distinguishes, firstly, between colonial and post-colonial and, secondly, between external and internal self-determination. The reader is provided here with a fairly descriptive, yet clear and succinct explanation of the evolution of the self-determination principle from a purely political aspiration to an international legal "right" with *erga omnes* character. As to the continued significance of this right in the post-colonial age, the author argues that international law increasingly recognises that the term "peoples" may – in addition to colonial peoples and peoples under

---

2 B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, revised edition, 1991). Interestingly enough, Wheatley does not expressly refer to Anderson's seminal study.

alien domination and occupation – also be applied to the populations of sovereign states as well as to ethno-cultural groups within states. Whereas the application of the right to self-determination to the entire population of an existing state can be said to have entered the mainstream of relevant international legal scholarship, the consequences of recognising a group within the state as a "people" are far from clear.

Wheatley's discussion of possible modes of accommodating claims to (territorial) self-government by ethno-cultural groups within states is one of the most interesting parts of the book. Unfortunately, perhaps the most viable option (if not requirement, particularly in a post-conflict scenario) of a reconfiguration of the overall political and constitutional framework of the state, so as to reflect and preserve its "multination" character, is considered only briefly. Practical examples are mentioned, e.g. the constitutional arrangements of Bosnia and Herzegovina and of the Former Yugoslav Republic of Macedonia, but would deserve a more detailed analysis in light of the pertaining difficulties related to their implementation on the ground. More attention is given to the concept of territorial autonomy, i.e. the granting of a meaningful degree of independence in respect of political decision-making by a state to a part of its territory where a majority of the population belongs to a distinctive ethno-cultural group. The author terms this form of self-determination by non-dominant sub-state groups as "less-than-sovereign" self-determination (page 106), and distinguishes it from cases of "sovereign" self-determination, i.e. acts of (consensual) separation and (unilateral) secession.

With regard to non-consensual sovereign (or external) self-determination, Wheatley outs himself as a supporter of the theory of "remedial secession". In line with a number of eminent scholars, both from the fields of international law and political science,[3] he holds that "where a territorially concentrated group is systematically excluded [from public life], secession is a potential remedy of last resort, in cases of serious human rights abuses against members of the group" (page 95). In the absence of such a situation, the recognition of the right to self-determination for ethno-cultural groups resident within an independent state is said to have no impact on the territorial integrity of that state (the only additional exception being the claim to external self-

---

[3] See, e.g., J. Crawford, "The Right to Self-Determination in International Law: Its Development and Future", in P. Alston (ed.), *Peoples' Rights – The State of the Art*, 2001, 7-67 (57); A. Buchanan, *Justice, Legitimacy, and Self-Determination. Moral Foundations for International Law*, 2004, 331 et seq.

determination by populations of constituent units of an ethnic federation in the process of dissolution – a situation which may be termed the "Socialist Federal Republic of Yugoslavia scenario"). Territorially concentrated groups within states may, however, have recourse to the internal aspect of the right to self-determination. As Wheatley puts it: "The internal aspect is enjoyed by the populations of sovereign and independent States, and by indigenous peoples and peoples recognised as such by the State" (page 125).

This approach to the potential beneficiaries of a right to self-determination may slightly confuse the reader. As already mentioned, Wheatley generally asserts that no objective distinction can be made between groups recognised as minorities, national minorities, indigenous peoples and peoples. Rather, "what distinguishes these groups is the nature of their political demands: simply put, minorities and national minorities demand cultural security; peoples demand recognition of their right to self-determination, or self-government" (page 124).

It is consistent with this line of thought when he further states that the definition of the term "people" in international law "must include both a collective expression of a desire to be self-governing, and a distinctive ethno-cultural identity; [b]eyond this, no criteria for defining the term 'people' can be discerned" (page 126). Does this imply that a sub-state group which displays a distinctive ethno-cultural identity is to be regarded as a "people" as soon as it demands political self-government in respect of a particular part of the territory of the state it is residing in? Probably not, as this would be clearly inconsistent with Wheatley's earlier stipulation that, unless they are recognised as "peoples" by the state in question (or are to be deemed as indigenous peoples), sub-state groups are not entitled to claim a right to internal self-determination.

Moreover, Wheatley agrees that the rights of minorities do not include the right to self-government, either in the form of separation or secession, or territorial autonomy. As noted above, however, he also supports the view that a territorially concentrated, non-dominant group within a state may emerge as a "people", if the members of the group are systematically discriminated against the rest of the population and, as a result, excluded from any meaningful participation in the political life of the State. Is, then, the permanent exclusion of such a group, if sufficiently proven, not the very factor that enables the international community to recognise it as a "people" with a claim to self-determination (including – in particularly egregious cases of oppression – "sovereign" self-determination), thereby "objectively" distinguishing it from

other ethno-cultural groups whose members may be afforded specific individual rights, but not a collective right to self-determination? Certainly, this is touching on highly controversial terrain with a number of legal pitfalls. It may not be surprising, therefore, perhaps even inevitable, that the part of the book which deals with sub-state groups as possible beneficiaries of the right to self-determination is generally raising more questions than it provides answers.

Ultimately, it is precisely the regime of indeterminacy in relation to the position of ethno-cultural groups in international law which brings the author to shift his focus to domestic institutions and procedures in *Chapter 3.* International law, he argues, has recognised the right of persons belonging to minorities to cultural security and the right of peoples to self-determination; yet, "it has failed […] to detail the circumstances in which measures to protect and promote cultural security should be introduced, or territorial self-government regimes established" (page 127). As a result, states' policies concerning ethno-cultural groups will emerge through domestic decision-making procedures, in accordance with internationally recognised principles. For democratic states the "norm of democracy", which Wheatley considers to be part and parcel of today's international human rights law, provides the essential parameters of these policies: popular sovereignty and political equality. On the basis of this assumption, he discusses in detail the equal right to political participation enshrined in a number of global and regional human rights treaties, and the specific rights of minorities to effective participation in decisions which affect them. As convincingly shown by the author, a state's respect for participatory rights does not *ipso facto* guarantee that persons belonging to minorities will be able to influence the results of domestic decision-making processes, even where issues affecting fundamental interests of the group are under consideration. Where democracy is defined by reference to majority rule, Wheatley notes, "numerical […] minorities are unlikely to have their cultural interests and preferences recognised by the State" (page 189).

Based on this assessment, the final sections of the book are devoted to "alternative" understandings of democracy. The author begins by considering two institutional responses to the limits of equal participation and procedural inclusion, namely consociational and integrative models of democracy. His examination of the main features of consociational (or power-sharing) democracy, the famous model suggested by

Arend Lijphart,[4] assesses the extent to which these features are compatible with international law. Wheatley concludes that the consociational model is in fact incompatible with international norms, as the human right to democracy "does not allow for political leaders to decide in advance who will share power" (page 166). From the point of view of international law, integrative responses to the realities of multicultural democratic polities seem to be more promising.

By referring to a number of empirical examples, Wheatley highlights the necessary building blocks of an effective integrative model of constitutional engineering in deeply divided societies. At the same time, however, he is aware of the inherent limitations of institutional and/or procedural approaches when it comes to the lasting prevention of internal ethno-cultural conflict in democratic states. Therefore, he suggests that the democracy norm should be interpreted and applied along the lines of a deliberative model of democracy, the key elements of which are inclusion, reasoned political debate and an attempt to reach consensus amongst all participants on relevant policy issues. States should be discouraged to regulate cultural practice in the face of opposition from the representatives of the ethno-cultural group concerned. If a state does regulate cultural conduct "it must accept that others, including those in the international community, may question the legitimacy of the relevant measure" (page 190).

It is obvious that the final part of Wheatley's treatise was written from a normative rather than a strictly legal perspective. It is also in this part that the multi-disciplinary approach taken by the author becomes most tangible. Many of the insights and suggestions offered in *Chapter 3*, as well as the conclusions in *Chapter 4*, are rather tentative, but this is to be expected from a book of this size in which so many fundamental issues cutting across various academic disciplines are tackled.

Overall, the work is informative, clearly structured (only a bibliography is painfully missing) and accessible not just to international lawyers but also to political scientists and scholars of international relations, as well as to advanced students in these disciplines. In sum, it is an extremely valuable read for anyone who seeks to better understand the relevance of international law to the accommodation of cultural diversity in the domestic sphere of states and, in this context, the complex interrelationship between minority rights, the right to self-determination and the emerging norm of democracy. The reader must be aware,

---

4 A. Lijphart, "Consociational Democracy", *World Politics* 21 (1969), 207-225.

however, that Wheatley has limited his analysis almost exclusively to democratic states. He thus leaves open the question of whether, or to what extent, international law contributes to the resolution of conflicts between state authorities and ethno-cultural minorities in a non-democratic environment. It would certainly be interesting to see this question addressed in a future work or, possibly, a second edition of this highly relevant book.

Christian Pippan, Lecturer, Faculty of Law, University of Graz

Tullio Treves: Diritto Internazionale. Problemi Fondamentali
Giuffrè, 2005, XXV + 781 pages, ISBN 88-14-11296-7

Tullio Treves' book addresses the principal problems of international law, giving the reader a comprehensive review in thirteen Chapters. Due to space constraints, not all the Chapters will be discussed and analysed in detail.

In **Chapter I**, the author traces the origins of international law, examining the evolution of state practices as well as the doctrinal developments. Although international law only really came into existence in the 17th century with the Treaty of Westphalia, in the 16th century, the studies of theologians F. de Vitoria and F. Suárez already represented first attempts at formulating autonomous theories. Hugo Grotius conducted the first systematic study on international law, with his famous *De Iure Belli ac Pacis,* followed by theories by S. von Pufendorf and C. Wolff. World War I gave rise to an attempt to establish a new international law of peace with the creation of the League of Nations, and the Charter of the United Nations in 1945.

Chapter II examines the subjects of international law. Treves focuses on states as the primary actors in international relations and analyses aspects of statehood, including the significance of state recognition and the consequences of revolutionary overthrow and territorial changes.

Chapter III deals with state succession. Treves distinguishes succession in fact from succession in law; the latter term refers to the continuity of titles and duties from predecessor to successor state. Treves points out the absence of general customary law rules regulating all aspects of legal succession (pp. 85-87). Where succession in treaties is concerned,

the 1978 Vienna Convention on Succession of States in Respect of Treaties is a useful source to ascertain the law in spite of its limited direct applicability. Legal succession as such mostly relies on principles of customary law (pp. 87-90).

The practices of newly independent states range from rejection of all treaties not signed by their own governments, to the conclusion of treaties of devolution through which the new state assumes all titles and duties that belonged to its predecessor. Whether treaties give rise to automatic transferral of titles and duties to newly independent states is controversial, as treaties are not considered to be binding upon third party states. The third approach taken by new states is to make unilateral declarations clarifying their attitude towards treaty provisions. However, these declarations have no binding effect (pp. 90-95).

In the case of bilateral agreements, especially those involving a decolonised state, the treaty continues if the two parties so agree. In order to continue a multilateral treaty, the new state may make ordinary acts of accession and declarations of succession, which are delivered to the depository of the treaty (pp. 95-97). Questions about the continuity of treaties are of particular relevance in cases of merger, separation and dissolution of states, especially as they occurred in Eastern Europe (p. 97). Border treaties, localised treaties and human rights treaties represent exceptions to the rule against automatic succession (pp. 101-104).

For succession in other matters, there are two points of reference: the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, and a Resolution of the Institut de Droit International from 2001. Treves confirms the existence of a rule for the succession of state property and archives, but is reluctant to confirm a similar rule for debts (pp. 104-111).

Chapter IV discusses international organisations. Treves describes the emergence and development over time of international organisations and discusses the extend to which they changed the traditional structure of the international community. Furthermore, Treves writes about international organisations' internal law and concludes with an analysis of non-governmental organisations.

In **Chapter V,** Treves examines the structure of other subjects of international law, e.g., the Holy See, the Sovereign Order of Malta and the so-called "governments in exile." The qualification "subject of International Law" is tied to problems of self-determination of peoples and territorial integrity, both examined by the author in the last paragraph of the Chapter.

The principle of self-determination, often seen as a moral and legal right, asserts that every nation is entitled to a sovereign territorial state, and that every specifically identifiable population should be able to choose to which state it would like to belong. The principle is commonly used to justify the aspirations of ethnic groups that self-identify as nations toward forming independent sovereign states. Although there is consensus that international law recognises the principle of self-determination, the principle does not, by itself, define which group are nations, which groups are entitled to sovereignty, or what territories they should receive. Moreover, its application in international law often creates tension with the principles of territorial integrity and non-intervention in internal affairs.

Treves further explains that the principle of self-determination formally expresses a central claim of nationalism, namely the entitlement of each nation to its own nation state and has become a typical demand of nationalist movements. However, the formal expression of the principle post-dated the nationalist movements and the formation of the first nation-states. In the 20th century, the self-determination principle was central to the process of decolonisation, but its use has not been limited to contesting colonialist or imperialist rule. Finally, the principle is given different ethical interpretations. Some treat it as a translation or extension of the universal rights of individuals (political freedom, freedom of religion, freedom of speech) to the group. Some interpretations treat it exclusively as a collective right, distinct from individual rights. Moreover, even its existence is disputed, with some arguing that no such entitlement exists, other than perhaps the right to resist or secede from tyranny.

Chapter VI deals with Human Rights and international crimes. Treves discusses questions of responsibility and urges the necessity of establishing international tribunals to prosecute the perpetrators.

In **Chapter VII**, Treves discusses characteristics of the different kinds of rules in international law, focusing on the two principle categories of customary/general international law and the law of treaties. General principles of law play a subsidiary role (pp. 221, 222).

Although the existence of customary rules of universal validity has never been contested, both their nature and origin have been subjects of heated debate. Nonetheless, disagreements over their origins do not detract from their pervasiveness or effectiveness. Treves describes the two elements – state practice and *opinio juris* – required by the prevailing doctrine for a norm to constitute customary law; in his view, however, these two elements fail to explain the ways in which customary law

evolves over time. According to Treves, the formation and evolution of customary law now happens in a spontaneous, flexible and informal way. In the past, customary rules came into existence only over long periods of time; today, they can evolve within a few years, if applied by a group of states adequate in number and representative of all different interests, e.g., both developed and developing countries.

Treves claims that states that deviate from the law and initiate new customary rules cannot possibly be convinced of the legal necessity of their actions. Thus, he does not see *opinio juris* as a reliable element; instead, states use it intentionally to modify the law, declaring that they are acting under a legal obligation without being convinced of it. He suggests that an assessment of state practice, i.e., states' actions and expressions of opinion, remains the best way to ascertain customary international law. However, even though state practice and expression of legal opinion are more and more frequently aimed at influencing the law's development, relying on *opinio juris* is the most convincing way to establish the content of customary law. For example, sometimes an infringement of the law turns out to be a correct interpretation of changed needs within the community of states and is endorsed by other states. In other cases, it is simply a violation (pp. 222-233).

Furthermore, Treves rejects the existence of "primary" or "constitutional" international rules, suggesting that there is no criterion to distinguish ordinary customary law from these superior rules. He insists that, in any case, the UN Charter does not represent such a superior norm. Finally, he argues that the term is misleading, as it was developed in and is best adapted to the national context (pp. 237-239).

On the nature of treaties, Treves points out that they originate from and are influenced by norms of customary law. He compares treaties to contracts, but rejects the assumption that treaties are exclusive sources of law in a technical sense in the same way that contracts are (pp. 239-242). Treves emphasises the fact that treaties are put in effect following rules of customary law, indicating a certain priority position of customary law, but without implying any greater normative effectiveness (pp. 245-248). Regarding general principles of law, Treves mentions the historical, but declining, significance of national principles in the development of customary rules of international law. Today, the transfer of national principles to the international level is only admissible if the possibility is contemplated by the treaty, as is the case e.g. under Article 38 (1) c.) of the Statute of the ICJ, which bestows upon the Court the competence to progressively develop the law (pp. 248-255).

International organisations have significant influence on the law of treaties but also contribute to the development of the law through their decisions and the rules they set (pp. 255-259). For example, organs of international organisations, especially the Security Council and the General Assembly of the United Nations, inspire new customary rules through their actions (pp. 259-262). Treves also examines whether the General Assembly's Declarations of Principles can be seen as new legislative or quasi-legislative sources of law and answers this question in the negative. At the same time, he acknowledges the excellent compliance rate of these and other soft-law instruments, which is achieved, in cases of non-compliance, through enforcement by mutual pressure (pp. 262-267).

Treves concludes Chapter VII by asserting that international law manifests the characteristics and structure of the society of states on a normative level. The lack of an international legislator leads to a lack in international legislation, although the term is used to describe the most significant multilateral "law-making treaties" (pp. 267-269).

Chapter VIII deals with the process used to ascertain whether customary law exists, its contents and its codification. Ascertaining the law requires a thorough analysis of the manifestations of the international practices of states and international organisations, as well as judicial and arbitral decisions. International courts and tribunals, especially the ICJ jurisprudence also help to reveal the rules. The doctrine's role today is limited to describing and classifying rules.

The sheer number of manifestations makes the actual law difficult to fathom (pp. 279-286). Frequent contradictions between and ambivalences among these manifestations may be hard to resolve. For instance, the repeated inclusion of certain obligations in treaties would seem to indicate the lack of customary rules regarding the contents, as rules would make the treaties superfluous. Instead, this repetition often serves as evidence of the existence of a customary rule. Caution is also required when analysing state practices, because state actions may reflect what the state considers to be the law, or what it wishes the law to be. Thus, the whole picture must be taken into account in order to arrive at a balanced assessment (pp. 286-289).

Moreover, the expansion of the international society of states in the decades following World War II increased the perceived necessity to codify international law through negotiations and conclusion of treaties by states. States expected that codification would facilitate increased knowledge of the law and promote legal certainty (pp. 291-294). The ILC played a particularly important role in the development and codi-

fication processes (pp. 298-300). Even where these codifications do not enter into force or are ratified by a small or unrepresentative number of states, they are an important point of reference to establish the existence and content of customary law. Finally, Treves distinguishes three different relationships between codifications and customary law: codification of a pre-existing customary rule, a convention as crystallisation of an emerging customary rule, and a convention as a factor generating a customary rule. On the other hand, customary rules that have been codified may lose their customary nature (pp. 306-311).

In **Chapter IX**, which addresses the law of treaties and its codification, Treves thoroughly examines the Vienna Convention on the Law of Treaties, as an essential point of reference. He also provides an overview of all different phases of a treaty, from its negotiation, conclusion, entry into force, amendment and modification, to its invalidity, termination or suspension (p. 313 et seq.).

Writing on the meaning of the rule of *pacta sunt servanda* for non-binding international agreements, Treves leaves open the question of its applicability (pp. 360, 361). He then discusses the different rules of treaty interpretation, stressing the importance of the teleological method and of ascertaining the intentions of the parties, while at the same time taking into consideration the evolution of the law since the treaty's conclusion. These rules are applied in addition to the literal interpretation (pp. 385-390). Treves also describes ways of addressing specific challenges that occur when a treaty is authentic in several languages or when a treaty is the founding instrument of an international organisation (pp. 393-397).

With respect to the effect armed conflicts have on treaties, Treves suggests that they usually suspend the applicability of multilateral treaties and terminate bilateral agreements between opposing states. However, he acknowledges existing ambiguities in the practices in this field (pp. 439, 440). Finally, regarding treaties between international organisations, Treves mentions the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, as containing rules that are, for the most part, customary (pp. 442, 443).

Chapter X examines the use of force and its limits under international law. Treves stresses that violations of the prohibition against the use of force are not so numerous as to make the existence of the rule doubtful. Alleged violators are careful to justify their actions with legal arguments, a practice that affirms the validity of the rule (pp. 445, 446).

Treves describes current changes in attitudes in international law towards the use of force. The earlier Natural Law Doctrine considered war to be generally evil, but just, and therefore lawful, when it redressed an injustice (p. 446). Although positivists in the 19th and early 20th centuries did recognise certain obligations during violent conflicts, they saw the use of force as a right belonging to sovereign states (*jus ad bellum*), insusceptible to any regulation under international law. It was not until after the World War I, and even more so after World War II, that war came to be seen as a "scourge" that must be eradicated (p. 447).

However, the League of Nations did not provide an absolute prohibition against the use of force, only requiring a procedure to be undertaken before resorting to it. The Briand-Kellogg Pact condemned the use of force, and the UN Charter finally proclaimed a clear prohibition not only against war, but against any threat or use of force, with limited exceptions, and provided an institutional framework for the application of the prohibition (p. 448). The maintenance of peace became the principle objective of the UN, and the prohibition against force assumed the status of a customary and compulsory rule (p. 449).

However, resolutions that have clarified this principle have left some important questions unanswered, such as: Can pre-emptive self-defence be legitimate? Is the use of force permitted for the protection of a state's citizens abroad? May force be used to support national liberation movements or peoples under foreign or racist rule (pp. 449-452)?

Treves suggests that the extension of the notion of "legitimate self-defence" to include the use of force against state-supported terrorists and infiltrators, ideological subversion, attacks on citizens abroad or any pre-emptive force goes beyond plausible and reasonable applications of the term. He goes on to assert that these attempts to extend the notion reflect the difficulty of addressing new modalities in the use of force that do not adapt well to the text of Article 51 of the Charter (p. 453).

Treves explains that the primary responsibility for maintaining peace and security is entrusted to the Security Council. The UN's monopoly on the use of force, reserved by the Charter, and the proceedings under Chapter VII seem to indicate that the Charter adopts a notion of "procedurally just war" (p. 455). He suggests that it is, however, legitimate to question whether the decisions to use force are "just" in the light of moral or political values. Moreover, the strict, step-by-step procedure as it appears in Chapter VII has rarely been applied in practice. Instead, Security Council decisions depend on the relations between its mem-

bers and the political feasibility of its decisions. The failure to comply with Arts 43, 45, 47 can lead to further difficulties (p. 456).

In terms of peace-keeping operations, these are authorised by the Security Council, but the legal bases for these authorisations derive from the scope and functions of the UN in terms to preserve international peace, as well as the consensus of Member States (p. 457). However, the boundaries between peacekeeping operations and the use of force pursuant to Chapter VII became increasingly blurred, especially since the end of the Cold War, during the failed missions in Yugoslavia and Somalia. In those cases, Treves suggests that the mandates did not suffice to fulfil the given tasks (p. 458). The main characteristics continue to be: impartiality, consensus of the parties and use of force only in self-defence (p. 459).

The end of the Cold War did, however, make the utilisation of Chapter VII possible (p. 460). Moreover, the interpretation of the term "threat to the peace" in Article 39 has expanded to include internal situations, and the Security Council has attempted to justify this expansion by citing international consequences, such as the movements of refugees. The term has also come to encompass terrorist acts, i.e., acts by non-state actors (pp. 460, 461).The compatibility of the method to authorise "coalitions of the willing," which operate without any control of the UN is doubtful (p. 461, 462).

Treves points to another innovation which has led to accusations that the Security Council exceeded its powers: the establishment of judicial and administrative institutions with jurisdiction over territories where serious conflicts have occurred. He mentions, for example, the Courts for Yugoslavia, Rwanda, and Cambodia and the administration of East Timor and Kosovo (pp. 462, 463).

As examples of the use of force in contravention of the prohibition, Treves offers NATO's use of force against Yugoslavia in 1999. He rejects both justifications of implicit authorisation and humanitarian intervention. Even if the concept of humanitarian intervention is accepted generally, he suggests that it was not necessary or applied in a proportionate way in that case. Treves also rejects the legality of the use of force against Afghanistan in 2002 as well as against Iraq in 2003. For Treves, the weakness of the argument that the authorisation contained in Resolution 678 from 1990 was reopened by Resolution 1441 is apparent in view of the failure of the United States and the United Kingdom to obtain the explicit authorisation of the Security Council. He also rejects the justification of pre-emptive self-defence and sees the uses of force in Afghanistan and Iraq as precedent dangerous to the

survival of the Charter's system for maintaining international peace and security. Finally, Treves addresses the fact that the Security Council confirmed ex-post the presence of the occupying forces in Iraq. Considering this divergence between the Charter's prescription and the reality of practice, Treves sees it as the task of lawyers to identify the adaptations of law that are made necessary by changed situations and values and that can be brought about through interpretation or reform. At the same time, lawyers must remember the value of reliable rules of law that can be referred to independently of political arguments (pp. 464-472).

The law of State Responsibility, together with an analysis of the elements of a breach of an international obligation, is the focus of **Chapter XI**. A key issue is the imputation of acts to state parties in the context of international law. For example, the question of state responsibility may revolve around whether the act of a state body can be imputed to the state, or whether an official acting outside his or her authority can breach treaties in a manner that will lead to the state being found responsible. A central question in the law of State Responsibility is whether fault, a subjective element of breach, is required for the state to be held responsible, or if liability is purely objective. Case law generally tends to support the objective school (see, for example, the *Caire* case). Whether or not fault is required may vary depending on the obligation alleged to have been violated and whether the state is being held responsible for damage caused by another party.

Chapter XII deals with international disputes and their resolution. In his definition of the term "international dispute," Treves emphasises the requirement of states' conflicting attitudes, as opposed to mere contrasting interests. These attitudes can concern either legal or factual matters (pp. 575, 576). The international community's awareness of the importance of preventing and resolving disputes is reflected in particular in Article 2 (3) UN Charter, which is also a customary rule and requires states to resolve disputes peacefully. This obligation extends beyond simply refraining from violent actions. In fact, however, its meaning is limited by the principle that each state may freely choose the peaceful means it wishes to use; thus, the rule equates to a mere prohibition of the use of force (p. 577).

The necessity of preventing disputes and minimising their negative repercussions has traditionally attracted less attention from the legal community than the resolution of disputes. This is changing now, and rules for inter-state consultations and preventive notifications, as well as institutionalised cooperation, are becoming more and more widely

used, especially in the environmental field (p. 579). Compliance mechanisms provided in multilateral conventions help to address non-compliance with non-confrontational means. The existence of mechanisms for compulsory resolution of conflicts also has a preventive effect, as it dissuades states from actions that might provoke disputes (p. 580). Treves suggests that, as a result of the equality of states, the intentions of the parties to a dispute are always reflected in its resolution, either in a direct way, when parties agree to a treaty, or in an indirect way, when parties agree to have a third party make a judgment. These two, exclusive ways of resolving a dispute, however, do not necessarily end it, particularly where sensitive political or security interests are involved (p. 581).

Treves then describes the procedures for attaining resolution, i.e., negotiation, enquiry, mediation, conciliation, arbitration and judicial settlement, as listed in Article 33 UN Charter. He classifies the procedures in two different ways. The first classification depends on whether or not there is third party involvement. Second, he distinguishes binding decisions from diplomatic proceedings, which aim at facilitating agreements between the parties (pp. 582, 583). Negotiation is the most commonly used procedure (pp. 585, 586). However, it is not always possible to find a clear distinction between the different procedures with third party involvement, which are also used preventively, where the third party helps to start or resume communication on one side (p. 587, 588). A mediator plays a significant role in facilitating negotiations, making proposals and using his organisation's or state's political clout to convince the other side (p. 589).

When a dispute revolves around a differing view about facts, parties can make use of an inquiry or fact-finding procedure undertaken by a third party, possibly in the form of a commission (pp. 589-591).

Conciliation is also undertaken by a third party, which may be an individual or a commission, who does not represent any state or organisation. The third party examines the dispute and formulates proposals for its resolution in a report (p. 592).

Arbitration is a proceeding in which the parties to the dispute choose the arbitrator and agree to be bound by its decision. Because the so-called "consultative arbitrations" lack binding decisions, Treves groups them with conciliations (pp. 596-601). The main difference between arbitration and a judicial proceeding is that international courts and tribunals are pre-constituted, not chosen by the parties.

Treves distinguishes two different notions of international courts and tribunals. More generally, the term refers to organs of a pre-constituted nature and permanent structure, made up of independent individuals of diverse nationalities whose function is to work towards the resolution of disputes. They are established under an international instrument (a treaty or binding resolution of an international organisation) and apply international law. Under a more restrictive definition, courts and tribunals have as their objective the resolution of international disputes, i.e., disputes between states and other subjects of international law. Treves focuses on these latter organs, namely, the ICJ, the ITLOS and the WTO Appellate Body (pp. 601-603). He emphasises the importance of examining whether rules on conflicts of jurisdiction are emerging analogously to those known in private international law, or whether any "criteria of comity" among tribunals or of economy of judicial activity exist that might evolve into rules. Such rules are needed because of the multiplication of courts and tribunals (pp. 604-606).

Treves describes the functions, composition, rules for jurisdiction and procedures of the ICJ (pp. 606-623). He emphasises the final and binding nature *inter partes* of the judgments, as well as the lack of a principle of *stare decisis*. The latter does not, however, prevent the Court from paying attention to its own precedents. Judgments are usually complied with, and, if not, states must justify their non-compliance by making legal arguments (pp. 624-627).

He describes the statutes and rules of jurisdiction for ITLOS and the WTO Appellate Body (pp. 627-632). He also refers to permanent regional or specialised tribunals, primarily the Human Rights Courts in Europe, America and Africa. He emphasises that these courts not only have the ability to review complaints from individuals against states for alleged violations of human rights, but also to decide interstate disputes and to perform consultative functions (p. 635). Treves describes the contributions of the European Court of Justice in the field of international customary law as limited and disappointing, as the Court tends to draw only on community law, even where customary international law seems to be relevant (p. 638).

He also notes the continuing distrust by states of judicial and arbitral proceedings, and, in fact, of the involvement of any third party, but this distrust is currently diminishing (pp. 639-642). This is true even though sometimes courts are asked to decide cases merely to attract the attention of the international community rather than to obtain a favourable judgment (p. 642). Finally, Treves states that concerns that the

proliferation of international courts may threaten the unity of international law are premature and exaggerated (p. 643).

In **Chapter XIII,** the author examines the relationship between international and domestic law, which is governed by various theories, including monism, dualism, transformation, delegation and harmonisation. International law supersedes domestic law in the sense that the breach of an international obligation cannot be justified by a state's pursuance of its own domestic laws. The presence or absence of a particular provision within a state's domestic laws, including its constitution if there is one, cannot be used to evade an international obligation.

In conclusion, Treves' book provides a comprehensive overview of all important aspects of international law. He thoroughly summarises and analyses sources of law, international cases and doctrinal positions, and his writing is well-argued and structured. The attractiveness of the publication lies essentially in the conceptualisation of the main problems of international law, with particular attention to the case law that has strongly influenced its evolution.

The book is certainly an indispensable instrument, not only for students but also for scholars, international lawyers, legal advisers and jurists who seek an up-to-date and complete framework of international law. It is hoped that an English translation will soon be available.

Christine Fuchs, Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg

Dr. Margherita Poto, Università di Torino

Max Planck Institute for Comparative Public Law and International Law

Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
- ZaöRV -

Heidelberg Journal of International Law

Founded by Viktor Bruns

Edited in cooperation with Rudolf Bernhardt, Karl Doehring, Jochen Abr. Frowein, Günther Jaenicke, Helmut Steinberger by Armin von Bogdandy, Rüdiger Wolfrum

Managing editor: Professor Dr. Ulrich Beyerlin

The editorial programme of the ZaöRV includes articles and reports on fundamental as well as topical issues of public international law, foreign and comparative public law, and European law.
Public international law is covered in all its aspects. Some of the main subjects treated regularly include peace-keeping and the United Nations, the international protection of human rights, new developments in international economic law, the law of the sea and environmental law, as well as aspects of the law of the European Union and other multi-level systems. Articles on legal theory and legal philosophy in the area of supra-state law are welcome.
The spectrum of studies on comparative law emphasizes the public law of the states of the European Union, and also the law of other states. Of special interest is the public law in states under international administration or in other transitional situations.
There are annual reports on domestic practice and jurisprudence concerning public international law in the Federal Republic of Germany.

Manuscripts to be considered for publication should be sent to the managing editor (also by email to: zaoerv@mpil.de).
All manuscripts must be original and not currently under consideration for publication elsewhere; they represent the scientific views of the author(s).
With the submission of a manuscript the author offers to transfer to the editors the rights of use, including the right of communication to the public (§ 19 a German Copyright Law).
Subscription price for a complete volume (4 issues and index; about 900 p.) from vol. 67: € 173,60 (plus € 11,– for postage and handling); single issues: € 45,50; indexes: € 24,20. The cancellation of subscription is only possible to the end of the current volume.

W. Kohlhammer GmbH, Heßbrühlstraße 69, 70565 Stuttgart