# FINNISH YEARBOOK OF INTERNATIONAL LAW

# FINNISH YEARBOOK OF INTERNATIONAL LAW

## Volume XIV, 2003

Ius Gentium Association

MARTINUS NIJHOFF PUBLISHERS
LEIDEN/BOSTON

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

Cited as: FYBIL

The Ius Gentium Association gratefully acknowledges that the publication of the Finnish Yearbook of International Law is made possible with the support of the Academy of Finland and the Legal Department of the Finnish Ministry for Foreign Affairs.

Printed on acid-free paper.

ISSN 0786-6453
ISBN 90 04 14616 4


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

http://www.brill.nl



Printed and bound in The Netherlands.

# Finnish Yearbook of International Law



We welcome unsolicited contributions related to international law. All manuscripts and editorial correspondence should be addressed to:


Executive Editor
Finnish Yearbook of International Law
Faculty of Law
P.O. Box 4 (Yliopistonkatu 5)
FIN-00014 University of Helsinki, Finland

e-mail: fybil-editors@helsinki.fi


You'll find general information for authors and a detailed guide to our house style at the end of this book. – We look forward to hearing from you.

# Contents

## Articles

## Book Reviews & Review Articles

# Articles

# Unity, Diversity and the Fragmentation of International Law

Matthew Craven*

In recent years a burgeoning literature on the apparent 'fragmentation' of international law has been developing.[1] It is not a term that has a long history, and is most frequently associated with the problems emerging from the recent proliferation of international courts and tribunals[2] and the associated development of autonomous, or semi-autonomous regimes, within the field of international law.[3] Whilst the emergence of new courts and tribunals may well have altered the shape and tenor of international legal activity, it is equally apparent that the issues caught within the snare of the debate are by no means quite as recent. The idea of a fragmenting international law brings into question issues such as the systemic character of international law, the lack of hierarchy, the absence of centralised institutions, and the problems of professional specialisation, all of which have been particular points of debate for many decades. Indeed, as the International Law Commission (ILC) has articulated it, the problem has its origins in the 'diversification and expansion' of international law[4] – processes which were themselves heralded by Friedmann in the 1960s as emblematic of what he saw to be the 'changing structure of international law'.[5]

---

* Reader in International Law, School of Oriental and African Studies, University of London.

1 See generally, Symposium, 31 *New York University Journal of International Law and Politics* (1999); Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *Leiden Journal of International Law* (2002) 553;

2 See e.g., Jonathan I. Charney, 'Is International Law Threatened by Multiple International Tribunals?', 271 *Hague Recueil des Cours* (1998) 101; Gilbert Guillaume, 'The Future of International Judicial Institutions', 44 *International and Comparative Law Quarterly* (1995) 862; Robert Jennings, 'The Role of the International Court of Justice', 68 *British Year Book of International Law* (1997) 58.

3 For an early discussion of this see Bruno Simma, 'Self-Contained Regimes', 16 *Netherlands Yearbook of International Law* (1985) 111.

4 International Law Commission, Report of 55th Session, UN GAOR, Supp. No. 3, UN doc. A/58/10 (2003) 267.

5 Friedmann M., *The Changing Structure of International Law* (Stevens & Sons: London, 1964)

Even if it is not entirely new, two particular features stand out in the current debate. First that although the process is cast in pejorative terms – fragmentation being associated with incoherence, disunity, and uncertainty – it is by no means the case that it is actually viewed as such. Just as much as we are told of the 'dangers' of fragmentation, so also we are encouraged to think of them as marks of success.[6] Talk about fragmentation, in that respect, seems to be heavily encoded: concern for the overspill of adjudication seems to be a surrogate for demonstrating to detractors that international law is not institutionally weak; anxiety as to normative inconsistency, is simply a manifestation of the maturity of the system and a demonstration of its normative breadth and depth; insecurity as to the absence of normative hierarchy, seems only to be an argument that the time is right for its articulation. These are not problems at all, we seem to be told, they are in fact strengths.[7] If this were to be the case, then, the debate might simply be recast in terms of pluralism, complexity and context sensitivity without any particular descriptive loss. Koskenniemi, for example, suggests that:

> [f]ar from being a problem to resolve, the proliferation of autonomous or semi-autonomous normative regimes is an unavoidable reflection of a 'postmodern' social condition and a beneficial prologue to a pluralistic community in which the degrees of homogeneity and fragmentation reflect shifts of political preference and the fluctuating success of hegemonic pursuits.[8]

Koskenniemi seems to assume, however, that the pursuit of hegemonic interests is necessarily to be associated with the maintenance or creation of homogeneity in international law and that, by contrast, pluralist fragmentation is a beneficial anti-

---

[6] In some evaluations this is explicit, see e.g., Georges Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks', 31 *New York University Journal of International Law and Politics* (1999) 919, at 925 ('the multiplication of specialised tribunals is, by itself, a healthy phenomenon. Its description by the term 'proliferation', with its negative connotations, is misleading'). Benedict Kingsbury, 'Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?', 31 *New York University Journal of International Law and Politics* (1999) 679, at 686 ('whatever the hazards of non-hierarchical proliferation, it has been the only way, and perhaps a very good way, to increase third-party settlement in international disputes through law-based forums. This in turn is regarded as an immense contribution in making more disputes effectively justiciable in practice, and in deepening the body of authoritative pronouncements of international law – the better to guide legal actors and to make future adjudicative decisions more predictable.')

[7] See e.g., Thomas Franck, *Fairness in International Law and Institutions* (Oxford University Press, 1995) at 4-6 ('International law has entered the stage of the practitioner-specialist. Specialization is a tribute which the profession pays to the maturity of the legal system…. This specialization reflects the fact that the law of the international community has, through maturity, acquired complexity.')

[8] Martti Koskenniemi, 'What is International Law For?', in Malcolm D. Evans (ed.), *International Law* (Oxford University Press, 2003) 89, at 110.

toxidant. It might be argued, nevertheless, that the fragmentation of a unified discourse of international law might either allow the prioritisation of particular projects (and value sets) at the expense of others, or at least provide the terrain upon which certain values might come to flourish and others perish. Even if not, at the outset, a hegemonic strategy, it might well come to be so.[9] If fragmentation is occurring, therefore, there is no obvious reason to suppose that it is entirely benign, and one may suppose the persistence of the terminology itself is at least suggestive of a continuing ambivalence in that regard.

The second feature of the current debate is that whilst the overt instances in which the problem has arisen have been associated with the apparent incompatibility between various sectors of international law – the competition between trade and the environment, law of the sea and fisheries regulation, human rights and state immunity – these seem to be merely symptomatic of something more fundamental. If it were simply a matter of normative incompatibility or judicial communication, such problems would be open to remedy – by, for example, developing rules of hierarchy (temporal, normative, or conceptual) or machinery for institutional dialogue. The sense is, however, that the underlying problem is one that is not open to any simple remedy and is concerned rather with the fragmentation of the basic 'systemic rules'– the 'rules of the game' – that underpin the idea of international law as a unitary domain of action and thought. The threat that seems to be perceived is one in which international law will eventually dissolve into a series of specialised, project-specific, regimes operating with little or no consistency between them as regards the relevant actors, institutional priorities, modes of settlement or framing suppositions.[10] International law would no longer be a singular endeavour, nor even a meta-systemic system, but merely an empty rhetorical device that loosely describes the ambit of the various discourses in question.[11]

It is, however, still a matter of debate as to whether a fragmentation of international law is actually occurring. Cassese suggests by way of contrast, for example, that

---

[9] Cf., Michael Hardt and Antonio Negri, *Empire* (Harvard University Press: Cambridge, Mass., 2000) at 138 ('When we begin to consider ideologies of corporate capital and the world market, it certainly appears that the postmodernist and postcolonialist theorists who advocate a politics of difference, fluidity, and hybridity in order to challenge the binaries and essentialism of modern sovereignty have been outflanked by the strategies of power. Power has evacuated the bastion they are attacking and has circled around to their rear to join them in the assault in the name of difference.')

[10] See, Abi-Saab, 'Fragmentation or Unification', *supra* note 6, at 926.

[11] Cf. Jean Combacau, 'Le droit international: bric-à-brac ou système?', 31 *Archives de Philosophie du Droit* (1986) 85.

> [t]he gradual interpenetration and cross-fertilization of previously somewhat compartmentalized areas of international law is a significant development: it shows that at least at the normative level the international community is becoming more integrated and – what is even more important – that such values as human rights and the need to promote development are increasingly permeating various sectors of international law that previously seemed impervious to them.[12]

For Cassese, and others no doubt, international law is on a different trajectory. Compartmentalization (qua fragmentation) is receding, not encroaching, and closer integration is being achieved through processes of permeation or 'cross-fertilisation'. What people call fragmentation, on such a view, might simply be the unavoidable side-effects of what are more broadly integrative processes. Whilst undesirable, they are not necessarily harmful.

The intention in this paper is neither to take a position upon whether fragmentation as understood by the authors above is actually occurring, nor to advance a thesis that it is either benign or malign. Rather, the intention is to explore what it is we might mean by fragmentation: what forms of fragmentation might be identified and what are the domains in which it might come to assume prominence? Since, at the outset, the idea of fragmentation seems to address itself directly to the endurance of international law as a system, consideration of that particular issue will be taken as the starting point. From there, the issue of fragmentation will be examined in relation to two well-known domains of activity and debate (reservations to treaties and state responsibility), with a view to exploring the thematic variegation associated with it. Ultimately, the argument pursued in this paper is that fragmentation, when understood in terms of an increasing diversity in norms, processes, actors and institutions is not something against which international law as a systemic enterprise is necessarily set. Rather, fragmentation is produced through precisely the same processes which are used to contain or control diversity.

## International Law as a System

The idea that international law is a systemic enterprise appears in many accounts to be almost axiomatic.[13] Once we embark upon the study of international law – once

---

[12] Antonio Cassese, *International Law* (Oxford University Press, 2001) at 45.

[13] Pierre-Marie Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice', 31 *New York University Journal of International Law and Politics* (1999) 791, at 793.

indeed we pose the question as to the nature of international law, or ask about it in some way – we are already disposed to understanding it in some systemic totality. Certainly if we speak in terms of 'fragmentation', the systemic unity of international law appears to be already preconfigured, articulated as an essential hypothesis. With a bravado characteristic of those who try to engage with the question, Dominicé observes, for example, that a sociological analysis would suggest that:

> within the framework of international society, whose basic structure is a plurality of sovereign states, there exists a system of legal rules termed and recognised as such. This conclusion is buttressed by the finding that there is a sort of collective *opinio iuris*, a conviction that international law exists and that States could not do without it. There is no need to seek a theoretical foundation to justify this assertion, which results from a mere observation of reality and is expressed by the maxim *ubi societas ibi ius*.[14]

Note how the 'system of legal rules' is articulated at the outset as a 'conclusion', to be 'buttressed' by, rather than 'founded' upon, a collective *opinio iuris*. Note also the simultaneous unwillingness to engage with 'theory' and the reliance instead upon a simple maxim – where there is society there is law. The systemic character of international law, furthermore, seems to be so closely entwined with the prior question as to whether it is law at all, that any serious engagement with it appears almost impossible.

It is clear that international law doesn't have to be articulated in terms of a system. It may, in fact, be understood in a number of alternative ways none of which necessarily implies anything particularly systemic: as a category description of the professional outlook of those engage with it;[15] as a domain of discourse between significant agents; as an empirical array of practices; or perhaps merely as the vocabulary employed by a community of scholars and practitioners. Indeed, it is evident that usage of the term 'system' in relation to international law has close associations with the style of formal analytical jurisprudence that has come to be imprinted, in particular, within the European tradition. Those more closely associated, by contrast, with the pragmatism of the American realist tradition seem to have no need for the idea. Nor do others of a broadly empirical bent, or those

[14] Christian Dominicé, 'Methodology of International Law', Encyclopaedia of Public International Law p. 334.

[15] Cf. Pierre Bordieu's notion of *habitus*, as the conditioning assumptions which predispose particular outlooks, Pierre Bordieu, *The Logic of Practice* (Polity: Cambridge, 1990) at 53.

concerned with articulating international law in terms of a 'process' rather than rules.[16]

Even if one were to reduce the idea of a 'system' to a mere homogeneity of outlook, its articulation is by no means easy. We are all very familiar, for example, with the idea that the conception of international law may vary by reference to ideology (consider, for example, the idea of 'socialist international law'), or by the cultural and political circumstances in which it comes to be articulated (exemplified in the idea of 'international law as applied by the courts of X or Y countries' or 'the approach of developing countries to international law'). We are all, furthermore, familiar with the various 'schools' of thought whose influence has spread through the discipline at various junctures in time, the points of divergence being occasionally narrow, but in other respects quite profound.[17] Diversity has been a central feature of both the theory and practice of international law for centuries, and it has only been by way of articulating such differences as mere matters of style or inflection (projecting divergences as internal modulations rather than external challenges) that the project has remained in any sense cohesive.[18]

Yet, with all the divergence and disunity that characterises the domain, it is hard not to think about international law in a way that doesn't invoke some idea of structure or system. In speaking about sources, personality, sovereignty or jurisdiction, for example, if only for purposes of noting the internal contradictions or lack of coherence within each, is at least suggestive of something unitary about the endeavour however imperfect that unity might be. These general theoretical constructs seem to define the domain in a particular way, and provide a basic understanding of the boundaries of the trade. Even Carty, for example, who maintains that since states exist in a state of nature 'there is no legal system which defines comprehensively the rights and duties of States towards one another', seems to admit that a system might exist in a less than comprehensive form.[19]

---

[16] One finds, for example, little mention of a 'system' in the work of McDougal however 'systematic' it might seem. See e.g., Myres McDougal and Florentino Feliciano, *Law and Minimum World Public Order* (Yale University Press: New Haven, 1961). Cf., Rosalyn Higgins, *Problems and Processes: International Law and How We Use It* (Oxford University Press, 1994) at 1 ('International law is not rules. It is a normative system. All organized groups and structures require a system of normative conduct…').

[17] For a survey of the various dynamics of the US tradition, in this respect, see, David Kennedy, 'When Renewal Repeats: Thinking Against the Box' 32 *New York University Journal of International Law and Politics* (2000) 335.

[18] David Kennedy, 'The Disciplines of International Law', 12 *Leiden Journal of International Law* (1999) 9, at 18.

[19] Cf. Anthony Carty, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester University Press, 1986) at 1.

Of course the debate over fragmentation seems to invest in the idea of a 'system' something more concrete than this. In some degree, the person to whom credit might be given for diagnosing what it is that people mean when speaking about a system of international law is H.L.A. Hart in his work *The Concept of Law* published in 1961.[20] *The Concept of Law*, whilst being a staple of Anglo-American jurisprudence, has never became a prime point of reference for international lawyers – partly, one may think, as a consequence of his essentially sceptical stance as regards the claims made in respect of international law,[21] partly perhaps as a consequence of his style and method.[22] By the same token, the analytical framework he articulated, finds significant resonance in debates that impinge upon the systemic character of international law – debates which themselves have implications for the question of fragmentation. There are several particular features of Hart's work that stand out in the current context.

At the outset, whilst overtly being an exercise in formal analytical jurisprudence, Hart distinguished his concept of law from that of the continental jurisprudence of Kelsen[23] and Ross[24] with which it has certain affinities. He did so, in part at least, by seeking to base his thesis upon what may broadly be described as a thin developmental sociology.[25] Like Weber, who saw the emergence of 'a logically clear, internally consistent… gapless legal system' as a component part of the emergence of modern bureaucratic society,[26] Hart distinguished the kind of law to be found in 'primitive societies' from that associated with the development of a modern legal system. The key feature of this transition from primitive to modern, in Hart's view, was the emergence of secondary rules – broadly articulated as 'rules

[20] H.L.A. Hart, *The Concept of Law* (Clarendon Press: Oxford, 1961). See further, Neil MacCormick, *H.L.A. Hart* (Arnold: London, 1981); Michael Martin, *The Legal Philosophy of H.L.A. Hart* (Temple University Press: Philadelphia, 1987); Michael Bayles, *Hart's Legal Philosophy* (Kluwer: Deventer, 1992).

[21] See, Ian Brownlie, 'The Reality and Efficacy of International Law', 52 *British Year Book of International Law* (1981) 1

[22] Franck, *Fairness in International Law and Institutions*, *supra* note 7, at 185. He argues that Hart's 'exaggerated critique' of the international system is coloured by 'Austinian positivism, which was more fashionable among legal scholars then than now'.

[23] Hans Kelsen, *General Theory of Law and State* (Harvard University Press: Cambridge, 1949)

[24] Alf Ross, *On Law and Justice* (University of California Press: Berkeley, 1958).

[25] In the preface Hart describes his book as 'an essay in descriptive sociology', Hart, *The Concept of Law*, *supra* note 20, preface. Cotterrell notes, however, that this merely represents a 'kind of sociological drift… but no serious sociology'. Roger Cotterrell, *The Politics of Jurisprudence* (Butterworths: London, 1989) at 96.

[26] Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (University of California Press: Berkeley, 1978) at 656.

about rules' – without which law would remain uncertain, static and inefficient.[27] It was, furthermore, in the identification (and acceptance) of such secondary rules – and specifically rules of recognition, adjudication and change – that one may discern the existence of a legal 'system'.[28] International law, however, in Hart's view possessed no secondary rules of this kind, and therefore assumed the form of a simple social structure characterised by the presence of an *ad hoc* collection of norms of conduct whose effect was dependent upon diffuse social pressure.[29] It was, he suggested, possible that international law may be 'in a stage of transition', but it had not, at that point, become a system of law.

Two particular aspects of Hart's analysis, in this respect, have a descriptive appeal in terms of the way in which international lawyers tend to approach the systemic dynamics of international law, and hence the question of fragmentation. The first is a broad tendency to accept the idea of a developmental sociology underlying the overall endeavour. The idea of international law as a project open to further development and systematisation through which it may be made more efficient, coherent and dynamic (and hence less primitive[30]) is a familiar trope. The words 'development' and 'codification', of course, have featured consistently in international legal endeavours at least since the League of Nations era and may be thought expressive both of a broadly instrumentalist outlook (of the will to change society through law) and also expressive of the idea that international law itself – its structures and processes – are open to evolutionary and progressive perfection. The Statute of the International Law Commission, for example, which was bought into being by the General Assembly in 1947 as an institution designed to assist it in encouraging 'the progressive development of international law and its codification',[31] mandates it specifically with the task of fostering 'more precise formulation and *systematisation* of rules of international law in fields where there

---

[27] Hart, *The Concept of Law*, *supra* note 20, at 89-96. One may note the parallels here between Hart's inflections on the conditions of primitivism, with Franck's ideas concerning the conditions under which rules may exercise a strong 'pull to compliance'.

[28] *Ibid.,* at 113 ('There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials').

[29] *Ibid.,* at 230-1.

[30] For explicit use of this term see e.g., J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Clarendon Press: Oxford, 1963) at 73

[31] Article 13 of the United Nations Charter, 26 June 1945, in force 24 October 1945, 1 *United Nations Treaty Series* xvi.

already has been extensive State practice, precedent and doctrine' [italics added].[32] Its role, in other words, is not merely the articulation of new rules upon a bedrock of practice, precedent and doctrine, but also, and significantly, their conceptualisation within the embrace of a singular code. Systematization seeks to make homogeneous, the empirically heterogeneous, and create a whole out of disparate parts.

The second feature of Hart's analysis that appears to reflect a continuing mode of thought is his emphasis upon the existence of secondary rules as the main condition for the creation and maintenance of a system of international law. The attraction of Hart's analysis for international lawyers, in this respect, is its overtly non-institutional thrust: it is not, he seems say, the existence or otherwise of institutions that makes law systemic, but rather the existence of power-conferring secondary rules addressed to the relevant 'insiders'. Whilst it is evident that institutions were far more central to Hart's account than he might have wished to acknowledge,[33] and whilst Hart was clearly sceptical as to the existence of secondary rules in international law, it is in the potential inconsistencies developing as regards secondary, or 'structural' rules, that one finds much of the debate over fragmentation located.[34] It is not, in other words, purely in the fact that specialised regimes dealing with human rights, trade, environmental law or the like have emerged within international legal practice, or indeed that each of these regimes appears to operate on a largely autonomous basis. Rather it is in the fact that each of these regimes projects outwards a particular conception of international law – a conception extending to considerations such as the source of obligation, the identity of relevant actors, the method by which competing interests are to be weighed, or the basis for responsibility – that seems to call into question the integrity of the whole. Koskenniemi argues, for example, that fragmentation

> 'is not a technical problem resulting from lack of coordination…. [but rather] a hegemonic struggle where each institution, though partial, tries to occupy the space of the whole'. [35]

[32] Article 15 Statute of the International Law Commission.

[33] It is arguable that Hart was ultimately concerned with grounding the authority of political institutions in law – justifying, in other words, the notion of a rechtstaat – rather than viewing them as bodies whose power and authority was essentially extraneous to law or legal control. In contrast to Austin, Hart's sovereign did not produce law, but was produced through it.

[34] See e.g., L. Barnhoon and K. Wellens (eds.), *Diversity in Secondary Rules and the Unity of International Law* (Martinus Nijhoff Publishers: The Hague, 1995).

[35] See e.g. Koskenniemi, 'What is International Law For?', *supra* note 8 , at 110.

The threat of fragmentation, in other words, is found in the idea that this systemic pluralism is either equivalent to, or productive of, an a-systemic primitivism.

In some respects these two ideas run against each other. The idea that international law has yet to complete the process of 'systematisation', sits uncomfortably with the idea of fragmentation as a dangerous proliferation of secondary, structural, rules. This has its analogue in a much remarked upon circularity in Hart's own account, in which he appears to try to locate the authority of judges in legal rules, whilst making the existence of those rules subject to their recognition by judges.[36] Certainly one may describe any system in terms of being open, or closed, dynamic or static, but however described the problem of the 'constitutional moment' (how one explains, in terms internal to the system, how the system itself came into being) will always remain.[37] As a diachronic narrative, therefore, progressive systematisation appears in tension with that of fragmentation.

By the same token, one sees an inherent dialectic here. A system is a system by reason of its ability to unify a diversity of experience – it must be simultaneously homogeneous and heterogeneous, unified but multipolar. A system of international law, in other words, must draw upon and recognise differences between regimes, actors, institutions and processes – it cannot merely be diffident. To be, or remain, a system, by contrast, difference and diversity must be disciplined, regularised, and contained within particular boundaries. One sees, in other words, on the one hand a relational repositioning of the central tenets of international law as a response to ideas emerging from particular sites of activity – a repositioning of the debate over responsibility as a response to developments in the field of environmental law, or that of 'personality' as a response to developments in the field of institutional law, or that of 'domestic jurisdiction' as a response to developments in the field of human rights. On the other hand, one also sees an attempt to confine or constrain the understanding of each site of activity within some general framework that maintains the integrity of the whole. Not only does this mean the upholding of certain structural features whilst others are changed, but also imprinting on the sites of activity themselves some coherent teleology which they do not necessarily possess. The assumption, for example, that human rights are concerned with the promotion of individual freedom at the expense of State authority, or that international economic law is concerned with the elimination of protective regulation in favour of ever more free-trade, only thinly disguises the various schisms, or points of divergence, that run through each.

---

[36] See e.g., Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press: Oxford, 1978) at 54-5.

[37] Cf. Derrida's critique of the Declaration of Independence, Jacques Derrida, *Otobiographies: l'enseignement de Nietzsche et la politique du nom propre* (Galilée: Paris, 1984) at 21-22.

When viewed in this light, the argument about system and fragmentation in international law becomes somewhat more involved. It can no longer be articulated simply in terms of a tension between generalists and specialists, or between two different sites in which centrifugal or centripetal forces are to be found. It is transformed, rather, into a complex melée in which competing ideas of unity and diversity are produced and reproduced at all of the various points at which the debate is engaged. It is no longer a question of unity or diversity, system or fragmentation, but rather what variant of each, and in what measure?

Before examining the processes by which the dialectics of universality and difference work their way through various 'structural' debates, two particular difficulties highlighted by Hart himself need emphasising. First of all, it is apparent that the articulation of the systemic unity of international law in terms of the existence of secondary rules depends upon a functional differentiation between rule types that is hard to maintain in the absence of centralised institutions for law-making or adjudication. Whilst, as it has been suggested, Hart's account was overtly non-institutional (institutions existing only in the shadows of 'power conferring rules'), the identification of any particular rule as being 'secondary' as opposed to 'primary' in nature, seems to rest largely upon the identity of those to whom it is addressed.[38] Hence his observation that international law suffered from there being no differentiation between sovereign and subject.[39] His point seems to be that since all rules can be cast in behavioural terms, the inability to differentiate between States as subjects of the law and States as law-makers and adjudicators – between those who Hart would characterise as being 'internal' to the system – makes the discernment of secondary rules particularly difficult.

Hart was particularly caustic, in this respect, of the attempts made by certain jurists to locate the source of obligation in international law in the rule *pacta sunt servanda*. *Pacta sunt servanda*, in his view, was merely another primary rule of conduct. Whether or not this example was a particularly good one, given the underlying question whether treaty rules themselves are to be regarded as rules of international law or rather as the incidental subject matter of private agreements, the point applies more generally. Thus, for example, rules concerning the recognition of States might, if formulated in one way, be characterised as primary rules of behaviour (i.e. a State should not give recognition to a secessionist entity prior to it becoming effective). If formulated differently, however, they might equally be presented as secondary (i.e.

[38] This was not entirely the case as Hart recognised the possibility of private actors having the power to change obligations assumed by others. Ross, by contrast, understood secondary rules as those addressed to judges.

[39] Hart, *The Concept of Law*, *supra* note 20, at 215.

States have the power, whether acting alone or in concert, to effectively adjust or re-allocate primary rights and obligations in case of certain events arising). Similarly, rules on immunity may be regarded, from one point of view, as primary in the sense that they require judicial restraint in matters *iure imperii*, but appear also to be secondary in the sense that they affect the right of enforcement of other primary rules (such as the prohibition on torture or genocide). Even the concept of *ius cogens*, whilst nominally appearing to be secondary – in the sense that it is concerned with the creation of a hierarchy between rules of conduct – may also be seen as merely descriptive of the material scope of certain norms of behaviour.

It is apparent furthermore that Hart's scepticism as concerns the claim that international law was a systemic endeavour had a good deal more to do with what he saw to be the lack of sociological integration within international society, than any real concern as to the function of particular rules. In discussing the efficacy of sanctions, for example, he argues that 'in societies of individuals, approximately equal in physical strength and vulnerability, physical sanctions are both necessary and possible'. But, he continues, just because such simple truisms hold good for individuals, they may not do so for states, 'and the factual background to international law is so different from that of municipal law, there is neither a similar necessity for sanctions… nor a similar prospect of their safe and efficacious use.'[40] Even for the most powerful state, he points out, to initiate a war is 'to risk much for an outcome which is rarely predictable with reasonable confidence'. Furthermore, because of the inequality of States, 'there can be no standing assurance that the combined strength of those on the side of international order is likely to preponderate over the powers tempted to aggression'. The organisation and use of sanctions, in other words, 'may involve fearful risks and the threat of them add little to the natural deterrents'.[41]

Here, Hart brings to the fore his real anxiety. In conflating rule types with forms of social organisation, Hart might have been read as offering the view that normative development itself was sufficient to transform a set of rules of behaviour into a system of law, and hence to provide the conditions for civilised society. Such an instrumental vision, however, was obstructed, as far as Hart was concerned, by the social-psychological motors of international society. Would it ever be possible, he seems to ask, absent the creation of centralised responsible institutions, to organise a system of law that would be anything other than counterproductive? Wouldn't the attempts to justify processes of law-making, adjudication and enforcement by way of the articulation of secondary rules risk their subversion by

[40] *Ibid*, at 214.

[41] *Ibid.*

hegemonic interests? As we shall see, Hart's concerns in this respect, neatly summarise some of the concerns arising in respect of subsequent system-building activities undertaken by the International Law Commission.

## The Dialectics of System and Fragmentation

As suggested above, the concept of a system of law supposes both unity and diversity. It has also been suggested that any system-oriented project (any process aimed at the unification and integration of international law) will necessarily seek to both reflect the diversity of experience and embrace all fields of international legal activity, whilst simultaneously seeking to discipline, order, or control, that diversity in a way that makes the system feasible or meaningful. As will be shown, however, the process of systematisation is one which itself is productive of fragmentation. Unification will necessarily imply differentiation, and that differentiation will necessarily give rise to new forms of fragmentation which themselves will threaten the unity that is originally sought. Fragmentation, in other words, is not something that merely pre-exists the systemic enterprise, something against which the unification of international law is always directed, but something that is produced through it and with which it consistently engages.

In order to explore the dynamics of this process, two particular issues that have some bearing upon the current debate concerning the fragmentation of international law will be examined – the first is concerned with the issue of reservations to treaties (with particular reference to human rights treaties), the second with state responsibility. There is no compulsion in the choice of these examples – they are merely representative of two areas of law in which the dynamics of unity and fragmentation can usefully be explored. In both cases, furthermore, the debate has been rendered in terms of a broad narrative that seeks to locate the various argumentative moves in some form of sequence. This has been undertaken, however, less for purposes of articulating an accurate history of each, but rather as a heuristic exercise with the intention of exposing, in a context in which the arguments themselves are relatively well-known, the relationship between system and fragmentation, unity and difference.

### A Story About Reservations

In the context of the ongoing work of the International Law Commission on reservations to treaties, there is a continuing debate as to the salience of the regime on reservations articulated in Articles 19-23 of the Vienna Convention on the Law

of Treaties[42] to 'normative' (and particularly human rights, or humanitarian) treaties. On the one side in the current debate one finds the International Law Commission that has bound itself to maintain the integrity of the Vienna Convention regime whilst seeking to accommodate, in its continuing work on the subject, the particular concerns expressed by institutions for the protection of human rights.[43] On the other, one finds the human rights bodies themselves, largely situating their practice outside the terms of the Vienna Convention, and arguing that they are 'inappropriate' and 'inadequate' for purposes of dealing with reservations to such instruments.[44] Here, one finds, a small element of the 'fragmentation' debate being acted out.

In order to make some sense of this, it is worthwhile stepping back to examine how the debate has emerged more generally within the context of international law. The problem of reservations essentially began shortly after the moment at which the international community embraced multilateral treaty making as the primary mode by which collective interests would be pursued on the international plane.[45] This form of multilateralism seemed to be premised upon the need to overcome the perceived dangers of a fragmented world by way of encouraging, universal adhesion to a singular set of values. As Paul Reuter argues, multilateral agreements emerged not simply by reason of a desire for simplification, but for the purpose of defending 'the common interests of mankind' out of a sense of global solidarity.[46] It was always evident, however, that meaningful treaty making involved the elaboration of rules designed either to change the *status quo* or reinforce it, and, in that respect,

---

[42] Vienna Convention on the Law of Treaties (1969), 1155 U.N.T.S. 331.

[43] See e.g., 'Preliminary Conclusions of the International Law Commission on Reservations to Normative Multilateral Treaties, Including Human Rights Treaties', 49 ILC Rep. (1997) 52 GAOR, Supp. No. 10, (1997) 112.

[44] General Comment No. 24(52), UN Doc. CCPR/C/21/Rev.1/Add.6, para. 17. See generally, Yogeshi Tyagi, 'The Conflict of Law and Policy on Reservations to Human Rights Treaties', 71 *British Year Book of International Law* (2000) 181; Konstantin Korkelia, 'New Challenges to the Regime of Reservations under the International Covenant on Civil and Political Rights', 13 *European Journal of International Law* (2002) 437; Rosalyn Higgins, 'Human Rights: Some Questions of Integrity', 52 *Modern Law Review* (1989) 1; C. Redgwell, 'Universality or Integrity? Some Reflections on Reservations to Multilateral Treaties', 64 *British Year Book of International Law* (1993) 245; Liesbeth Lijnzaad, *Reservations to UN Human Rights Treaties: Ratify and Ruin?* (Martinus Nijhoff: Dordrecht, 1994); Susan Marks, 'Reservations Unhinged: The Belilos Case Before the European Court of Human Rights', 39 *International and Comparative Law Quarterly* (1990) 300; Dinah Shelton, 'State Practice on Reservations to Human Rights Treaties', 1 *Canadian Human Rights Yearbook* (1983) 205; M. Coccia, 'Reservations to Multilateral Treaties on Human Rights', 15 *California Western International Law Journal* (1985) 1.

[45] One of the earliest examples being the French reservation to the General Act of the Brussels Conference in 1890.

[46] Paul Reuter, *Introduction to the Law of Treaties* (Kegan Paul: London, 1995) at 2-3.

would constantly be faced by particular forms of resistance premised upon notions of economic, social, political or cultural difference.[47] It was by way of accommodating such difference that reservations came to be an accepted feature of instruments of adhesion to multilateral instruments. They were simply the price of universalism.

In the time of the League of Nations reservations, to be effective, required the unanimous acceptance on the part of other States parties.[48] Difference, in other words, could be accommodated, but only so far as it was considered consistent with the multilateral endeavour as understood by each and every state party individually. Difference was constrained and regularised, tolerated only within limits. From the perspective of existing states parties, this ensured the integrity of their endeavour, but by the middle of the 20th Century it became clear that by making the instrument of ratification with appended reservation subject to the effective veto of other states parties, the process of adherence to many such multilateral agreements had been obstructed and their entry into force delayed. The International Court of Justice was then called upon to review the problem in the particular context of the Genocide Convention.[49]

At the outset, the Court was clearly faced with two forms of fragmentation. On the one hand, it was faced with the problem of seeking to assist the universalisation of multilateral law-making in the context of an 'expanding', and hence more fragmented and pluralistic, international society. With a greater number of potential participants in the general regime, bringing with them a greater range of cultural and political sensitivities, the possibilities of universal ratification were apparently diminishing. And all the more so, if the regime on reservations essentially provided each and every state party a prospective veto over the participation of other reserving states. On the other hand, it was faced with the problem posed by the application of a singular, unified, rule on reservations to what was becoming an increasingly diverse array of instruments. The insistence that all treaties were essentially alike (broadly 'contractual' in nature) and therefore to be subordinated to a singular set of principles seemed to have to give way in face of the

---

[47] Tyagi identifies, for example, the major 'causes' of reservations to human rights treaties in terms of domestic law constraints, higher national standards, ideological dissent, political objectives, vital interests, harmonization of parallel obligations, precautionary measures, balancing acts, economic constraints and religious fundamentalism. Tyagi, 'The Conflict of Law', *supra* note 44, at 190-201.

[48] Report of the Committee of Experts for the Progressive Codification of International Law, 8 *League of Nations Official Journal* (1927) 880. See, A.D. McNair, *The Law of Treaties* (Clarendon Press: Oxford, 1961) at 162-3, 173-7.

[49] *Reservations to the Genocide Convention Case*, Advisory Opinion, ICJ Reports (1951) 15.

variety of purposes to which treaties were increasingly being put.[50] The unanimity rule could work, it was apparent, in contexts in which the number of parties was relatively small, or in cases in which the states parties were a relatively responsive and homogenous group, but not in cases of the 'new' kind of quasi-legislative multilateral agreement.[51] Some sort of functional differentiation appeared to be necessary.

In response the Court sought to address both concerns. In respect of the second issue, it recognised the particular characteristics of the Genocide Convention as one in which a 'perfect contractual balance between rights and duties' could not be maintained; States did not have independent interests in compliance, but merely a 'common interest in the 'accomplishment of those high purposes which are the *raison d'être* of the convention'.[52] The treaty, furthermore, was one in which universal ratification was almost imperative – anything less than that 'would detract from the authority of the moral and humanitarian principles which are its basis'.[53] In that context the Court sought to modify the broadly contractual form of the League of Nations rule and allow participation on the part of reserving states so long as the reservation had been accepted by one or more parties, and was consistent with the object and purpose of the agreement.[54] In case of objection by some, but not all States, the reserving state would become party to the convention, but legal relations between it and other objecting parties would be precluded. Despite the obvious difficulties with this[55] – not least being the fact that compatibility with the object and purpose of the Convention could be determined by other States parties – this approach was approved by the General Assembly[56] and the Secretary General was instructed to apply it in relation to all conventions concluded under UN auspices unless they contained provisions to the contrary.

Overtly, the Court simply replaced one general rule for another. In place of the rule of unanimity, it offered instead a rule allowing participation in cases in which at least one other party accepted the reservation as being compatible with the

---

[50] See, A. McNair, 'The Functions and Differing Legal Characteristics of Treaties', 11 *British Year Book of International Law* (1930) 100.

[51] Cf. Wilfred Jenks, 'State Succession in Respect of Law making Treaties', 29 *British Year Book of International Law* (1952 ) 105.

[52] *Reservations to the Genocide Convention Case*, *supra* note 49, at 23.

[53] *Ibid.*

[54] *Ibid*, at 29-30.

[55] See e.g., Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points', 33 *British Year Book of International Law* (1957) 203, at 272-293.

[56] GA Res. 598 (VI), 12 January 1952; GA Res. 1452 (XIV), 7 December 1959.

object and purpose of the treaty. It sought to uphold the general integrity of treaty law by, at once, disposing of the impediments to universal ratification posed by an increasingly fragmented international society, and by seeking to postulate a bilateralist understanding of multilateral agreements. It positioned itself against, in that respect, the idea that universal multilateral agreements were 'law-making' and hence of a legislative character, and against the idea that they were multipartite contracts. They were, in its view, simply networks of bilateral relations, and the regime on reservations became thereby a mechanism by which mutual modification might be effected.

At the same time, the Court's efforts to stem, or deflect, the forces of fragmentation with which it was faced, subsequently reproduced precisely the same problems, albeit in a different guise. The regime of reservations articulated by the Court, as subtly modified in the terms of Articles 19-23 of the Vienna Convention on the Law of Treaties, left exposed the problem of treaty integrity. Whilst the bilateral framework of acceptance or rejection might, in some circumstances, be such as to discourage resort to reservations, in many others the sanctioning potential of objection was clearly limited. In the context of a human rights agreement, for example, the fact that one or more states parties may have objected to a reservation seemed to be of little significance. Only if all state parties without exception objected to a reservation with the intent of precluding adherence on the part of the reserving state, would any necessary legal consequence emerge, and that event was obviously unlikely. In easing the process of making reservations, in other words, the Court's solution simultaneously gave rise both to the possibility of normative dilution and the erosion of the multilateral endeavour.

Further to the general dilution of standards, the bilateralist frame of reference also offered a relativised, or fragmented, form of normativity.[57] Given the premise of reciprocal reliance, no one state would ever possess exactly the same obligations in respect of each and every other state. Every normative commitment would be made dependent upon the identity of the other contracting parties: simply being a party to the same arrangement no longer answered the question as to what commitments those states assumed in relation to one another. That depended upon their respective positions as regards any reservations made. The promise offered by international law for universal solutions to universal problems appears to have been cut down in its prime.

---

[57] Cf. Prosper Weil, 'Towards Relative Normativity in International Law', 77 *American Journal of International Law* (1983) 413. For a thoughtful critique see, John Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case', 16 *Oxford Journal of Legal Studies* (1996) 85.

In the particular case of human rights agreements this relativisation of normativity posed evident problems. When faced with claims on the part of individuals affected by the actions or omissions of a State in respect of which a reservation had been made, the problem arose as to whether the supervisory body should give effect to the reservation on the basis that certain states had not objected to it, or examine, on its own initiative, whether the reservation was compatible with the object and purpose of the agreement. Deferring to the reservation seemed to be what was required by the Vienna Convention (assuming Articles 19 and 20 are to be read together), but that took little account of the fact that in the relationship between an individual and the state concerned, the position of other states parties (or indeed the number of other states parties) seemed to have little significance. Could it really be the case that a reservation to which objections had been made by a significant number of other states parties was still effective? Could the silence of one state alone really validate a reservation that cut to the heart of the agreement? Surely there was a need for some standard of appraisal that was independent of the position of other States? Surely, in other words, a universalising objectivity had to be deployed in order to counteract this normative relativism?

The response of human rights bodies, then, was to develop a practice in which they took it upon themselves to evaluate the effect of reservations, and to extract from that evaluation any particular consideration as to the position of other parties.[58] Whether or not a reservation was to be regarded as effective was simply a matter of construing the agreement in light of its object and purpose. If the reservation was not consistent with the treaty (when read, occasionally, together with its object and purpose) it was simply severed.[59] Normative fragmentation was overwritten by a concern for the functional integrity of the agreement. Of course, however, in order to justify such a policy, the courts and tribunals concerned had to particularise – to sever their activity from that of other bodies dealing with other treaties.[60] The problem of reservations, in their view, was not a general problem, but one that specifically affected human rights instruments. Human rights instruments to their mind seemed to be peculiar, or different, not merely in virtue of the distinctive nature of the subject matter, but in their conceptual structure. They were non-reciprocal, objective, regimes premised less upon a horizontal relationship of rights and obligations between contracting states, and more upon the provision of

[58] See e.g., General Comment No. 24(52), *supra* note 44.

[59] See e.g., *Belilos v. Switzerland*, ECHR (Ser. A) (1988), No. 132; *Loizidou v. Turkey*, Preliminary Objections, Decision of 23rd March 1995, ECHR (Ser. A) (1995), No. 310.

[60] In Loizidou, for example, the EctHR noted that the 'fundamental difference in the role and purpose of the respective tribunals' was such as to provide 'a compelling basis for distinguishing the Convention practice from that of the International Court'. *Ibid*, paras. 83-5.

certain guarantees in the relationship between governments and those falling within their jurisdiction. As expressed by the Inter-American Court of Human Rights:

> modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.[61]

What this meant, ultimately, was that a differential regime of reservations had to be developed for human rights treaties. International law – in the form of Articles 19 and 20 the Vienna Convention – had to be set aside in order for the supervisory bodies to perform the functions with which they were entrusted.

At the same time, the productive output of those decisions appears, on occasion, to have merely reproduced the initial problem. Thus, the decision by the Human Rights Committee in the case of *Rawle Kennedy v. Trinidad and Tobago*[62] to the effect that its reservation was incompatible with the object and purpose of the Optional Protocol – again on the basis that its particularism was objectionable – subsequently resulted in Trinidad and Tobago denouncing the Optional Protocol. For Trinidad and Tobago, its reservation appears to have been a *sine qua non* for its acceptance of the Protocol and its severance by the Committee precluded continued participation. The Committee's pursuit of normative integrity came, once again, at the expense of a universality of participation.

In contrast to the path adopted by human rights bodies, the International Law Commission stood its ground. Overtly, it had been requested to review the question of reservations, in part at least, because of the emerging tensions arising from the position adopted by human rights bodies (or what it has referred to as 'normative multilateral conventions'). Instead, however, of seeking to rearticulate (or perhaps even reinterpret) the terms of the Vienna Convention to remedy the obvious difficulties, it left them intact, and has moved on to worry about filling the perceived gaps in the existing arrangements.

---

[61] *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights* (Arts. 74 and 75), Advisory Opinion OC-2/82 of September 24, 1982, Inter-Am.Ct.H.R. (Ser. A) No. 2 (1982), para. 30.

[62] Comm. No. 845/1999, UN doc. CCPR/C/67/D/845/1999.

The particular projections articulated by the various protagonists in this story may, at one level, be thought to correspond with their innate concerns. The International Law Commission and the International Court of Justice, insofar as they represent central pivots in the maintenance of the structural cohesion of international law, might have been thought naturally unwilling to entertain the possibility of deconstructing a clear, unifying, treaty rule, but far more happy to accept the possibility of normative relativity or lack of universality. For them, perhaps, the 'system' could be sustained only if it was largely agnostic as regards the particular projects or substantive values there were, from time to time, articulated within the framework of international law. Fragmentation by reference to subject matter would disturb this basic ethos, reorienting structure by reference to particular value sets, and prioritising, as it was ultimately to become clear, community values over sovereignty. Human rights bodies, by contrast, might be thought to have viewed themselves as agents of a specialist endeavour, centrally concerned with the problem of normative universality (ensuring maximum adherence to the norms in respect of the maximum number of parties) than with the implications of systemic fragmentation. For them, structural coherence was a luxury, agnosticism a heresy. Their concern was to uphold and maintain the object and purpose of the agreement in face of whatever intent States may have expressed on ratification.

At this level one finds the International Law Commission upholding the structural integrity of international law against the forces of special pleading, and human rights bodies dismissing system-level considerations as purely the concerns of the generalist practitioner. But the position is clearly not quite so simple. Each protagonist positioned itself in respect to the claims of the other. The ILC could only maintain the sense of structural cohesion by being able to effectively embrace human rights agreements within the general framework – hence one finds Special Rapporteur Pellet arguing that, for all their differences, human rights agreements still contained 'typically contractual clauses'.[63] They were, in other words, still capable of being conceptualised in the way necessary for the Vienna Convention regime to work.

At the same time, one finds human rights bodies, whilst maintaining the particularity of their endeavours – to the point at which they are described as independent legal orders[64] – simultaneously seeking to support their position by placing it squarely within the accepted terms of treaty interpretation (reading the

[63] *Second report on reservations to treaties*, by Mr. Alain Pellet, Special Rapporteur, UN Doc. A/CN.4/477/Add.1 (1996).

[64] In Loizidou, for example, the European Court referred to the Convention as a 'constitutional instrument of European public order', *Loizidou v. Turkey*, *supra*, note 59, para. 75.

agreement in light of its object and purpose) and common principles governing the activities of international courts and tribunals (assuming the competence to determine their own jurisdiction). These were not rogue decisions, or decisions that called into question the 'systemic' character of international law, but simply decisions necessitated by the functional prerequisites of the subject matter. They were there to uphold international law, and fulfil their obligations as servants of the legal order: it was just that the Vienna Convention regime on reservations was insufficiently nuanced to deal effectively with the problem.

For all their differences, one finds, in other words, a number of commonalities in the position of the protagonists. Both were concerned with the question of integrity (the human rights agreement; the Vienna Convention), both also with that of universality (universality of standards; universality of participation). Both engaged with the problem of how to accommodate diversity on the outside whilst maintaining the integrity of the legal endeavour (in particular and general terms). In the hands of human rights bodies, the normative relativity of the Vienna Convention regime was discarded in favour of a response that was, at once, universalising (in the sense that the effect of a reservation was not held dependent upon the positions of other parties), but simultaneously particularising (in the sense that it was conditioned upon the particular nature of the agreement). It was, in that regard, the exact obverse of the approach articulated in the Vienna Convention, which sought to universalise the regime of reservations across subject matters (or 'types of treaty'), but particularise it in terms of the positions of parties to the agreement. These reversals, however, are clearly related. Just as maintaining the particularity of human rights treaties has a relationship to the ideal of normative unity (integrity), so also is the maintenance of a unified system of reservations related to normative relativity – both are ways of overcoming or accommodating the problem of difference whilst maintaining some sense of adhesion to the common project. What is apparent from each manoeuvre, however, is that no resting place is to be found. Each attempt to restrain or capture diversity, merely reproduced that diversity, or allowed it to spill out at a different point.

## A Story About State Responsibility

If the story of reservations follows a pattern of moving from a concern for sociological fragmentation, through normative relativisation to a debate concerning the legitimacy of fragmentation by reference to particular regimes, that concerning State responsibility takes up the debate at the latter stage. The main point of focus, in that respect, is the historic endeavour of the International Law Commission to draft a set of articles dealing with the issue of state responsibility, which it finally

accomplished in 2002. It is in the drafting of the articles from the 1950s until that date, that this narrative is set.

Almost from the outset, the ILC's work on State responsibility was concerned with producing a unitary set of systemic rules capable of accommodating, or over-spanning, the diverse array of practice from all fields of international law (trade, environment, human rights etc.). As a project, it necessarily sought to position itself both within that practice, but independent from it. These were to be both general and residual rules – rules to be applied in absence of other agreement, but necessarily also reflective of the practice of those agreements. The working supposition seemed to be, in other words, that legal practice was already fragmented, and the task was one of identifying consistencies in face of difference, universals in the context of divergence.

The evident problem facing the ILC was how to unify what appeared to be a particularly disparate set of practices and principles. Not only were there clearly a diversity of actors involved (states, individuals, corporations, international organisations), but diversity in terms of the source and character of obligations from which responsibility might arise (treaty/custom; dispositive/peremptory/*erga omnes*) and their form (conduct/result; bilateral/multilateral). There was, furthermore certain diversity in thought as regards the basis of responsibility (*dolus/culpa*), in terms of the type of act that might be regarded as wrongful (act/omission), and the consequential terms of reparation (*restitutio ad integrum*, compensation, or penal sanctions). Bringing this all together by locating universals in the interstices of the particular would be a monumental task.

From the fairly obvious starting point that the origin of responsibility lies in the commission of an unlawful act, the ILC initially moved in the direction, quite naturally one may suppose, of seeking to determine the circumstances in which an act or omission might be regarded as unlawful. García-Amador's six reports drafted with this focus in mind, concentrated primarily upon the rules governing injury to aliens (the law of diplomatic protection). This however, immediately struck commentators as being both too particular, and too contentious. On the one hand the reports did not take into account the demand (from the USSR and elsewhere) that the project should deal with responsibility arising from the breach of other, more important obligations, such as the prohibition on the use of force. On the other, they attempted to codify an area of law that had become particularly sensitive in relations between the West and the newly independent colonial territories.[65]

[65] Crawford pithily refers to García-Amador's contribution as 'the Code Napoléon without the Emperor'. James Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge University Press, 2002) at 15.

It was quickly decided, drawing perhaps upon Hart's work,[66] that a distinction had to be made between primary obligations of conduct on the one hand, and secondary rules concerning the effect of compliance or non-compliance with those primary obligations on the other. The rules of State responsibility were to be understood in terms of the latter, not the former. They were to be differentiated, by reason of what they sought to do, or what function they served: ensuring compliance with obligations rather than describing the content of those obligations.[67]

This decision has, perhaps, been of more significance than any other in the development of the rules on state responsibility. In the first place, it cemented the idea that the project was an essentially structural one, concerning itself with rules about rules, rather than the 'law of obligations' itself. Hart's intimation, however, that, absent an institutional infrastructure, the characterisation of certain rules as secondary rather than primary remained largely hypothetical, had some relevance here. In order for these rules to be regarded 'structural' they had to do more than merely set out rules of attribution or provide for a requirement of reparation. After all, a stipulation that in circumstances X a State is obliged to do Y, would appear to be little more than another (however elaborate) rule of conduct. Rather, the rules had to extend to the question of enforcement, conferring powers upon injured parties to take action as a consequence of a breach. And it was to that point that the ILC was eventually to turn.

A second consequence of the distinction was that it allowed the ILC to displace concerns as to the evident variety of primary obligations by shifting its focus away from determining when a breach of an international obligation has taken place, to a concern for relations arising in consequence of a breach. It was able, thereby, continually to circumvent discussion, for example, as to whether fault was a component part of responsibility,[68] or as to the difference between obligations of conduct and obligations of result,[69] by simply suggesting that these were matters of a

[66] An alternative source, of course, may have been Alf Ross. See Alf Ross, *On Law and Justice*, *supra* note 24, at 209-10.

[67] See Crawford, *The International Law Commission's Articles, supra* note 65, at 15.

[68] On this see, Andrea Gattini, 'Smoking/No Smoking: Some Remarks on the Current Place of Fault in the ILC Draft Articles on State Responsibility', 10 *European Journal of International Law* (1999) 397.

[69] Pierre-Marie Dupuy, 'Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility', 10 *European Journal of International Law* (1999) 371.

primary, rather than of a secondary, nature. [70] Abstraction allowed the displacement, or deferral, of difference.

Of course, a functional differentiation between primary and secondary rules or obligations, would only achieve the task of overcoming diversity, so long as the secondary rules were sufficiently neutral, or abstracted from the particular contexts in which they were to apply. The question of fault could be avoided, for example, so long as it was nowhere significant in terms of the rules to be elaborated. It is evident on this point, that the issue was never entirely avoided – the residue of fault reappearing in the folds or contours of the resulting articles.[71] Even this was inevitable,[72] it is clear that in one area in particular, the ILC was forced to face more directly the problem of diversity. The story starts, in this respect, with the question of damage.

## Damage

Since the idea of responsibility is necessarily related to the concept of reparation, it has always been evident that damage (whether of a material, or purely 'moral' or 'juridical' nature) would have some significance in the articulation of general principles. In the work of Anzilotti damage was regarded as an integral part of the 'caractère antijuridique' of the act from which responsibility would arise. The unlawful act would, by its nature, disturb the interest it sought to protect and thus also the subjective right of the person whose interest it is.[73] Damage, in other words, was inherent in the breach of an obligation, and therefore presumably required no separate elucidation.

Anzilotti's approach to the question of damage appeared to have been embraced by Roberto Ago in his original articulation of the fundamentals of state responsibility. State responsibility arose as a consequence of an international wrongful act. An international wrongful act, furthermore, consisted merely of an act

---

[70] See, J. Combacau and D. Alland, '"Primary" and "Secondary" Rules in the Law of State Responsibility: Categorising International Obligations', 16 *Netherlands Yearbook of International Law* (1985) 81.

[71] See e.g., Gattini, 'Smoking/No Smoking', *supra* note 68.

[72] Crawford notes, for example, that just because there is no general principle or presumption about the role of fault in relation to any given primary rule 'it is an error to think that it is possible to eliminate the significance of fault from the articles'. Crawford, *The International Law Commission's Articles, supra* note 65, at 13.

[73] Dionisio Anzilotti, 'La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers', 8 *Revue General de Droit International Public* (1906) 1, at 13. See generally, Pierre-Marie Dupuy, 'Dionisio Anzilotti and the Law of International Responsibility of States', 3 *European Journal of International Law* (1992) 139.

or omission attributable to a state in contravention to the terms of an obligation owed by it to another. No mention of damage was to be found here. But so long as the ILC was concerned simply with elaborating the obligations incumbent upon the State responsible for the breach, this would serve well enough. The nature and extent of the damage would only assume significance in the terms of reparation.

Paradoxically, however, in seeking to separate the rules on responsibility from other 'primary' rules of behaviour, Roberto Ago was forced, as has been suggested above, to consider also the position of the injured state. In his formulation, the breach of an international obligation gave rise to a new set of legal relations between the wrongdoer and the injured state(s), and was thereby concerned not only with the obligations incumbent upon the former, but also the rights arising for the latter. State responsibility now implicated the question of countermeasures and clearly foresaw the possibility of States assuming a public, as opposed to a merely private, role in law enforcement.[74]

The problem to which this immediately gave rise was that in trying to articulate the instrumental consequences of wrongful actions, the ILC needed to be able to identify who was, or was not, injured by the breach of an obligation. Anzilotti's assertion that every wrongful act created a victim was fine so far as it went. But who was the victim in case of the violation of a treaty to enact a uniform law? What States, if any, are injured by a State's ill-treatment of its own nationals? This, of course, might have warranted the reintroduction of a definition of damage into the articles on state responsibility, but the ILC was aware, at that stage, that the plurality of primary obligations and the divergences between them were such that 'no general rule in this respect' could be discerned.[75] The ILC explained, by way of example, 'the obligation under a treaty to enact a uniform law is breached by the failure to enact the law, and it is not necessary for another State party to point to any specific damage it has suffered by reason of that failure'.[76] Damage could not, in such circumstances, provide a clear indication of injury.

## Injury

As a definition of damage would not do the trick, the ILC turned instead to defining what was meant by an 'injured State'. Here the problem was to be approached by

[74] See on this point Vaughan Lowe, 'Precluding Wrongfulness or Responsibility: A Plea for Excuses', 10 *European Journal of International Law* (1999) 405, at 409-10.

[75] Commentary to draft article 2 on Responsibility of States for Internationally Wrongful Acts, International Law Commission, Report of 53rd Session, UN GAOR, 56th Session, Supp. No. 10, UN Doc. A/56/10 (2001), p. 73 para. 9.

[76] *Ibid.*

way of trying to identify to whom the obligations in question were owed. The operating assumption, as Special Rapporteur Riphagen was to make clear, was that 'to each and every obligation corresponds *per definitionem* a right of at least one other State'. For purposes of bilateral obligations no particular problems would arise – the question as to who was harmed by the breach went without saying. In the context of multilateral obligations, however, the position was considerably more difficult. If every multilateral obligation was owed to each and every other party *ut singuli*, every other State could regard itself as injured. If, by contrast, such obligations were owed to other States parties as a community, absent the possibility of *actio popularis*, none of them could. Some theoretical conceptualisation of multilateral obligations appeared to be necessary. Riphagen attempted to modulate his response between these extremes. In some cases (international crimes, human rights obligations) every state to whom the obligation was owed could regard itself as injured. In others, only those 'specially affected' by the breach. What was later to become Article 40 of the 1996 draft was subjected to vociferous criticism.[77] Ripahgen had cast the net too broadly, provided too much discretion, and allowed the possibility of too many claimants, too many demands for reparation. Article 40 would, it seems to have been feared, allowed the intrusion of a fragmented world on the outside into the sanctity of the legal domain. The prospect of a Hobbesian war of all against all breaking out through the medium of legitimised countermeasures seemed all too possible.

The ILC, in response, sought to reformulate the terms of Article 40[78] by attempting to differentiate, in a general manner, between injured States who are entitled to seek reparation for a wrongful act in their own right, and those merely possessing a 'legal interest in performance'. The former would be entitled not only to control the process by way of determining the form of reparation provided (Article 43) and perhaps waiving the claim, but also, in certain defined circumstances, to take countermeasures by way of response. The latter, by contrast, would simply be entitled to seek cessation of the breach and performance of the obligation of reparation

[77] For discussion of this problem see e.g., Kamen Sachariew, 'State Responsibility for Multilateral Treaty Violations: Identifying the 'Injured State' and its legal Status', 35 *Netherlands International Law Review* (1988) 273; D. Hutchinson, 'Solidarity and Breaches of Multilateral Treaties', 59 *British Year Book of International Law* (1988) 273; Bruno Simma, 'Bilateralism and Community Interest in the Law of State Responsibility', in Y. Dinstein and M. Tabory (eds.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Nijhoff: Dordrecht, 1989) at 821; Jochen Frowein, 'Reactions by Not Directly Affected States to Breaches of Public International Law', 248 *Hague Recueil des Cours* (1994) 349; and Christian Dominicé, 'The International Responsibility of States for Breach of Multilateral Obligations', 10 *European Journal of International Law* (1999) 353.

[78] Report of the International Law Commission on the work of its fifty-first session, UN GAOR, Fifty-fourth Session, Supplement No.10, UN Doc A/54/10 and Corr.1 & 2 (1999) at 10, para. 29.

(Article 48) – their rights to take countermeasures being expressly 'reserved' under the terms of Article 54.[79]

The definition of the injured party was to essentially turn upon the character of the obligations in question. Under the terms of Article 42 a State may regard itself as 'injured' in one of three circumstances: a) where the obligation breached is owed to that State 'individually'; b) where, in case of a multilateral obligation, the breach is such as to 'specially affect' that State; or c) where the multilateral obligation is essentially of an 'integral' nature such that breach of the obligation 'is of such a character as radically to change the position of all the other States to which the obligation is owed'.[80] These were clearly not intended to be fully descriptive of the entirety of international obligations and were more obviously premised upon the idea that the problem could be determined either by reference to the innate structure of obligations (whether they were essentially bilateral) or by reference to the demonstration of some particular prejudice. In case of multilateral obligations established in the collective interest (*erga omnes*, or *erga omnes partes*), a state could regard itself as injured only if it was 'specially affected'.

There are two significant aspects of the categorisation employed by the ILC in this context. First of all, it is evident that the differentiation employed by the ILC could only be maintained by imprinting upon the character of a particular regime, certain characteristics but not others. Whilst for the ILC, no doubt, this was a matter of examining the nature of the primary obligations, it is by no means certain that even with such examination, their implicit character will shine out. It seems to be no more innately true that a human rights agreement, or an agreement protecting the environment, is necessarily constituted in the 'collective interest' (and hence not bilateral), than it is to suggest a disarmament treaty creates essentially 'integral obligations', or that the Vienna Convention on Diplomatic Relations comprises of a series of bilateral arrangements. In the case of the former, one only has to pass back to the ICJ's decision in the Reservations Case to be clear in the view that it appeared to believe that that agreement, whilst overtly constituted in the collective interest, actually gave rise to a series of bilateral commitments. Indeed, precisely the same

[79] Article 54 provides: 'This Chapter does not prejudice the right of any State, entitled under Article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached'.

[80] Considerable emphasis was placed, in the construction of this typology, upon the terms of Article 60 of the Vienna Convention on the Law of Treaties from which the distinctions in cases b) and c) above were directly drawn. Commentary to Article 42, International Law Commission, Report of 53rd Session, *supra* note 75, pp. 295-6, paras. 4-5. It was noted that although Article 60 of the Vienna Convention is exclusively concerned with treaty obligations and is limited to 'material breaches', the parallelism was thought justified.

point has been made in respect of the European Convention on Human Rights by the European Court.[81]

Of some interest here is the fact that ILC was clearly of the view that the conceptual structure of different obligations (bilateral /collective) was of significance in terms of the articulation of structural rules. As noted above, in the context of reservations a differentiation between types of obligations (or types of treaty regime) has been resisted as a perceived danger to the integrity of the system. Conceptual differentiation would undermine certainty and stability, leaving the way open to the progressive degradation of the unity of international law. In this context, by contrast, such differentiation was employed as the primary means of defence – a way of preserving the integrity of international law against the possibility of it being systematically subverted by powerful interests. The obvious difficulty, of course, is that one position may work against the other: to suggest that human rights treaties are constituted in the collective interest and thereby give rise to no particular rights of response on the part of other States parties, might easily be extended in the context of reservations to the view that they possess no particular rights to determine the validity of reservations.

What the ILC clearly had in mind, in the context of State responsibility, was the potential danger of allowing powerful states the authority to assume, for themselves, the role of policing collective obligations.[82] There is a paradox here, however. On the one hand, the existence of those obligations is frequently regarded as emblematic of an emergent community spirit: they are, to use Friedmann's terminology, the hallmarks of a shift in international society from one based upon co-existence, to one of cooperation. They are, it might be said, the repository of the collective conscience. On the other, it is appears to be recognised that those interests have come into play in a society that remains undersocialised – still anarchic, still a domain in which power prevails – and in which formal standards may all too easily be co-opted and subverted. Hart's concerns as to the dangers of creating a system of international law in which certain agencies are given the power and responsibility to act in the public interest, appear to have had some purchase. That these ideas appear to sit side by side in the articles on state responsibility, however, is not necessarily a contradiction. It doesn't make the project incoherent, but simply reflects a fundamental ambivalence both as to

---

[81] *Ireland v. United Kingdom*, ECHR, Series A (1978), Vol. 25, Judgment of 18. Jan. 1978, 2 EHRR 25 (The Convention 'comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual bilateral undertakings, objective obligations... which benefit from a "collective enforcement"').

[82] It was apparently influenced, in that regard, by a powerful plea on the part of Martti Koskenniemi. See Martti Koskenniemi, 'Solidarity Measures: State Responsibility as a New International Order?', 72 *British Year Book of International Law* (2001) 337.

the nature of the society in which the rules would come to play, and as to the role international law might assume within it.

## Conclusions

The debate over fragmentation appears to be one peculiarly associated with international law. It is not an issue that appears to intrude too directly into legal debates within domestic settings despite the protestation that it is simply an unfortunate side effect of a legal system's emergent 'maturity', or its growing 'complexity'. There is therefore a context to the debate, and one that appears to be loosely associated with the perceived problem of adjudicative and normative proliferation within a horizontal, or decentralised, society. As an idea then, fragmentation is cast in ambivalent terms from the outset: first as a celebration of an intensifying spirit of solidarity and growing cooperation between States on the international plane, as particularly exemplified in the multiplication and expansion of normative endeavours and the development of corresponding mechanisms for dispute resolution. Secondly, and simultaneously, it also represents a sorry reminder of the under-socialised nature of international society which, in absence of centralised institutions, is neither able to maintain homogeneity within the various normative endeavours, nor to ensure decision-making consistency. Normative proliferation seems to be taking place against a background in which there is little agreement as to the core substantive values to be recognised within international society, and the proliferation of courts and tribunals against a background in which their wider public role (as opposed to their specific role in resolving private disputes) is always open to question.

As a degenerative story – a story about loss of cohesion, certainty or consistency – the idea of fragmentation also seems to offer the possibility of recuperation. Problems associated with the multiplication of tribunals, it might be thought, could be counteracted by the International Court of Justice assuming a more proactive and responsible role in defending the cohesion of the aggregate enterprise.[83] The multiplication of normative endeavours might similarly be regulated by the development of a series of rules governing, for example, the relationship between successive treaties or the conditions under which the *lex specialis* principle is to apply. Adjudicative centralisation and normative hierarchy appear to be the answer.

---

[83] See, Dupuy, 'The Danger of Fragmentation', *supra* note 13, at 806; Abi-Saab, 'Fragmentation or Unification', *supra* note 6, at 930. See also, Shigeru Oda, 'Dispute Settlement Prospects in the Law of the Sea', 44 *International and Comparative Law Quarterly* (1995) 863.

In the course of this paper, however, I have suggested that the story of fragmentation is not one that is either temporally situated (i.e. not a condition strictly associated with a moment of systemic maturity), nor necessarily degenerative (signalling a return to 'primitivism'). Rather, it is a continuous feature of international legal thought and practice in its attempt to overcome difference and diversity that assail the discipline both from within and outside. 'Fragmentation' is simply a way of expressing, with certain obvious overtones, a concern that the disciplinary centre can no longer hold the forces of diversity in check. What goes for 'centre' or indeed 'diversity', however, remains the central point of debate.

At the outset, two forms of diversity appear to be the cause of concern. One is the evident multiplication of normative endeavours on the international plane – endeavours which appear to be a continuation of the standard setting projects (projects of codification and progressive development) initiated in the era of the League of Nations. The other, more recent, phenomenon is the proliferation of courts and tribunals, many of which are situated within particular normative regimes and which have a varied range of responsibilities from 'pure' dispute resolution at one end, to more proactive forms of 'implementation' at the other. These developments, neither of which can be seriously disputed, are also supplemented by the emergence of diverse colleges of expertise within subject-specific domains – trade, human rights, environment, investment protection etc. – which tend to overarch the specificities of particular regimes, or at least encompass several treaty-based regimes within their singular intellectual embrace. One already has, at this stage, a two tiered structure of diversity: one of which is located within the formal embrace of particular normative arrangements (the Biosafety Protocol; the Covenant on Civil and Political Rights; the International Tribunal for the Former Yugoslavia), the other of which appears to be functionally differentiated by reference to the operating suppositions lying behind each subject-specific domain (environment, human rights, criminal law).

These forms of diversity might, on their own account, give rise to some obvious concern. At one level the proliferation of instruments and institutions within each particular subject-specific domain may produce certain difficulties as regards institutional overlap, normative consistency, and cohesion within the broader enterprise.[84] At another, the evident competition between each domain offers the possibility of the more general marginalisation or distortion of certain endeavours by way of their being channelled through institutions associated with another.[85] These

[84] See e.g., Eric Tistounet, 'The Problem of Overlapping Among Different Treaty Bodies' in Philip Alston, and James Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000) 383.

[85] See on this point, the debate between Alston and Petersmann. Philip Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Pertersmann', 13 *European Journal of*

problems, however, are suggestive of a further form of diversity: one associated with the structural rules of international law as a whole, within which each regime, endeavour, or actor seeks to places themselves. And it is in the concern that different structural rules – rules concerning, for example, reservations to treaties or state responsibility – are developing within particular regimes or domains, that appears to be of greatest concern. Behind all this, of course, is one final form of diversity which implicitly underlies much of the debate, namely a diversity within international society itself – a diversity of actors, institutions, and values – which shapes, and is shaped by, every specific endeavour whether that be in terms of normative articulation and regime design, or in terms of the elaboration of the structural rules.

In one sense, one might suppose that the demands to which the threat of fragmentation (diversity) give rise, is that of the homogenisation, centralisation, or unification of international law – the creation, or development, of a constitutional structure mapped around existing institutions, coupled with the more precise elaboration of secondary rules dealing with institutional and normative conflict. Two points of concern stand out in this respect. First of all, it is apparent that every act of unification, is also, and simultaneously an act productive of difference. Thus, the unanimity rule on reservations to treaties defeated the promise of a universal multilateralism by mapping out international society by reference to those who could commit themselves wholesale to the regime, and those who could not. The 'flexible' regime of the Vienna Convention, by contrast, defeated the promise of adherence to a universal set of values, by relativising the process by which reservations might be accepted. The initial difference between participants/non-participants was simply replaced by a more complex differentiation in the level of commitment amongst participating states.

Secondly, every act of unification will necessarily involve seeking to constrain, discipline, or regulate difference. Thus in articulating the articles on State responsibility, the ILC was forced to try to identify, and thence to dissociate itself from, forms of difference emerging from its survey of 'primary obligations' (i.e. as regards the relevance of fault or damage). It was, furthermore, ultimately to construct a regime governing countermeasures which was overtly articulated by reference to the 'type' of obligation in question. Certain types of regime, at the outset, are conceived to be constituted in the 'collective interest', others merely occupy the interests of particular states: human rights regimes fall within the former, trade relations the latter. In trying, in other words, to unify international law, to suppress difference and halt

*International Law* (2002) 815; Ernst-Ulrich Petersmann, 'Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston', 13 *European Journal of International Law* (2002) 845.

fragmentation, is merely to alter the terms by which difference is already expressed and articulated and re-fragment the terrain along different lines.

This is not to say, of course, that such processes are avoidable. Rather, they are to be associated with any form of category thinking – any thinking which endeavours to be vaguely systematic. But at the same time, by highlighting them, one obtains a different sense of the debate over fragmentation. It is not something against which one can be opposed to as a process – it doesn't say anything much, in its own right. What is of issue, however, is the ideological markings that are associated with particular forms of unification and differentiation, and the way in which such arguments may obscure the relations of power that underlie them. One is reminded, in that sense, of Hart's warning, that in the elaboration of structural rules, in the effort to make international law systemic, one might all too easily unleash the power of the aggressor or legitimise the pursuits of the hegemon.

# The Problem of Representation and the Iraqi Elections

Outi Korhonen*

## Introduction

In this short article, I intend to take up perhaps the largest question in international law – or in any comparable activity that aims at the good of the humankind. That is the problem of representation. To accentuate the point, it is indeed within this problem that lies the fight between good and evil in international law and in any community claiming to represent this law. My argument is that it is not so much what one has – what concepts, rules, argumentative structures, practices, resources – but it is rather how one represents them (in the senses of offering, using, advocating and exposing them to others) that makes the difference.

I take the upcoming series of elections in Iraq as an example. Here, electoral democracy is seen as a prime manifestation of the most popular normative export goods; an essential part of the good governance and rule of law parcel that is on the agenda of most foreign offices and international organizations in the West. It is part of the universalizing, civilizing effort that is inherent in international law since its beginnings and it is a crucial element of the spreading effort of international

---

* This piece is based on a much shorter speech on the same topic at the European Society of International Law (ESIL-SEDI) Inaugural Conference, Florence 13-15 May 2004. I have, however, updated, modified and extended the argument to a great degree since the developments in Iraq have unfolded. The theoretical argument is based on my work in the nineties culminating in the book Outi Korhonen, *International Law Situated: An Analysis of the Lawyer's Stance towards Culture, History and Community* (Kluwer Law International: The Hague/London/Boston 2000). The analysis of the post-conflict administrations is based on work that I have done on this subject since 2000 and that has been published in various articles and a book by Outi Korhonen and Jutta Gras, *International Governance in Post-Conflict Situations* (Publications of the Faculty of Law, University of Finland: Helsinki 2001). I would like to thank my colleagues at the Université Libre de Bruxelles, and especially Barbara Delcourt, for inspiring comments, discussions and readings in the spring of 2004. I am also indebted to Katja Keinänen and Pentti Kotiranta for the coming about of these reflections.

administration and international governance at large in which the West has been engaged during the various waves of globalization, not excluding the colonial and immediately post-colonial periods.

For this reason and others that will be discussed later, I maintain that it is not an excuse to say that the decisions made concerning democracy-building and other (re)construction in Iraq only reflect the attitudes of the occupiers led by the United States (US) and not those of the United Nations (UN) or the international (legal) community proper. I shall argue that we in the West are in various ways accomplices in the events notwithstanding the volume or the impetus of our criticisms of the policy of the US and the Coalition at large and that, therefore, the elections process in Iraq should be carefully considered as a lesson in the problem of representation in international law in general and particularly in later international governance efforts.

## Elections as a Strategy

It is common knowledge that in almost every post-conflict administration case since the end of the 19th century until today have there always been elections or a plebiscite of some sort. It is very easy to see why they have been organized:

First, with the expectation of the expanding universalization of the Western democratic governance model, the importance of the post-conflict elections – 'free and fair (parliamentary) elections' – has, of course, only increased since the 1960s, that is, since decolonization. One could also put this desire in more blunt terms: what else could one (a Western-minded governor) do in post-conflict society that has undergone a more or less brutal international intervention and provisional administration, than to try to have the people themselves to take charge of their destiny, i.e. the various socio-economic/socio-moral problems that face such a shaky community.

Second, through the holding of elections and the achievement of a statistically acceptable number of voters, who actually come to the polls (55+ %), the international post-conflict administrators (be they the UN, the European Union (EU) or another coalition) can claim: (a) that the administration (and, *ergo*, the international military and/or civil intervention) has been a success – at least, formally; and (b) that they have offered the target people, at least, a chance to decide for themselves. This latter claim is what I have elsewhere called the 'Post As Justification' argument, i.e. the *ex post facto* justification and legitimization claim for

an earlier, and perhaps doubtful, humanitarian or other such well-intended intervention.[1]

The obvious third reason for the rapid organization of elections is that the post-conflict administrations are financially and politically very heavy charges on the organizations and the States who take the role of the principal sponsors in each different case. The constituencies in these countries may quickly grow tired of these burdens, and changes of regime and changes of mind are to be expected, as occurred in the Spanish general elections of March 2004.[2] It is also fact that there are really no other plausible exit strategies except to leave the people to work it out by themselves in a democratic process – of which the holding of elections seems the logical first step. In short, the West has no other answers except the right of all peoples to electoral democracy when it comes to solving complicated socio-economic problems or genuine conciliation in a troubled post-conflict community that has possibly been heavily intervened by and, consequently, made dependent on foreign and international support in various ways.

However rational and inevitable the above reasons seem and however inevitable the starting of the electoral process in society that is emerging from a conflict, one is yet not at all unaware of the forceful critique against holding such elections. That is the critique[3] attacking their formalism and superficiality that mainly result from the immature state of any political life that could sustain a meaningful exercise of all the relevant civil and political rights by all members of the community. It is evident that the holding of elections can at best, and in the great majority of cases, if not in all, be a formal success because:

(1) the elections and plebiscites mostly seem to be held too soon in the post-conflict phase. They are held 'soon' in relation to the rate at which any kind of reconciliation and any kind of real consolidation of the human security in the target society is proceeding. The human security comprises the development of both positive and negative freedoms in society; the opportunities to act as well as the freedom of fear of bodily harm and violence, i.e. the bases on which the basic civil and political rights and freedoms can be exercised;

(2) the most basic security atmosphere is mostly still extremely intimidating. The rates of violent crime, kidnappings, abductions, militia activity etc. remain

---

[1] Outi Korhonen, '"Post" As Justification: International Law and Democracy-Building after Iraq', 4 *German Law Journal* (2003) 709-723.

[2] The Spanish voted down the government of Prime Minister José Maria Aznar in the general elections of 14 March 2004. For commentary, see 'Iraq – One Year On', *Financial Times*, 18 March 2004.

[3] An in-depth critical analysis of the potentials and limitations within the concept and practice of democracy is provided by Susan Marks, *The Riddle of All Constitutions: International Law, Democracy and a Critique of Ideology* (Oxford University Press, 2000).

reportedly very high for years in post-conflict societies. This has been the case for the Balkans and the cases of East-Timor, Afghanistan and Iraq alike[4];

(3) the understanding of the options and the number of alternatives available to the voters may be very limited. This is a consequence of the above-said conditions, the conflict itself and possibly the long years (if not decades) of oppression, the lack of education and the lack of political life preceding it;

(4) the boycotting of polls is very frequent because the political groups that have been formed and have been able to establish a platform have done so with the support and approval by the internationals. There are, however, other groups, often the heirs of conflict parties or others regarded as trouble-makers, or ethnic minorities or even majorities who feel that they have had no opportunity to recruit, advocate and participate in just terms. The Serbians in Kosovo have often felt this way,[5] the communists or ex-Baathists in Iraq and the Taliban-influenced Muslims of Afghanistan to name but a few of the most salient examples;

(5) the formation of a normal, indigenous political life has only just started – if such a modest start has occurred at all. In addition to groups that feel that their platforms have been inadequate or non-existent, the opportunities to participate in political life by single individuals have not reached all levels and segments of society, e.g. women and other non-combatants;

(6) whenever a completely new regime is to emerge in a State, the stakes are very high. Consequently the outside (foreign) interest and influence may be very high. In addition to the neighbours and the regional powers who feel interested and affected because of the geographic proximity of the new State, those interested in the natural or other resources of the country may be exercising influence on, lobbying for and supporting their sympathisers among the political groupings that are being formed and running in the elections;

(7) the base-level indigenous grass-roots activity is mostly still missing. Even if a number of political groups have been established, socio-cultural civil society takes much longer time to develop and find meaningful activities and causes around which to rally;

---

[4] See Bossem Mroue, 'More Than 10,000 Iraqis Die in Baghdad', *Iraq Net*, 9 September 2004, <www.iraq.net/displayarticle5310.html> (visited 10 September 2004) and 'Women suffer disproportionately during and after war, Security Council told during day-long debate on Women, peace and security' *UN Press Release* SC/7908, 29 October 2003, <www.un.org/News/Press/docs/2003/sc7908.doc.htm> (visited 10 September 2004).

[5] A sad example is provided by the situation in Kosovo which remains urgent and violent after five years of international administration; the strives between the ethnic communities escalating again in the spring of 2004. See, Peter Spiegel, Judy Dempsey and Eric Jansson, 'More Nato Troops Sent to Kosovo as Violence Escalates', *Financial Times*, 19 March 2004, at 1- 2.

(8) conflict and unrest have marginalized non-combatant members of society e.g. women, children, the elderly etc. who were not among the major players during or after the conflict. The weak are only allowed to enter the political scene and the (international) consultations when physical security attains an acceptable level – save for some token representatives. This, often quite patronizing, protection offered to the feeble contributes also to their late engagement – and/or continued passivity – in the political and electoral activities of society in formation.

In sum, all of these conditions make the exercise of the right to vote such elections less of a 'free and informed' choice that it purports to be. As James Dobbins[6] put it with reference to the upcoming Iraqi elections process:

> Elections in conditions of insecurity tend to polarize rather than unite societies. People vote for those whom they judge best able to protect them [from physical harm], not those promising more progressive economic or social policies. The winners typically are not centrist figures or moderate reformers but militant leaders who appeal to their constituents' most basic religious, ethnic and tribal identities.[7]

## The Situation in Iraq

The plans that were negotiated among the Coalition powers, the UN and the consultative bodies formed of the Iraqis in the late spring of 2004 envisaged the handing over of the *sovereignty* from the Coalition powers, i.e. the occupiers, to an interim Iraqi Government by June 30, 2004. It has been noted that the Iraqis in charge have been selected either because of their religious affiliation (Shi'a or Sunni), their ethnicity or their technical competences thus rendering the new power as a-political and as non-partisan as possible. This a-politicization has purposefully been promoted by the Coalition, as well as by other international administrations elsewhere before it, despite the fact that there are well-known and grave risks to this sort of 'sectarianizing' and 'ethnicizing' of politics.[8]

---

[6] James Dobbins heads the Rand Corporation International Security and Defense Center and has served in Somalia, Haiti, Afghanistan, Bosnia and Kosovo for the US administration.

[7] James Dobbins, 'A Perilous Journey From Sovereignty to the Polls', in *Financial Times* 'Iraq – One Year On', 18 March 2004.

[8] See Barbara Delcourt referring to the studies of the International Crisis Group on Lebanon and others in Delcourt, 'Les modalités de gestion de l'après-guerre en Irak: des révelateurs intéressants des enjeux de pouvoir dans le "Grand Moyen-Orient"', in Karine Bannelier, Olivier Corten, Théodore Christakis and Pierre Klein (eds.), *L'intervention en Irak et le droit international* (Pedone, Cahiers internationaux No. 19: Paris, 2004) 344-358.

After the US concluded in late 2003 that the building of democracy from bottom-up was taking too long, the Coalition powers resorted to a top-down strategy for the future governance of Iraq. However, even with 'a strong man' – an ex-Baathist,[9] ex-CIA person Mr Iyad Allawi as an Interim Prime Minister who has good relations to both the Sunni and the Shiite communities in Iraq – the security measures taken will be entirely dependent on the troops of the US-led coalition even after the hand-over. In addition, during the 14 months of his reign, the US Ambassador L. Paul Bremer enacted a large number of decrees on the security issues and other important topics, the purpose of which is to remain in force, at least, during the transition period. Reportedly, some of the major restrictions that attach to the Iraqi interim sovereignty have been imposed 'at the urging of the influential Shiite clergy that sought to limit the powers of non-elected administration'[10] while most originate from the views prevalent in the U.S. and in the Coalition. The first and foremost restriction to the interim government is, of course, the dead-lined nature of its empowerment: it will be in power during the transition only. The other restriction of greatest importance is that the Coalition, i.e. mainly the US, will still hold responsibility for security which makes the Iraqis completely reliant on it. It is also noteworthy that the interim government will not be able to amend the Transitional Administrative Law nor declare a state of emergency and assume emergency powers for itself. To take another example of the curtailments of the Iraqi sovereignty, in a late and obviously quite controversial decree (June 26, 2004), it is stipulated that the US and other Western civilian contractors have immunity from Iraqi law while performing their jobs in Iraq.[11]

It is a fact that because of the lack of local capacity and the trouble caused by the insurgent militias, the Iraqi Interim government will be absolutely dependent on the Coalition in the most pressing matters of its entire survival and ability to work, namely those related to security. The 'sovereignty' that is transferred is thus 'sovereignty' in a very handcuffed form[12] despite the formal wording of the hand-

[9] It should be noted that ex-Baathists are as a rule excluded as, e.g., nominees for the National Assembly by the rules of the Law of Administration for the State of Iraq art. 31 (B)(2) and (3) which, however, allow that with express and signed denouncement of their former partisan activity they can be admitted.

[10] See, 'Handover Completed Early to Thwart Attacks, Officials Say', a report by the Associated Press, <www.nytimes.com/2004/06/28/international/middleeast/28CND-HANDOVER.html?hp> (visited 28 June, 2004).

[11] *Ibid.*

[12] See Steven R. Weisman, 'White House Plans Limits to Iraq Sovereignty', *New York Times*, 24 April, 2004; also termed as 'semi-sovereignty' by William Safire, 'UN's Iraq Envoy Fails His First Test', *New York Times*, 27 April 2004.

over letter that was read by Bremer in the small-scale, nearly secret surprise ceremony in June 28, 2004.[13]

If such dependent sovereignty can indeed be called 'sovereignty' or the emerging Iraqi government 'the sovereign' is yet another question. [14] As it was put by Barbara Delcourt during the hostilities: '[when] the Bush administration could not represent the sovereign will of the Iraqi people then it had to enable a simulation of that sovereignty […]'. And it did so by relying on the international Iraqi diaspora among whom the members of the interim government were also sought. As a cause of such simulation, however, sovereignty only retains a 'sign value' from which many problems result. As Delcourt continues: 'In simulation, sovereignty and intervention cease to function as opposing labels. They become two signifiers which are interchangeable. In doing so, simulation is fatal to the system of representation, which requires some value (sovereignty) to insure the value of its terms within the system.'[15] In short, the simulation that is so achieved makes the representation of the will of the Iraqi people chimerical at best and the drawing of the distinction between that which is foreign influence and that which is indigenous impossible – even at and after the fact of 'the transfer of sovereignty'.

Yet, however open and unsatisfactory the questions and answers concerning the sovereignty are left, after the hand-over, Iraq is to enter into a series of elections according to the plans. It opens a long (one-and-a-half-year) transition period into Iraqi elected governance in the country. First in the series will be the elections of the Iraqi National Assembly. They are to be held by December 31, 2004, or, at the latest, by January 31, 2005. The next time to go to the polls will be the vote on a Draft Constitution, the preparation of which is the primary task of the aforesaid Assembly. This vote is envisaged, at the latest, for mid-October 2005. After the eventual approval of the new Constitution the elections for a new government, according to the terms of the new Constitution, are to take place by mid-December 2005. Of course, there will be a necessary number of new votes and re-elections if

---

[13] The letter reads: 'As recognized in U.N. Security Council resolution 1546, the Coalition Provisional Authority will cease to exist on June 28th, at which point the occupation will end and the Iraqi interim government will assume and exercise *full sovereign authority* on behalf of the Iraqi people. I welcome Iraq's steps to take its rightful place of equality and honour among the free nations of the world. Sincerely, L. Paul Bremer, ex-administrator of the Coalition Provisional Authority.' See <www.cnn.com/2004/WORLD/meast/06/28/iraq.handover/index.html> (emphasis added).

[14] Barbara Delcourt, 'Pre-emptive Action in Iraq: Muddling Sovereignty and Intervention?', paper on file with author (Free University of Brussels ULB, Institute of European Studies). In her analysis on sovereignty she draws on Cynthia Weber, *Simulating Sovereignty. Intervention, the State and the Symbolic Exchange* (Cambridge University Press, 1995).

[15] *Ibid.* Barbara Delcourt has analysed the evolving of the concept of sovereignty since the Balkan wars and interventions in her book *Droit et Souverainetés, Analyse critique du discours européen sur la Yougoslavie* (Press Interuniversitaires Européennes – Peter Lang: Bruxelles 2003).

no agreement on the Constitution can be reached by the Assembly or if it fails in the popular vote and/or the Assembly is dissolved for other reasons in the meanwhile.

The latter scenarios are not at all unlikely in a post-conflict situation in which the struggle for power and influence is waged hard during the months of uncertainty and preparation for an eventual localization of power and the withdrawal of the foreign (occupying) troops. It is, in fact, estimated that the security situation – continuously at low-range war – can only worsen when different parties and groups fight for influence during the period preceding the various elections.[16] This is also why the actual hand-over of the sovereignty was expedited and it took effect June 28, 2004 (in Baghdad at 10.26 a.m.) under extremely heavy-handed security measures and as a surprise to all observers.

In short, it can be concluded that all the critiques above as to the formality, at best, of the 'gift of the democratic chance' or the 'Liberation' that the West purports to bestow on Iraq, apply to the hand-over of the sovereignty, the transition and elections process in Iraq. As an Australian sceptic writes: 'The […] illusion that has been badly damaged by Iraq is the belief that democracy is an export commodity.' The shattering of such illusions is, according to him, the best lesson taught by the Iraq situation.[17]

## Role of the UN, Role of International Law?

The next question, however, is what all the trouble with Iraq has to do with international law. We might ask – as international lawyers or supporters of international law – why we should be involved, let alone blamed, for all those criticizable problems with the Iraq situation.

In a formal sense, clearly, international law can wash its hands of the whole situation because international law did not authorize the intervention and because there is no positive international law on post-conflict governance and nor is the right to democracy carved in the stone of international legal doctrine. In my opinion, however, one cannot do this for several reasons:

First, if one did, it would amount to the worst form of *deference strategies* where international lawyers shift burning world problems away from law, claiming that

[16] See James Dobbins, 'A Perilous Journey from Sovereignty to the Polls', *Financial Times*, 18 March 2004, at 13. Similar views expressed by others in the Financial Times: Comment Iraq – One Year On, *Financial Times*, 18 March 2004, at 13.

[17] Tom Switzer, 'Iraqi Debacle: At Least the Illusions Are Gone', *International Herald Tribune*, 23 April 2004, <www.iht.com/ihtsearch.php?id=516667&owner=(IHT)&date=20040425150753> (visited 26 April 2004).

'there is nothing legal one can say to it'.[18] Second, through the involvement of the UN, cautious as it may be, and its eventual role in the Iraqi elections process, the international community at large will be involved and will hopefully abide by and reinforce the respect for all the applicable international legal rules and principles. Third, the Coalition and the US (who are notable members of the international community and thus representatives of its law) explicitly rely on international law in their rhetoric and rule-making: The Coalition Provisional Authority of Iraq (the CPA) always purported to enact laws on the basis of the international legal authorization that it claimed. To quote art. 26 of the Law of Administration for the State of Iraq for the Transitional Period (8 March 2004)[19] drafted in the name of 'The people of Iraq', it provides in its subsection (c) that

> [t]he laws, regulations, orders, and directives issued by the CPA *pursuant to its authority under international law* shall remain in force (during the transition).[20]

In other words, international law is already *represented* to the Iraqi people and to the world at large as the rule of law governing the post-conflict situation in Iraq and authorizing the law-making on the national level by the Coalition and the organs that have been set up by it. And for the other two reasons – the involvement of the UN and the disingenuousness of the deference strategy – international lawyers cannot easily turn away from Iraq. Of course, as Delcourt's reflections showed, the representations are plagued by the simulation of sovereignty that makes it an eternal riddle to guess where the imposition by the interveners ends and the governance by the international rule of law starts.

## The Problem of Representation

At this stage of my argument, I have already introduced a long list of representation problems of different levels of practical impact, gravity and depth. Starting from the representational questions of the Iraqi post-conflict Administration, they can be recapped as follows:

- How did the CPA represent international legal authority;

---

[18] Outi Korhonen, 'On Strategizing Justiciability in International Law', 10 *Finnish Yearbook of International Law* (1999) 91-101. In this article I outline my critique on the so-called 'deference strategy' in legal decision-making and define it as 'yielding in front of other authority', 'postponement of key issues indefinitely' and 'issue-reduction or modification'. I also define what I call a 'deference analysis' which suggest a way of ontological-ethical assessment of legal decision-making.

[19] See <www.iraqcoalition.org/cgi-bin/pfriendly.cgi?http://iraqcoalition.org/government>.

[20] Emphasis added.

- What motives and whose projects does the Iraqi Interim Government of 28 June 2004 represent;
- What will the only formally (superficially) democratic elections and votes represent;
- What kind of rule of law does the transfer of (handcuffed, i.e. relativized, or semi-) sovereignty represent;
- Who and when represented the Iraqi people in the name of whom the Interim Administration Law is worded;
- How and among whom will the parliamentary elections candidates emerge – to represent what and whom?

I shall not go into all these questions individually in this short article. I would just like to note that through the involvement of the UN, international lawyers and those aiming to advance the international rule of law must keep them in mind when considering what to do with Iraq. As Juergen Habermas put it after the start of the intervention and I have already often quoted:

> […]the UN has not so far suffered truly significant damage … [Its] reputation […] can suffer only self-inflicted damage: if it were to try, through compromises, to 'heal' what cannot be healed.[21]

I take this to emphasize that what the international community has done in the post-conflict phase and continues to do at present – and what the UN will represent in Iraq after the hand-over of the sovereignty – is key to what the whole Iraq conflict has done to international law, to the UN and to its Charter. With these reflections, I arrive at the theme of this article: the problem of representation. The questions to ask are: What does international law represent for Iraq in its post-conflict state? Or, rather, how does the international community or its active members (through the UN or else) represent international law for Iraq?

I argue, however, that the answers cannot be found by polishing the concepts, structures, principles and procedures that international law and international governance have to offer in their toolkits for good governance, international law and the rule of law. They cannot be offered as such as export commodities to such society as is under the constraints and pressures of the kind that reign in Iraq. One should rather keep another quote in mind; namely, what Gayatri Chakravorty Spivak has said on the problem of representation and the difficulties involved when trying to help others in need through representing their concerns: 'to address Others or

[21] Juergen Habermas, 'Interpreting the Fall of a Monument', 4 *German Law Journal* (2003), no. 7, at 701 and 708.

the concerns of Others is not to represent them but to learn to represent ourselves'.[22]

I think this puts on the table the theoretical problem of representation lying behind all the aforementioned individual representational questions as we confront them when trying to do good by interfering in the messy affairs of others – for instance, by liberating people from dictatorships or by enforcing peace unto them. Spivak's 'to learn to represent ourselves' is a call for an exposure of ourselves – the cultural, historical and communal projects and motives inherent in the tools, means and pieces of advice that we can offer to and through which we aim to represent the concerns of others. In other words, it is also a call to expose the simulations that our actions have caused to take the place of such values as 'sovereign will' and 'politics' – the latter in contrast to a-politicized group-affiliation.

To give an example as to electoral democracy as it is advocated and represented for those who do not have it yet, one needs to point out the following problems: Rarely, do those advocating electoral democracy to non-democratic societies expose the problems that electoral democracy as a solution to communal organization has proven to have in the established democracies; one does as if the scepticism among the Western voters did not exist and as if the declining percentages of the use of the ballot meant nothing and signified no pertinent questions. In David Kennedy's terms, one fails to voice 'the background noises'[23] i.e. the political tensions, scruples and simulations, within the concepts, norms and practices that one advocates. One fails to be transparent when simultaneously advocating principles such as 'transparency' as the corner stones of good governance and a solid future of society.

To apply the foregoing to Iraq and the Iraqi elections, means that one cannot bring to Iraq – through any kind of post-conflict administration or even through the involvement of the UN – an objective norm of democracy and set it to govern over society as such without complications and without grave risks of backlash – the unexposed dark sides of our concepts, models and solutions always exist and often spring forth in the volatile circumstances of society in the making. One cannot bring anything that would ensure objectively democratic representation of the Iraqi people and an objective rule of law for the beginnings of new society. The way the 'gifts' by the international community are seen are always already tarnished by what has happened – all the wrongs that have been committed since colonial times, through Saddam Hussein, the harshness of the economic sanctions, the intervention and the

---

[22] Gaytri Chakravorty Spivak, 'Can the Subaltern Speak?', in P. William and L. Chrisman (eds.) *Colonial Discourse and Post-Colonial Theory* (Columbia University Press, New York: 1994) 66 at 82 and 84.

[23] David Kennedy, 'Background Noise? - The Politics Beneath Global Governance', 21 *Harvard International Review* 3 (1999) 52.

occupation by the US-led Coalition and the ensued simulations of the values that were supposedly defended by it. All one can bring is relative to this past, this history and this 'clash of cultures' and it is also relative to the background of those who bring it.

Yet, nor may one not conclude that, in this case, one should wash one's international legal hands of the whole mess. It would be the opposable kind of deference to hold that if there is no pure and straight normative path to objective democracy and good governance, international law cannot help.

What those supporting international law, multilateralism and international involvement in places such as Iraq can do is to note Habermas' and Spivak's cautions and start to reflect upon how we *re-present* (in the meaning of exposing) ourselves and our electoral democracy along with its deficits to the Iraqi people.

## Conclusions

In conclusion, the acknowledgement of the *problematique of representation* related to the Iraqi elections process and the building of post-conflict society such as Iraq would suggest, at least, the following. One should strive away from representations that amount to the uncritical advocating of solutions about which one oneself is sceptical. It is essential for the achievement of the least superficial outcome in a country that is only starting out on the path to democracy. Of course, one would not wish the Iraqis to become as cynical of democracy as the average European voters are today; exposure of 'background noises' of the concepts and projects that the international governors aim to bring does not equal cynicism and the annihilation of the chance to represent international rule of law and the democratic virtues to a suffering people.

In more practical terms it would mean the striving away from what the newspapers already write: That the US (because of its internal elections, budget reasons etc.) needs to get out of the Iraqi situation as soon as possible and it will do with any kind of elections to pave the way for an honourable exit. [24]

In order not to do damage to the principle of democracy and to the noble humanitarian commitments, the international community or the UN cannot, of course, condone an attitude of 'any kind of elections' even if it means, as it most likely does, that one needs to find much more time, financial resources, more education and solutions of the other socio-economic problems (e.g. creation of jobs,

[24] See, e.g., Bill Powell, 'No Easy Options', *Time*, 19 April, 2004, at 28; Similar views on the rush of the US to get out by various writers in 'Iraq – One Year On', *Financial Times*, 18 March, 2004.

getting the frustrated off the streets) and more consolidated security before any concrete orchestrations of democratic decision-making should be organized. In other words, it may mean a serious and undoubtedly costly effort of reinitiating the bottom-up strategy that was already abandoned by the coalition powers as too burdensome in 2003.

With Jutta Gras, I studied more than twenty cases of past and present post-conflict administrations from Tangiers to Congo and to Kosovo until the year 2001. The conclusions are the same as for Iraq now. It is again the time to think how we *re-present* ourselves (meaning transparency and the exposure of the 'background noises'[25]), think how we *re-present* our norms that are, always and necessarily, culturally, historically and communally situated things, consider their adaptability, reflect on how our actions reflect them, and pay heed in the normative reproduction and advocacy of reified solutions as 'ready transplants'.[26]

[25] David Kennedy, *supra* note 23, at 14.

[26] These reflections are a central theme in my book, See Korhonen, *International Law Situated*, *supra* note *, at 1.

# Relatively Failed. Troubled Statehood and International Law

Inger Österdahl*

## Introduction

The purpose of this article is to find out what normative effects the so called failed states may have on the international system of sovereign and equal states; 'the immovable object of contemporary international society' as it has been called by one author.[1] Differently put, the question running through this article is whether the political and empirical concept of failed state is developing into a normative concept and what international legal consequences this may have.

The state as an absolute, uniform and binary concept is still a fundamental concept and building block in international law. We talk about states and non-state actors, we do not talk about full states, half-states, quarter-states and 'entities formerly known as states' for instance. The question is for how long this conceptual system can remain in international law. For how long will international law be able to continue using the fiction of the uniform concept of the state? At what point will the concept of the state implode in the face of the imploding states?

Even as a purely political or empirical category, the failed states may have a considerable impact on the contents and system of international law as a result of all the national and international problems which follow from state failure. This article, however, focuses on the actual concept of the state and whether this has changed as a consequence of the appearance of the failed states, whether indeed the seemingly immovable equal sovereign statehood is movable.

---

* Professor in Public International Law, Uppsala University.

1 Robert H. Jackson, *Quasi-states: Sovereignty, International Relations and the Third World*, (Cambridge University Press, 1990) at 201. The approach of the current author resembles the approach of Gerard Kreijen in his considerably more comprehensive and penetrating study entitled *State Failure, Sovereignty and Effectiveness* (Martinus Nijhoff Publishers: Leiden, Boston 2004)

Trying to think the unthinkable, namely an international legal system organized on another fundamental premise than that of the sovereign and equal statehood the author of this article has drawn inspiration primarily from political science literature in the field. I have endeavoured to amalgamate the political thinking with my own legal thinking and have then tried to draw the normative conclusions as to the legal concept of the state. The existing international legal doctrine has dealt extensively with issues deriving from the phenomenon of the failed states, but few tend to question the relevance and adequacy of the very concept of the state.

This article will begin by discussing the criteria of statehood in international law and what is meant by a failed state. Then some alternative conceptions of the state will be dealt with followed by different authors' views on whether or not the state has an intrinsic value. In this section an effort is made to ponder the issue of statehood freely and unconventionally and in an unprejudiced manner. Finally, the normative changes which may follow from the tension between fact and fiction in the field of statehood are speculated upon. The article springs from the hypothesis, right or wrong, that the failed states must make a normative imprint on the international nation-state system.

# What is a failed state?

## Criteria of statehood

It is common knowledge that a state in international law is supposed to fulfil four criteria:[2] There must be a permanent population, a defined territory, a government and the entity must possess the capacity to enter into relations with other states.[3]

There are some more possible criteria of statehood. These criteria partly appeared already in the context of decolonization in the 1960s and 1970s, but became more evident in the context of the disintegration of the former Yugoslavia and the former Soviet Union in the beginning of the 1990s.

The additional criteria have to do with the character of the government which according to some signs in international recognition practice has to be representative and democratic in addition to being effective, in order for the

[2] Cf. Convention on Rights and Duties of States, Montevideo, 26 December 1933, not in force, 165 *League of Nations Treaty Series* (*LNTS*) 19. On statehood see further James Crawford, *The Creation of States in International Law* (Clarendon Press: Oxford, 1979).

[3] Cf. Article 1 of the Convention on Rights and Duties of States.

government to fulfil the 'government' criteria of statehood. Malcolm Shaw calls this the criterion of self-determination.[4] The sporadic signs of this from the 1960s and 70s were amplified by the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union adopted by the EC in 1991.[5] Arguably, these guidelines are of a more general importance than merely documenting a certain practice of the EC at a certain point in time. These additional, qualitative, criteria will not be treated further here. A state is considered to be an entity which fulfils the four classical, formal, criteria, as far as this article is concerned.

The problem of statehood poses itself somewhat differently with respect to the recognition of a new state compared with the situation where an existing state has imploded. This article focuses on the situation where an existing state can be regarded as a failed state. This article thus is not concerned with the creation of new states but rather with the crumbling of existing states, and possibly their disappearance.

When the extinction of statehood has been dealt with in the modern legal literature, the failure of the state has not been included as one of the possible causes of extinction. Nor have the more general legal consequences for statehood of the crumbling of the government been dealt with until recently. The forms in which the extinction of statehood may legally take place today are as a consequence of merger, absorption or the dismemberment of an existing state.[6] Extinction as a result of annexation is no longer a legal possibility since the conquest of territory by military force is not allowed. The implosion of the state administrative apparatus or of the control of the government of its territory has not been considered a cause for the extinction of statehood in international law so far.

## Criteria of failure

A failed state in the sense of the term used in this article is a state in which the government structure is no longer effective.[7] The concept of failed state will be used rather loosely. Basically what is meant is a state where the public administrative apparatus no longer works or the government is no longer in control of the country.

---

[4] Cf. Malcolm N. Shaw, *International Law*, fifth ed. (Cambridge University Press, 2003) at 183. For a critical view of other criteria than effectiveness, see Brad R. Roth, *Governmental Illegitimacy in International Law* (Clarendon press: Oxford, 1999).

[5] On 16 December 1991, (1992) 31 *International Legal Materials* (*ILM*) 1486-1487.

[6] Cf. Shaw, 'International', *supra* note 4, at 186.

[7] The term 'failed state' was coined by Gerald B. Helman and Steven R. Ratner in 'Saving Failed States', Issue 89 *Foreign Policy* (1992-93) 3-20. The concept of 'failed state' is severely, but in the view of this author not mortally criticized in Ralph Wilde, 'Representing International Administration: A Critique of Some Approaches', 15 *European Journal of International Law* (2004) 71-96, at 89-91.

Robert I. Rotberg lists the states he considers to be failed recently: Afghanistan, Angola, Burundi, the Democratic Republic of Congo, Liberia, Sierra Leone, and Sudan.[8]

This is a rather incontestable list of failed states. Then Rotberg adds what he labels a collapsed state which is Somalia.[9] Somalia is also an incontestable item on the list of failed or collapsed states.

In this article no gradation will be made within the category of failed states. At least the states enumerated by Rotberg qualify as failed states. Others might think that additional states should be included.[10] It can be noted that except for Afghanistan, the failed states are all found in Africa. For the time being the concept of failed state as used in this article will be defined by means of this exemplification only.[11]

In the definition of failed state used in this article there is no element relating to the political system of government of the state in question, i.e. a state is not

---

[8] Robert I. Rotberg, 'The New Nature of Nation-State Failure', 25 *The Washington Quarterly* (2002) 85-96 at 90; see further Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror* (World Peace Foundation: Cambridge, MA; Brookings Institution Press: Washington, D.C., 2003).

[9] Rotberg, 'The New Nature', *supra* note 8, at 90.

[10] In order to illustrate that some authors include many more states than the just mentioned in the category of failed states, or implicitly hint that many more current states no longer qualify as states, it can be noted that Mark R. Beissinger and Crawford Young write that in roughly a third of African polities, the state has lost one of its defining attributes – a monopoly of the means of coercion – through the proliferation of insurgent militias. On postcolonial Africa and Post-Soviet Eurasia they write further that '[m]any of the unmitigated catastrophes of state collapse that emerged in both regions could have been avoided in the presence of effectual leadership', thus implying that there have been many instances even of state collapse (Mark R. Beissinger and Crawford Young, 'The Effective State in Postcolonial Africa and Post-Soviet Eurasia: Hopeless Chimera or Possible Dream?', in Mark R. Beissinger and Crawford Young (eds.), *Beyond State Crisis? Postcolonial Africa and Post-Soviet Eurasia in Comparative Perspective* (Woodrow Wilson Center Press: Washington D.C., 2002) 465-485 at 477; 483).

[11] For examples of further ways of defining failed states, cf. Jackson, *Quasi-states*, *supra* note 1, at 21; Ruth E. Gordon, 'Some Legal Problems with Trusteeship', 28 *Cornell International Law Journal* (1995) 301-347 at 306-309; Zartman, I. William, 'Introduction: Posing the Problem of state Collapse', in I. William Zartman (ed.), *Collapsed States. The Disintegration and Restoration of Legitimate Authority*, (Lynne Rienner Publishers: Boulder and London, 1995) 1-11 at 1; Henry J. Richardson, '"Failed States," Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations', 10 *Temple International and Comparative Law Journal* (1996) 1-78 at 13-16; Chinedu Reginald Ezetah, 'Legitimate Governance and Statehood in Africa: Beyond the Failed State and Colonial Self-Determination', in Edward Kofi Quashigah and Obiora Chinedu Okafor (eds.), *Legitimate Governance in Africa. International and Domestic Legal Perspectives* (Kluwer Law International: The Hague, London and Boston, 1999) 419-459 at 432-434; Daniel Thürer, 'The "Failed State" and International Law', 836 *International Review of the Red Cross* (1999) 731-766.

regarded as failed because it is not democratic.[12] No distinction is made, furthermore, between good states on the one hand and evil, aggressive or rogue states on the other. It is fully conceivable to include among the states considered failed states who lack a democratic system of government or states who do not respect human rights or states who are otherwise to be considered evil, should the categories not completely overlap. This more ideological approach to state failure is left out of this article.

Not only do different authors define the concept of failed state differently, the terminology also differs. 'Failed state' is only one of many different terms used in order to denominate the least well functioning states in the world. Other denominations used are for instance collapsed states, crumbling states, imploding states, eroding states, disintegrating states, dysfunctional states, fractured states, disoriented states, and troubled states.

Sometimes the states at issue are called 'fail*ed*', 'collaps*ed*', 'crumbl*ed*' etc. and sometimes they are called fail*ing*, collaps*ing*, crumbl*ing*, and so on. Depending on the author, the latter designation may or may not be a manner of indicating that the state in question is going downward, but has not yet reached the bottom.

The differences in terminology in respect of the tense used illustrates real difficulties in defining a '"failed" state'. State failure is not an absolute concept, it is more a question of degree than of kind and it is difficult exactly to pinpoint when a state has entered into a situation of total failure; state failure is rather a movement towards the other end of a scale beginning with 'successfulness'. Somalia seems generally to be considered the worst example and according to some the only example of complete state failure or state collapse.

An unusual and elucidating distinction between state failure and state collapse, which however will not be kept up throughout this article, is made by Jennifer Milliken and Keith Krause.[13] Milliken and Krause talk about the institutional dimension of state collapse and the functional dimension of state failure.[14] Concern over the possibility of state failure, they write, often has as much to do with dashed expectations about the achievement of modern statehood, or the functions that

---

[12] Another issue is whether democracy is not more effective in the long run than non-democracy so that the significance of effective and democratic government may be the same. Cf. also the debate on an alternative UN for democracies, for instance Ivo H. Daalder and James M. Lindsay, 'An Alliance of Democracies', *Washington Post*, May 23, 2004, at B07; Allen Buchanan, *Justice, Legitimacy, and Self-Determination. Moral Foundations for International Law* (Oxford University Press: Oxford, New York, 2004) at 450 and following.

[13] 'State Failure, State Collapse, and State Reconstruction: Concepts, Lessons and Strategies', in Jennifer Milliken (ed.), *State Failure, Collapse and Reconstruction* (Blackwell Publishing: Malden, MA, Oxford, Melbourne and Berlin, 2003) 1-21.

[14] *Ibid.* at 1.

modern states should fulfil, as it does with the empirically-observed decomposition or collapse of the institutions of governance in different parts of the world.[15]

Intuitively, it is rather easy to grasp what a failed state may be, a state where 'nothing works' and a state that is unable to provide its inhabitants with the basic services that one expects from a state.

The problem is that if the definition is put in such general terms, quite a lot of states, if not the majority in terms of numbers would qualify. Most of these would be found in the developing world. Indeed, a so called developing country and even more obviously an underdeveloped country is almost by definition a failed state. A failed state could hardly be found among the developed countries since then the latter could not be regarded as developed. One could, however, imagine states sliding from the group of developed states into the group of develop*ing* countries because a process of failure has begun.

It would seem as if many of the states making up the former Soviet Union particularly in Western and Central Asia are states that were regarded as developed when they belonged to the Soviet Union, because the Soviet Union was regarded as a developed state, but that have been moving towards state failure since the break-up of the Soviet Union. In the case of the states belonging to the former Soviet Union the question is how 'successful' they were in reality before they became independent; maybe they were failing even during their membership in the Soviet Union, but could hide behind the Soviet shield. In that case the fall is not as dramatic as if Sweden for instance, as an example of a developed state, would have slid into a process of failure.

In order to be usable, the concept of 'failed state' has to be limited in some way to the group of worst failed states.

States like the former Yugoslavia or the former Soviet Union, which are broken up in parts which in their turn will form new independent states are not necessarily categorized as 'failed' in this article. They may or may not have been failed states before they broke up and they may result in a number of states which will fail, but the very breaking up of a state does not make it failed.[16] A failed state is a state which has imploded, not one which has exploded, for the purposes of this article.

---

[15] *Ibid.*

[16] A more provoking question which will not be discussed further, however, is whether today Russia could be labelled a failed state (Cf. Stephen Holmes, 'What Russia Teaches Us Now. How Weak States Threaten Freedom', 8 *American Prospect* (1997) 30-39).

Recently, the concept of 'weak states' has begun to be used in the international politico-legal rhetoric in about the same sense as 'failed state' is used here.[17]

Both the US and the European Union (EU) consider failed or failing states to constitute a major threat to international security today. In the US National Security Strategy of 17 September 2002, it is stated that 'America is now threatened less by conquering states than we are by failing ones'.[18] In the European Security Strategy of 12 December 2003, state failure is listed among five key security threats.[19] The EU states in its Security Strategy on the subject of failed states that '[b]ad governance – corruption, abuse of power, weak institutions and lack of accountability – and civil conflict corrode States from within. In some cases, this has brought about the collapse of State institutions.'[20] The EU lists three examples of failed states: Somalia, Liberia and Afghanistan under the Taliban.[21]

In the US National Security Strategy, Afghanistan is pointed out as an example of a 'weak' state which term is used in the same sense as failed state and is largely defined in the same way as the EU defines state failure.[22]

## Alternative conceptions of the state

### Removing recognition

Rarely does one see the idea discussed in the international legal or political literature that imploded states could be 'derecognized' or no longer considered to constitute full states. Karin von Hippel is one of the authors who brings up this issue.[23] Von

---

17 'Weak state' is also a term of the art in the political science literature, cf. for instance Barry Buzan, *People, States and Fear. An Agenda for International Security Studies in the Post-Cold War Era* (Harvester Wehatsheaf: New York, London, Toronto, Sydney, Tokyo and Singapore, 1991); Stephen D. Krasner, 'Compromising Westphalia', 20 *International Security* (1995/96) 115-151 at 144-149; William Reno, *Warlord Politics and African States* (Lynne Rienner Publishers: Boulder and London, 1998).

18 *The National Security Strategy of the United States of America* at 1.

19 *A Secure Europe in a Better World. European Security Strategy* at 4.

20 *Ibid.*

21 *Ibid.*

22 *The National Security Strategy of the United States of America*, Introduction by President George W. Bush.

23 Karin von Hippel, *Democracy by Force. US Military Intervention in the Post-Cold War World* (Cambridge University Press, 2000) at 200-201; and so does Nii Lante Wallace-Bruce, 'Of Collapsed, Dysfunctional and Disoriented States: Challenges to International Law', 47 *Netherlands International Law Review* (2000) 53-73 at 67; and Gerard Kreijen, *State Failure*, *supra* note 1, at 329-362. Earlier than these authors, Jeffrey Herbst dealt thoroughly and almost in a visionary way with the issue of decertifying failed states, in 'Responding to State Failure in Africa', 21 *International Security* (1996/97) 120-144 especially at

Hippel is of the opinion that 'the international community's rigid adherence to the Montevideo Convention of 1933 exacerbates conflict'.[24] She notes the four criteria for the recognition of a state, mentioned earlier, and observes correctly that the '[f]ulfilment of these conditions is necessary for recognition, yet their erosion or disappearance later in time does not mandate that it should thereafter be withdrawn.'[25] 'The application of such a principle', von Hippel continues, 'would decertify a large number of states, mostly in Africa, and in some parts of the former Soviet Union and former Yugoslavia, where borders are largely insignificant and porous, disputes rampant, and governments systematically corrupt and unable to control much territory outside the capital, if that.'[26]

Von Hippel thinks that only the fourth criterion of statehood (the capacity to enter into international relations) is still met by some collapsing states.[27] Not even the criterion requiring a population is met by the failed states, in the view of von Hippel, and she explains her view by the fact that state borders are in many instances straddled by populations of which the members often hold more allegiance to their ethnic group than the state.[28]

From the strictly legal point of view of statehood the last argument is not tenable, but as an empirical observation and as a factor which in some cases certainly weakens the state it is a relevant remark.[29] Likewise, even if borders are porous in practice, if they are legally recognized the territorial criterion of a state is fulfilled formally.

Von Hippel then continues her argument into the more controversial area of 'derecognition' and returns to her thought that the rigid adherence to the Montevideo Convention may exacerbate conflict. Von Hippel writes that '[i]n some

142-144; Richardson, 'Failed States', *supra* note 11, at 78, makes specific policy proposals for measures to take to that effect.

24 Von Hippel, *Democracy*, *supra* note 23, at 200; cf. also Susan L. Woodward who draws a similar conclusion from the rules on state sovereignty, 'Compromised Sovereignty to Create Sovereignty. Is Dayton Bosnia a Futile Exercise or an Emerging Model?', in Stephen D. Krasner (ed.), *Problematic Sovereignty. Contested Rules and Political Possibilities* (Columbia University Press: New York, NY, 2001) at 252-300.

25 Von Hippel, *Democracy*, *supra* note 23, at 200.

26 *Ibid.* Cf. also Gerard Kreijen, 'The Transformation of Sovereignty and African Independence: No Shortcuts to Statehood', in Gerard Kreijen, Marcel Brus, Jorri Duursma, Elisabeth de Vos and John Dugard (eds.), *State, Sovereignty, and International Governance* (Oxford University Press: Oxford, New York, 2002) 45-107 at 106-107.

27 *Ibid.*

28 *Ibid.*

29 On allegiance, cf. Ezetah, 'Legitimate Governance', *supra* note 11.

instances, war-lords only need to grab the centre, because they then fulfil the convention, which in turn allows them to receive foreign aid and all the other goodies that come with state recognition. This is also why fighting during civil wars is heavily concentrated in the capital city.'[30] Then von Hippel makes the following proposal: 'If the international community could instead institute a mechanism for removing recognition until such time that the state demonstrated a commitment to establish a representative government that respected fundamental human rights, perhaps this might reduce the scramble by war-lords for control of the state.'[31] What would be the consequences of such a removal?

The argument of von Hippel concentrates on the qualitative aspects of statehood having to do with democracy and human rights protection. These criteria of statehood are not included in the current analysis of failed states. Von Hippel does not seem to make the distinction between the traditional – Montevideo – criteria and the more modern democracy criteria made in this article.

If the state is failed it is not certain that it is able to establish a representative government that respects human rights even if it wanted to. Apart from that, it is a good idea to remove recognition until democracy is installed in the country in order to show the war-lords what is demanded from them if they want the state under their control to be internationally recognized. This may just as well be achieved by means of withholding recognition of the new government, however, so that the proposal of von Hippel's is not so dramatically different from current practice after all.

If the surrounding world considers that the new war-lord leadership of a state does not fulfil reasonable standards of democracy and respect for human rights, the surrounding world may just as well refuse to recognize the new government either explicitly or implicitly by interrupting diplomatic and other relations with the state until a democratic government is established. No mechanism needs to be instituted.

If there is a competing old government which has been forcefully removed by the war-lords, then the same effect can be achieved by maintaining the relations with the old government and treating the old government as the legitimate representative of the state although it is no longer in effective control of the country. The latter strategy is difficult to uphold in the long run if the old leadership can not be put back into real power. Cutting relations with a new authoritarian regime, however, is not difficult.

Von Hippel seems to mix up recognition of a state and recognition of a government. Removing recognition of a government is considerably more trivial

[30] Von Hippel, *Democracy*, *supra* note 23, at 200-201.

[31] *Ibid.*, at 201.

than removing recognition of an existing state. What von Hippel seems to discuss in reality is the removal of recognition of governments in failed – or collapsed - states.

Even though cutting relations with an undesirable government is easier than 'de-recognizing' an existing state it may cause the population suffering if foreign aid is withdrawn for instance as an example mentioned by von Hippel, or if trade and other relations are interrupted.[32]

If the argument is carried one step further and the possibility of removing recognition of the failed state is considered then we enter into waters unknown to the international community so far.

## Effects of removing recognition

Just removing recognition would not fulfil any purpose except as a punishment of an authoritarian government. Jeffrey Herbst who actually contemplates the 'decertification' of states (and not merely of governments), writes, however, that the decertification might be viewed not as a punishment but as a simple acknowledgement of reality.[33] The question is what effects the removal of recognition would have.

If relations with the territory formerly known as state X are completely interrupted the consequences might be considerable for the territory and perhaps for the states who entertained different kinds of relations with X. Private actors can maintain transnational relations with private actors in X, but even relationships among private actors like traders for instance are probably rendered difficult by the lack of a state apparatus.[34] For the territory itself, an inevitable consequence would be a slowing down of its pace of development or even a movement backwards.

A way of curing the negative consequences of a removal of recognition (but perhaps creating new ills) would be to install an international administration of the territory until it is ready to become an independent state again, democratically governed and respecting human rights.[35]

---

32 Cf. von Hippel, *Democracy*, *supra* note 23.

33 Cf. Herbst, 'Responding', *supra* note 23, at 143.

34 But see William Reno, *Corruption and State Politics in Sierra Leone* (Cambridge University Press, 1995). The repressive sides of international economic transactions, however, may be more difficult to implement in failed states (cf. David Cortright and George A. Lopez, *Sanctions and the Search for Security. Challenges to UN Action* (Lynne Rienner Publishers: Boulder and London, 2002) at 11-13).

35 On the theoretically and practically increasingly popular issue of international administration see among many others, Outi Korhonen and Jutta Gras, *International Governance in Post-Conflict Situations*, (The Erik Castrén Institute of International Law and Human Rights, University of Helsinki, 2001); Ralph Wilde, 'From Danzig to East Timor and Beyond: The Role of International Territorial

On the other hand, leaving a territory alone for some time by removing recognition and not installing any international administration may not have as disastrous consequences as one may at first fear, at least not for the population of the territory.

What Maria H. Brons writes about the development of Somalia with the telling sub-title of *From Statelessness to Statelessness?* seems to show that at least in the case of Somalia, undeniably the most failed states of all, a population left to traditional methods of organization can do quite well relatively speaking.[36]

How one views the option of removing recognition and the different possible courses of action after such a hypothetical removal also has to do with the way one views the intrinsic value of the state as form of social organization. We will come back to this issue below.

## Other solutions than removing recognition

What would be some alternatives to removing recognition of existing states? One possibility would be to create new legal categories of states. Robert Jackson uses the term quasi-states to denote states of which some would be labelled failed in this article.[37] The term quasi-state as used by Jackson is broader and his focus is exclusively on the ex-colonies in the Third World. The quasi-states as defined by Jackson possess juridical statehood, but '[t]hey disclose limited empirical statehood: their populations do not enjoy many of the advantages traditionally associated with independent statehood'. Their governments are often deficient in the political will, institutional authority, and organized power to protect human rights or provide

Administration', 95 *American Journal of International Law* (2001) at 583-606; Andreas Zimmerman and Carsten Stahn, 'Yugoslav Territory, United Nations Trusteeship or Sovereign State? Reflections on the Current and Future Legal Status of Kosovo', 70 *Nordic Journal of International Law* (2001) 423-460; Carsten Stahn, 'Constitution Without a State? Kosovo Under the United Nations Constitutional Framework for Self-Government', 14 *Leiden Journal of International Law* (2001) 531-561; Michael Bothe and Thilo Marauhn, 'UN Administration of Kosovo and East Timor: Concept, Legality and Limitations of security Council-Mandated Trusteeship Administration', in Christian Tomuschat (ed.), *Kosovo and the International Community. A Legal Assessment* (Kluwer Law International: The Hague, London, New York, 2002) 217-242; Simon Chesterman, *You The People. The United Nations, Transitional Administration, and State-Building* (Oxford University Press: Oxford, New York, 2004).

36 Maria H. Brons, *Society, Security, Sovereignty and the State in Somalia. From Statelessness to Statelessness?*, (International Books: Utrecht, 2001). On the case of Somalia, cf. also Riikka Koskenmäki, 'Legal Implications Flowing from State Failure in Light of the Case of Somalia', 73 *Nordic Journal of International Law* (2004) 1-36.

37 Jackson, *Quasi-states*, *supra* note 1. For a critique of Jackson's perspective, see Carolyn M. Warner, 'The Political Economy of "quasi-statehood" and the demise of 19th century African politics', 25 *Review of International Studies* (1999) 233-255.

socioeconomic welfare.'[38] Coming close to the definition of failed states used in this article, Jackson claims that '[i]t is clearer today [in 1990] than it was in 1960 … that numerous emergent states did not, and many still do not, disclose substantial and credible statehood by the empirical criteria of classical positive international law.'[39]

Jackson does not draw any explicit conclusions as to the consequences in terms of a relativization of the state concept that his terminology would seem to suggest.

Based on Jackson's terminology one could say that establishing a new category of states – quasi-states – could be an alternative to removing recognition completely from the failed states. The quasi-states could have fewer obligations and fewer rights than ordinary states. Fewer obligations because a failed state cannot be expected to fulfil its obligations and fewer rights because the amount of rights and obligations should correspond at least roughly. One question is what persons would be the concrete bearers of the rights and obligations on the part of a state which is failed and which consequently lacks a working government and public administration. Who should exercise the rights of the quasi-state and who is going to carry out the remaining obligations of the state?

The people of the state would under all circumstances be the bearers of human rights, although their human rights will be of limited practical value if there is no state to see to their enforcement. It would mostly be in an international context that the human rights of the inhabitants of a quasi-state could be asserted, i.e. against any potential foreign intruders who presumably originate from a state which is intact. It could be, however, that informal human rights agreements could be struck with representatives of sub-national groups.[40]

The most failed states would lose most of their rights and duties and the least failed states would lose fewer. The point of placing a state in the category of quasi-state and potentially in one of several different kinds of quasi-state would be to reduce the existing tension between the applicable international rules and the reality.

Another alternative to removing recognition would simply be to reduce the level and kinds of requirements that an entity has to fulfil in order to qualify as a 'state' in international law. At least with respect to already existing states who break down. In order for a failed state to remain a state it may be enough to remain intact geographically in order to still qualify as a state under international law; this alternative would imply dropping the requirement that there exists an effective government in order for the geographical entity to constitute a proper state. In

[38] Jackson, *Quasi-states*, *supra* note 1, at 21.

[39] *Ibid.*, at 22.

[40] Cf. Herbst, 'Responding', *supra* note 23, at 139; cf. also Richardson, 'Failed', *supra* note 11, at 61.

practice it will be difficult or impossible for other states to maintain their ordinary inter-state relations with such a failed state especially their bilateral relations, but in the intellectually constructed international system the failed state would remain a 'state'. The failed state would thus be exclusively geographically defined, presuming that the entire population does not disappear which would seem highly unlikely.

Maybe we should stop worrying about the inner qualities of the state and the potential effects that changes within a state may have on the logic and consistency of the international system of law and states. Or rather, in order to retain the logic and consistency we may accept as a state an independent geographical entity with internationally recognized borders.

All states may not have to look the same, not even on the level of legal fiction. So, one alternative to the removal of recognition of the failed state would be to lower the threshold as to what is demanded from a state properly speaking. This presumes the acceptance of the idea that the equal states in theory are dramatically different in practice. The acceptance of the idea of unequal states would in its turn presume that the currently underlying thought and aspiration that all states should develop into a similar form of organization and level of economic development is given up.[41] States are unequal and may remain unequal in a system where the threshold to the club of states is lowered. In such a system states would remain equal as theoretical constructs but be unequal in reality.[42]

A further-reaching alternative to removing recognition of failed states would be to do away with state equality as such as the organizing principle in international law. Then the states would not even be equal in theory.[43] Labelling some states quasi-states, as was suggested earlier, could be a first step on that road although that thought was built on the presumption that the normal category is the states and that a few states, the failed ones, are temporarily put in another category awaiting their development and reintroduction into the state community.

Going one step further, however, one could imagine a system where states are not legally equal even *a priori*. In such a system the issue of the removal of the recognition of a state would not come up since there would be no unique model of

---

41 Cf. Jackson, *Quasi-states*, *supra* note 1, at 26; cf. also Immanuel Wallerstein, 'The New World Disorder: If the States Collapse, Can the Nations be United?', in Albert J. Paolini, Anthony P. Jarvis and Christian Reus-Smit (eds.), *Between Sovereignty and Global Governance. The United Nations, the State and Civil Society* (MacMillan Press: Houndmills, Basingstoke, London; St. Martin's Press: New York, NY, 1998) 171-185 at 177-178.

42 Cf. the discussion of Gerry Simpson, in *Great Powers and Outlaw States. Unequal Sovereigns in the International Legal Order* (Cambridge University Press, 2004).

43 Cf. in relation to the position of states in international organizations, Athena Debbie Efraim, *Sovereign (In)equality in International Organizations* (Martinus Nijhoff Publishers: The Hague, Boston and London, 2000).

a state, but several. The issue that might appear would be the movement of a state from one category to another depending on whether the state is descending or ascending on the scale of general development.[44] All states, however, would remain states of some kind. Moving from one category of state to another may be less dramatic a change in comparison with the exclusion of a state from the community of states altogether through the removal of recognition. The idea of having an unequal state system even in theory and principle, furthermore, may not be as dramatic as it may seem because in reality it is uncontroversial that there is a wide spectrum of different kinds of states, from the most developed to the least and measured according to other scales as well. It would not be overly dramatic to allow the (legal) map to correspond in some measure to reality. Such a reorientation of the international legal system would, however, again presume that aspirations for equality or at least similarity have to be given up or rethought.

Robert Jackson states his view quite clearly on the potential relativization of the sovereign equality of states: '[I]n a post-colonial but highly unequal world such as ours, there ought to be various international statuses ranging from outright independence to associate statehood to international trusteeship which are determined by the circumstances and needs of particular populations.'[45]

Going even one step further along the road of relativization would be to change terminology altogether and talk of actors, entities, subjects or something similar instead of states. Such a change in terminology would also make it possible to include other actors than states in the same categories as the former states.

Such a change in terminology would accommodate the international legal system to the fact that there are currently many kinds of significant international legal actors and the relevant principal division may no longer be between states and non-state actors, including expelled quasi-states.[46] If the state terminology is done away with altogether (admittedly a very hypothetical scenario) then the theoretical problem of how to handle the failed states would disappear because there would no longer be either intact or failed states, only stronger or weaker, more or less

---

[44] For a critical view of a 'bi-level system of sovereignty', cf. Richardson, 'Failed', *supra* note 11, at 40.

[45] Jackson, *Quasi-states*, *supra* note 1, at 200. Although he cautiously adds some qualifying questions which are at least as difficult to answer as the more theoretical one relating to the concept of statehood: 'Who would merit independence? Who must settle for associate statehood or some other nonindependent status? Who would make the decision? How should it be made? If it were a referendum, who would frame the question?' (*ibid.*)

[46] Cf. the views on degrees of statehood put forward by Christopher Clapham, 'Degrees of Statehood', 24 *Review of International Studies* (1998) 143-157; and also Alfred van Staden and Hans Vollaard, 'The Erosion of State Sovereignty: Towards a Post-territorial World?', in Kreijen, Brus, Duursma, de Vos and Dugard, *State, Sovereignty*, *supra* note 26, at 165-184.

important international legal actors. The practical problems relating to the welfare of the population in the failed states would remain of course.

Considering the large multinational companies, large international organizations and even large NGOs who may be more resourceful than states, and not only failed states as the term is used in this article, the suggestion may not be unwarranted that the legal system is organized around other divisions than the one between states and non-states and that consequently the state centred terminology is done away with altogether. If there are no longer any states there will be no failed states and the problem of whether or not to remove recognition from the failed states will disappear by itself. It may be that the idea of the state system and its terminology locks the thinking along certain unfruitful lines which prevents constructive solutions to current problems from being thought out. Maybe the real issue is not whether a certain entity qualifies as a state or not, but something completely different and more important.

## Consequences of loss of statehood

Within the framework of the current state system, what would be the consequences of a total or partial loss of statehood? Other rules would necessarily have to apply to the non-state or quasi-state since only states can reasonably be subject to the rules relating to states. If other rules would not apply to the non-states or quasi-states then one could ask what the point would be of altering their position in the basically legal state system.

What the changes in the rules would be is difficult to foresee and can merely become a matter of speculation for the time being.

It would seem as if the international legal system would become an even more intricate web of rules than today if different rules would apply to states and non-states and perhaps within the category of non-states different rules would apply to different sub-groups depending on their degree of failure.

On a more practical level, given that the international community finds that a state is failed what could, would and should the said community do in response to such a situation?

From that perspective an alternative to the current system consisting exclusively of independent states could be a system of independent states plus a number of internationally administered dependencies, i.e. the failed states.

From the point of view of other states finding that a state is failed and possibly also more formally ascertaining that the failed state does no longer qualify as a state is a more demanding option than not finding that the state is failed, at least not explicitly, and consequently go on pretending that the state still qualifies as a state according to conventional criteria. The former option presumes almost that the

surrounding world is prepared also to take the next step once it has found state failure, i.e. to take some action in response to the state failure. The easier option would be to pretend that all states fulfil the criteria of a state and consequently that there is no need for international efforts in order to save the failed states.

A finding of state failure would not necessarily lead to international action as the next step, but at least it would create some kind of expectation that something constructive will follow. The cynicism of the international community will be more evident if the said community first finds a case of state failure and then stops short of further measures and the wish to avoid such an impression may create a public pressure and motivate the surrounding states to act. In reality, remaining silent, but hardly uninformed, would be just as cynical.

The international administration of dependent territories would probably be politically controversial and would in any case constitute a radical departure from the paradigm of sovereign equality laid down in the UN Charter.[47] (Of course, if a former state is reborn as a non-state its international administration as such is not controversial since the entity in question is no longer a state. Obviously then it is the removal of the state label that would be controversial.) It would also be expensive in economic terms and practically cumbersome in numerous ways. On the level of principle, however, in contrast to the rulers it is not certain that the population in the potentially internationally administered currently failed states would mind the international administration. Maybe the population would appreciate the efforts to reconstruct the state irrespective of from where the efforts originated. If the international administration included efforts at democratization, the favourable attitude of the population might be even stronger. What the population would think of the international administration of their territory could be found out for instance through a referendum or at least a large public opinion poll. The opinion of the

[47] Cf. Article 78 of the UN Charter saying à propos of the International Trusteeship System that it 'shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality'; see also Ruth E. Gordon, 'Some Legal Problems with Trusteeship', 28 *Cornell International Law Journal* (1995) 301-347; Ruth E. Gordon, 'Saving Failed States: Sometimes a Neocolonialist Notion', 12 *American University Journal of International Law and Policy* (1997) 904-974; Richardson, 'Failed', supra note 11. Helman and Ratner avoid the term 'trusteeship' and talk instead of 'conservatorship', cf. Helman and Ratner, 'Saving Failed States', *supra* note 7. On Mandates and Trust Territories, see further Crawford, *The Creation*, *supra* note 2, at 335-355; Quincy Wright, *Mandates Under the League of Nations* (University of Chicago Press, 1930); Robert Jackson, *The Global Covenant. Human Conduct in a World of States* (Oxford University Press, 2000) 294-315; Duncan Hall, *Mandates, Dependencies, and Trusteeship* (Carnegie Endowment for International Peace: Washington DC, 1948). For something trusteeship-like, if not an actual trusteeship, cf. Michael Pugh, 'Elections and "Protectorate Democracy" in South-East Europe', in Edward Newman and Oliver P. Richmond (eds.), *The United Nations and Human Security* (Palgrave: Houndmills, Basingstoke, 2001) 190-207.

people could be one factor that counted in the decision on whether to install an international administrative regime or not. The opinion of the people at large should carry greater weight than the opinion of the former or ineffective rulers.

Another alternative to the current state system would be to let the failed states disappear from the community of states altogether, they will be neither independent states nor dependencies. Neither will they have to be *terra nullius* in the old sense for that matter free for anyone to grab. The failed state would no longer be a member of the community of states, but the borders of the territory could remain intact awaiting the territory's eventual re-entry into the state community. Within the territory, the people could organize themselves in any way they wanted, perhaps along traditional pre-modern lines as in Somalia and start anew with any efforts at modernization.

## New structure in old states

An original variation on the theme of what to do with the failed states is propounded by Chinedu Reginald Ezetah, at least as concerns the African states.[48]

Ezetah goes so far as to say that in Africa it is increasingly evident that most states are incapable of performing the primary functions of a state. Thus, he applies a wider definition of a failed state than the one used in this article. What Ezetah advocates is primarily an internal reorganization of the African states, but in extreme cases he also accepts that the colonial boundaries may have to be altered.

The states should be reorganized internally along federal lines or lines of internal self-determination in order to make the modern state legitimate at all in Africa. Ezetah maintains that the African concept of the state was completely different from the modern Western concept and that the latter largely lacks legitimacy in Africa, both internal and institutional as Ezetah puts it.[49] By internal legitimacy Ezetah means the historical and sociological legitimacy of the state manifested among other things by the degree of allegiance felt by the population toward their state. The institutional legitimacy on the other hand is the situation in which the 'normal' Western state institutions find themselves.[50]

Ezetah states that an exclusive focus on the institutional legitimacy suggests that the states in question have been effective prior to the collapse.[51] This contradicts the African reality, Ezetah continues, as many African states are known

---

48 Ezetah, 'Legitimate Governance', *supra* note 11.

49 *Ibid.*, at 432-434.

50 Cf. the somewhat different dichotomy made by Milliken and Krause, 'State Failure', *supra* note 13.

51 Ezetah, 'Legitimate Governance', *supra* note 11, at 434.

to have existed since independence almost entirely on external props.[52] The collapse of the African state is fundamental, according to Ezetah, in that it is not just an extreme case of institutional decay; it is a failure of juridical assumptions of an organic unity of a people, territory, and government.[53]

Ezetah is both pragmatic and revolutionary, however, in that he advocates the conservation of existing states filled with a different organizational contents altogether based on the will of the people and African history and tradition.[54] Ezetah wants to make the state legitimate and tries to fill the institutional state model with genuinely African content. He wants the state to take root in Africa. This will require, Ezetah writes, 'a decentralization of power to traditional democratic formations in communities and for the institutionalization of a state based upon cultural foundations of indigenous democracy and development.'[55] 'At the national level', Ezetah continues, 'the state should, in addition to permitting plurality of opinions, also institutionally acknowledge and provide for the plurality of nationalities.'[56] This is because ethno-national identity is an empirical reality all through Africa anyway, Ezetah writes.[57]

Ezetah makes a fruitful effort at filling the Western state concept with African contents. His reasoning as to the reconstruction of the African failed states reminds of the reasoning of Maria Brons cited earlier on the subject specifically of Somalia.[58] Ezetah is favourably disposed towards international involvement in the reconstruction of the African state, through the implementation of the right of self-determination (primarily in its internal aspects).[59] Ezetah's openness towards international involvement is also fruitful, but unusual. 'As regards the institutional medium of implementation, an international commission with judicial and

---

52 *Ibid.*

53 *Ibid.*, at 431-432. For a similar argument concerning implicit and explicit assumptions about state behaviour in international treaty law and how these assumptions affect the legitimacy and compliance pull of a particular treaty regime, cf. Joyeeta Gupta, 'Legitimacy in the Real World: A Case Study of the Developing Countries, Non-governmental Organizations, and Climate Change', in Jean-Marc Coicaud and Veijo Heiskanen (eds.), *The Legitimacy of International Organizations* (United Nations University Press: Tokyo, New York and Paris, 2001) 482-518.

54 Richardson, 'Failed', *supra* note 11, is even more revolutionary in that he advocates both domestic and international reorganization.

55 Ezetah, 'Legitimate Governance', *supra* note 11, at 445.

56 *Ibid.*

57 *Ibid.*

58 Cf. Brons, *Society, supra* note 36.

59 Richardson, 'Failed', *supra* note 11, also takes the right to self-determination as point of departure for reform proposals.

investigative organs will be necessary for overseeing internal mechanisms and processes. This commission may be established under the auspices of the Organization of African Unity (OAU, now the African Union (AU)), but should be fully answerable to the international community. It should have the mandate to intervene on behalf of the international community where local sentiments undermine the credibility and fairness of the internal processes.'[60]

## The intrinsic value of the state

The discussion on the removal of state recognition in extreme cases of state failure, on the possibility of thinking along other lines than state equality and the discussion on the possibility of the international administration of dependent territories is closely connected with a discussion on the intrinsic value of the state as a form of social organization.

To start with Karin von Hippel, she does not propound any particular view of the intrinsic value of the state. Considering her stated view that the international community's rigid adherence to the Montevideo Convention exacerbates conflict and that in some cases it would be fair to remove recognition from a state, one may venture to draw the conclusion that von Hippel is not overly sentimental about the state as such.[61]

On the other hand the removal of recognition must be understood as a strictly temporary measure until the state is committed to establishing a representative government that respects human rights (as pointed out earlier, what von Hippel looks for is rather a mechanism for removing the recognition of a government than a mechanism for removing the recognition of a state). The point of von Hippel's is that the Montevideo Convention encourages war lords to fight for the control of the capital, which in most cases counts as being control of the entire state. And under the Montevideo Convention the effective government is the legitimate government.

Robert Jackson for all his talk of quasi-states does not express any particular view on the intrinsic value of the state. Jackson seems flexible and mostly registers

---

[60] Ezetah, 'Legitimate Governance', *supra* note 11, at 456. For a similarly favourable attitude towards international involvement cf. Edward Kofi Quashigah, 'Legitimate Governance in Africa: The Responsibility of the International Community', in Edward Kofi Quashigah and Obiora Chinedu Okafor (eds.), *Legitimate Governance in Africa. International and Domestic Legal Perspectives* (Kluwer Law International: The Hague, London and Boston, 1999) 461-485; cf. also Richardson's proposal for a Mediating Forum (Richardson, 'Failed', *supra* note 11, at 61 and following). See also Obiora Chinedu Okafor, *Re-Defining Legitimate Statehood. International Law and State Fragmentation in Africa* (Martinus Nijhoff Publishers: The Hague, Boston, London, 2000), who emphasizes the importance of the African regional organizations.

[61] Cf. Von Hippel, *Democracy*, *supra* note 23, at 200, 201.

ongoing developments both in reality and in terms of norms. He seems to have no preconceived notion that would either favour or disfavour the state as such. Jackson writes, however, that the assumption underlying current international law on state sovereignty is that the state is of authentic worth to the populations involved and that protecting the states through international law only makes sense if the states are valuable in themselves.[62] Jackson then states that the value assumptions underlying the international law are turned upside-down by what he calls quasi-states which by definition are not yet valuable places for their populations.[63]

Jackson still seems to take the current international organization for granted as a system exclusively made up of states. Jackson was visionary enough when he wrote his book on quasi-states in 1990, but reality must have surpassed his wildest fantasies. Going so far as to question the idea and viability of the sovereign and equal state was probably not yet conceivable at that point in time.

Robert Jackson entertains a rather relaxed attitude toward empirical state inequality: '[S]ome states have always been less substantial and capable than others. History offers many examples of large or strong states and small or weak states and indeed of ramshackle or derelict states both inside Europe and outside.'[64] 'What has changed', Jackson adds, 'is not the empirical conditions of states but the international rules and institutions concerning those conditions.'[65]

One's view of the intrinsic value of the state can have two different dimensions, at least. On the one hand the state may be a useful form of social organization from a practical perspective. On the other hand, one may view the state from an ideological perspective and consider the idea of the independent equal state to be the best irrespective of practical realities.

William Zartman seems to be a representative of the latter way of regarding the value of the state. It may be added that the ideological or normative way of viewing the state has been dominant in modern international law and politics and still is, but not quite as heavily as before. The ideological perception of the intrinsic value of the state is probably most often combined with the view that the state is also the most viable form of social organization. The practical perspective on the state, however, must not necessarily be combined with the ideological view of the state. One may

---

62 Jackson, *Quasi-states*, *supra* note 1, at 183.

63 *Ibid.*

64 *Ibid.*, at 22.

65 *Ibid.*, at 23. The way Jackson emphasizes the significance of international norms is reminiscent of the way Susan L. Woodward emphasizes the norms on sovereignty as determining for better or for worse the behaviour of different state and non-state actors (Woodward, 'Compromised', *supra* note 24).

view the state as practical currently, but if another more practical societal model presents itself one may not have anything against trying the new model instead.

William Zartman, however, seems ideologically convinced that the sovereign state is the best. Writing about collapsed states in Africa, Zartman states that '[i]n the search for answers, it is first necessary to reaffirm that reconstruction of the sovereign state is necessary.'[66]

The only instance where Zartman discusses the possibility of reshaping the state is in relation to self-determination and secession, and then within the context of restoring the state in its original, precollapse, condition, thus not reshaping any of the substantial traits of the state.[67] When Zartman talks about changing the dimensions of the state it turns out that he refers to the possibility of secession only, and in very rare cases. The scepticism of Zartman toward any kind of change in the state as such is witnessed by his conclusion to the discussion of secession: 'Independence is still the highest political value available to a community: it is not to be asserted lightly nor claimed without struggle and sacrifice.'[68] Thus secession shall be difficult to achieve, according to Zartman. His statement also shows that he values independence more than anything else, thus making the acceptance of arrangements including international administration or the relativization of the state concept little likely.

Moreover, Zartman is of the opinion that empirical data speaks against secession; 'the potentially seceding members are likely to be worse off and the remaining core no better off as a result of the amputation.'[69] And, '[i]t is better to reaffirm the validity of the existing unit and make it work, using it as a framework for adequate attention to the concerns of its citizens and the responsibilities of sovereignty, rather than experimenting with smaller units, possibly more homogenous but less broadly based and less stable.'[70]

Ezetah for his part considers secession to be the last option in the exercise of self-determination.[71] In contrast to Zartman who claims that smaller units than the

---

[66] I. William Zartman, 'Putting Things Back Together', in I. William Zartman (ed.), *Collapsed States. The Disintegration and Restoration of Legitimate Authority* (Lynne Rienner Publishers: Boulder and London, 1995) 267-289 at 267.

[67] *Ibid.*, at 267-268. It is unclear whether Zartman uses the term collapse only with reference to the external boundaries of the state or whether he also uses the term collapse to denote the internal collapse of the governmental structures. Thus when Zartman talks of the reconstruction of the state it is likewise unclear whether he refers solely to the external state boundaries or whether he also refers to the reconstruction of the internal governmental structures of the state.

[68] *Ibid.*, at 268.

[69] *Ibid.*

[70] *Ibid.*

[71] Ezetah, 'Legitimate Governance', *supra* note 11, at 457.

existing states are possibly more homogenous but less broadly based and less stable, Ezetah thus recognizes that secession may sometimes be viable and justified: 'In cases where the assertion of the right [to self-determination] is isolated to a particular ethnic nation, its exercise should range from a negotiated autonomy to complete secession with records of the severity of past maltreatment or subjugation of the group determining the breadth of the negotiation option.'[72]

'In general', Zartman concludes, 'restoration of stateness is dependent on reaffirmation of the precollapse state.'[73] Zartman means the reaffirmation from the point of view of the original borders of the precollapse state, but it would seem as if a second meaning that could be attached to his statement is that the restoration of 'stateness' shall take place within the framework of a traditional conception of the liberal democratic state.

Although the conception of the state of which his text witnesses seems rather conventional, Zartman does introduce a new element into the state concept which makes it more complex and the consequences of which are not entirely clear. Having stated that the reconstruction of the sovereign state is necessary, Zartman goes on to say that '[s]overeignty needs to be reasserted as a responsibility, not as either a cover for tyranny or a relic of a world order past. The state needs to be restored and its sovereignty needs to be reinstated as the criterion for accountability, short of which its government is not legitimate.'[74]

Zartman seems to say that sovereignty implies responsibility and accountability, i.e. a democratic government, but the question is if he also means the opposite namely that a state without a democratic government, or without a government, cannot validly lay any claim to sovereignty. If so, it would be a rather radical turn in Zartman's argumentation. There is nothing in the rest of what Zartman writes which hints that his very conception of the state is dependent on whether the government is responsible and accountable. Zartman further writes that if the government is not accountable it is not legitimate. What conclusions, political or others, may be drawn from that statement is not clear, from the point of view of international law it is a dubious or at least ambiguous statement.

## The lacking intrinsic value of the state

Then there is the view already hinted that the modern state has no intrinsic value at all and that on some occasions it may be better to leave the people alone. Then the

[72] *Ibid.*, at 456; cf. Zartman, 'Putting', *supra* note 66, at 268.

[73] Zartman, 'Putting', *supra* note 66, at 268.

[74] *Ibid.*, at 267.

people may reorganize themselves along traditional structures which may be more sustainable. Such a view obviously looks more to what may be practical than what may be ideologically desirable.

Von Hippel, again, writes on the subject of Somalia that the focus on the unitary state, from without by the surrounding world and from within by the different war-lords, is based on the erroneous assumption by many members of the international community that any state is better than no state.[75] It could be argued, von Hippel says, that 'Somalia without a government is better off than a centralized, non-representative Somali government'.[76]

No government and no 'normal' state structures is better than a malfunctioning government and public administration von Hippel thinks. This would seem to constitute a considerably more critical view of the state than the one of Zartman's presented above.[77]

Von Hippel goes on to discuss different alternatives to the state as we know it today. She says that on the one hand the international community, led by the United States and Europe, can help to buttress the power base of members of civil society through fortifying, or establishing, democratic and transparent institutions.[78] Then she discusses different institutional and constitutional measures by which this may be accomplished.

On the other hand, she states that it is also true that the international community may have to accept that the Westphalian state-based system may not endure for much longer in all parts of the world, especially in Africa.[79] Although much has happened since the end of the Cold War in 1989, this view is still a radical and unusual view among scholars also in the field of law. Something entirely new may need to replace the old order, von Hippel writes, so that the state will not revert to the situation that caused the intervention in the first place.[80]

Von Hippel discusses decentralization as an alternative to the Westphalian centralized state. Decentralization would be particularly suitable to Africa, von Hippel argues, where traditional culture and levels of command and authority operated at the local level before colonial powers interfered in the continent.[81]

---

[75] Von Hippel, *Democracy*, *supra* note 23, at 199.

[76] *Ibid.*, at 200.

[77] See *supra* text accompanying notes 66-70.

[78] Von Hippel, *Democracy*, *supra* note 23, at 201.

[79] *Ibid.*

[80] *Ibid.* Cf. also Herbst, 'Responding', *supra* note 23, at 139-140.

[81] Von Hippel, *Democracy*, *supra* note 23, at 201-202.

Power could be devolved to villages and communities, von Hippel continues, even including those that cut across international borders.[82]

Von Hippel adds that this example could apply also to many of the crises in the former Soviet Union, the former Yugoslavia, Afghanistan (the book came out in 2000), Albania, or in terms of Russian relations with its 'near abroad'.[83]

In addition to decentralization, von Hippel explores the possibility of applying consociational principles to the failed states in order to reconstruct functioning social organizations if not states proper.[84]

Within a consociational arrangement each group administers its own community needs, such as education, and minorities are given the right to veto legislation, von Hippel writes.[85] These principles apply irrespective of where members of a particular group live, and thus they are often, according to von Hippel, referred to as non-territorial arrangements. For example, von Hippel continues, in Africa, individuals could choose to associate with others of the same ethnic group (or preferred ethnic group in the case of mixed ethic offspring), or even with others who share religious or political beliefs, or who speak the same language, regardless of where they live.[86]

All groupings of a certain size would then have a specified number of seats allocated within a larger unit, such as a confederation.[87]

If greater decentralization is therefore needed, and consociational principles applied, then confederations could assist in loosening the state structure and reorganizing the system.[88] A confederation normally is a union of separate but equal states linked by international treaties. Confederations are created for specified purposes such as for common defence or free trade, and the centre acts as a co-ordinating body only.[89]

Then, as a conclusion to her argument concerning the potential fruitfulness of consociational arrangements, von Hippel writes that to take this example to its extreme – albeit unlikely – conclusion, loose confederations could be created in

---

[82] *Ibid.*, at 202.

[83] *Ibid.*

[84] *Ibid.*

[85] *Ibid.*

[86] *Ibid.*

[87] *Ibid.*

[88] *Ibid.*

[89] *Ibid.*

Africa, with membership drawn from these new associations in a manner that would assure loyalty to the confederation.[90]

What von Hippel seems to have in mind thus are confederations made up of associations other than states. A confederation if it is not too large, von Hippel says, could enable individuals to belong to their state or association, within a regional confederation, satisfying the needs for inclusion and separateness.[91]

Von Hippel suggests that there be four regional confederations in Africa.[92] The separate confederations could then have representation in the OAU, von Hippel concludes.

For two main reasons, von Hippel is pessimistic about the possibilities of realizing the loose confederations she sketches in her book.

Firstly, those in power will not easily allow greater decentralization. And secondly, as von Hippel puts it, major systemic changes normally only occur after a complete breakdown, such as the formation of the League of Nations and the United Nations after two world wars.[93]

Despite the crises subsuming many states today, they are occurring in small waves rather than all at once. Therefore, von Hippel finds, right or wrong, that any significant reorganization of states is surely a pipe-dream, but the consociational decentralized principles can work on smaller levels, which in turn could lead to greater changes on a step-by-step basis.[94]

She points to the European Union as a source of inspiration for gradual change. Von Hippel's pessimism as to any significant reorganization of states is justified no doubt, but the only thing we can be certain of is that we do not know anything about the future. As right as von Hippel may be in her assumptions, future developments may just as well take us by surprise.

Von Hippel's argument has been cited at great length here because it is unusual and because it is directly relevant to the discussion of the failed state and the question of the intrinsic value of the state.

Another author who seems to share von Hippel's detached attitude towards the intrinsic value of the state as such is the earlier mentioned Maria Brons.[95] Based on her study of Somalia, Brons draws clear conclusions on this matter: 'With regard

---

[90] *Ibid.*

[91] *Ibid.*, at 203.

[92] *Ibid.*

[93] *Ibid.*

[94] *Ibid.*, at 204.

[95] For the kind of critical security studies perspective that Brons embraces, see further Pinar Bilgin and Adam Davin Morton, 'Historicising Representations of "Failed States": Beyond the Cold-war Annexation of the Social Sciences?', 23 *Third World Quarterly (2002)* 55-80.

to the inevitability of the state the Somali experience has . . . revealed that, considering the matter internally, a society does not necessarily need a state in order to keep law and order, exercise a certain degree of control over the use of violence, achieve social security and economic recovery. Externally, however, considering a society as a member of the world community, the state does seem to be inevitable. Furthermore, belonging to a state is part of the modern sense of national identity and pride and the Somali people are eager to regain their pride in this regard. This does not necessarily mean that they are eager to rebuild a central state.'[96]

From the external point of view maybe Somalia could be a member of the world community even though its state had broken down, if the Somalian territory was awarded some other position than that of a state proper. Somalia could perhaps be a member of the world community as a dependent quasi-state of some kind, if the international system of nation states is reformed, a perspective that Brons does not include in her study.

Maria Brons discusses the collapse of the Somali state in terms similar to those used by Chinedo Reginald Ezetah referred to earlier, when he describes how he would like to see the African states reorganized within the current system of nation states to the extent possible. The reasoning of Brons also bears resemblance to the manner in which von Hippel suggests that failed states could be reorganized in order to create viable social communities. In comparison with Ezetah von Hippel is more open, however, toward the possibility that there will be both states and other kinds of associations participating side by side in the international community, at least in Africa.

Brons finds that '[the] analysis of the Somali experience suggests that the state collapse of 1991 need not be understood as a rupture in Somali political history, but can be considered one step in the process of establishing political authority structures that are both adequately modern and rooted within the traditional set-up of Somali society'.[97]

On the subject of the, fictitious, former Somali state Brons writes that '[t]he Somali state that existed at independence in 1960 turned out to be merely a formal shell which was empty long before 1991, and which seems further than ever from

[96] Brons, *Society*, *supra* note 36, at 283. The claim that the state is externally necessary is contradicted by the opposite claim by Herbst: '[I]n a variety of circumstances, the international community has proved adept at adapting to diplomacy with something other than the traditional sovereign states.' (Herbst, 'Responding', *supra* note 23, at 141.) Cf. also Richardson, 'Failed', *supra* note 11, at 61, 78, who talks of 'representative peoples' as an alternative to dysfunctional governments.

[97] Brons, *Society*, *supra* note 36, at 284.

being refilled with empirical substance and political life.'[98] Thus the collapse of the Somali state was no great loss.

On the contrary, Brons labels as the 'second liberation of Africa' the development which has taken place in Somalia since independence. 'Somalia now, at the beginning of the 21st century, is a showcase for the "second liberation of Africa", the liberation from states and their leaders who have been superimposed on societies to the detriment of freedom and development.'[99] Coming close to Ezetah, Brons then adds that '[a]ll this, however, does not imply that Somalis do not want to reconstitute some form of state structure.'[100]

Even though Brons gives a bright picture of the fruitfulness of the efforts of the Somalis to create their own legitimate political authority structures, one can reasonably assume that this perspective scares all political leaders in power and that they will resist any such endeavours with violent means if necessary.

It is noteworthy that Brons claims that the modern 'nation-state-formation project' has been detrimental to development.[101] This goes against the conventional wisdom of modern state structures as a prerequisite of development almost. Brons' claim also goes against the conventional ideological wisdom amounting to the modern Western liberal independent centralized and unitary state structure as being the highest form of social organization and the achievement of which is or should be the ultimate goal of all peoples. Brons also claims, and rightly so no doubt, that the state structures imposed on the African societies have been detrimental to freedom, which is also a relatively controversial proposition. Since Brons labels the current state collapse the 'second' liberation of Africa, she probably thinks that the creation of independent states and the end of colonialism constituted the 'first' liberation and thus something good in spite of the fact that the states then formed have mostly turned out unsuccessful. Maybe the 'first' liberation was also a necessary step in the process of establishing legitimate political authority structures. The problem - whether a necessary step or not – seems to have been the inadequacy of the internal structures of the states formed at independence, not the fact that the colonial powers left, nor basically that the artificial borders were maintained in order to delimit different territorial entities called 'states'.

The maintenance of the artificial state borders and the artificial international system of nation-states in Africa may have been a problem in the sense that it may have created certain expectations as to how the internal structures should look.

---

98 *Ibid.*

99 *Ibid.* at 285.

100 *Ibid.*

101 *Ibid.* at 284.

Indirectly, the territorial division of the continent into different 'states' with all the expectations that such a division arouses may have contributed to the creation of the inadequate internal state structures we now see failing. At least a large discrepancy arose between the geographically delimited 'state' and any meaningful internal significance of the concept of the state – as we have seen Brons calls the former Somali state 'a formal shell'.[102]

On the existence of any intrinsic value of the state or not, Brons concludes quite clearly: 'My premise has been that security for its population is the main purpose of political organization. The means to reach this end can vary from case to case. Somalia has shown that the modern state is not the only source of security for society. Other social organizations provide social, economic, [and] legal security.'[103] In a way this is simple, but in other ways it is a highly provoking statement.

The question put in the current article is also whether and how these insights on the relative significance of the state shall be turned into law. Brons leaves open whether other forms of social organization than states should be introduced on the international scene or whether there should only be 'states', but with widely different internal structures.

Her main conclusion from the study of Somalia is that 'it is society and people that come first'.[104] 'The most prominent political organization of modern times, the state, is nothing but one optional means for a people to achieve security and well-being.'[105] The hope expressed by Brons is that 'the international community of nations states will allow the tender shoots of state formation to rise, prosper and grow strong and that the efforts of the Somali people to bring their house in order is honored and recognized in an appropriate way.'[106]

In order to illustrate the wide distance between Brons' open attitude towards the value of the state and a more state-oriented one, we can use Zartman as an example. He claims that 'state functions cannot be left to even a well-functioning society, any more than society can abdicate its activities to the state.'[107]

In Zartman's view, the society and the state seem to be two clearly different things and the state must under all circumstances be reconstructed as a conventional

---

[102] *Ibid.*.

[103] *Ibid.* at 289.

[104] *Ibid.* at 291. The tenor of this quote is remarkably similar to what Jackson aptly wrote: '[T]he real value of states varies enormously compared to the intrinsic worth of persons which does not vary at all.' (Jackson, *Quasi-states*, *supra* note 1, at 184.)

[105] Brons, *Society*, *supra* note 36, at 291.

[106] *Ibid.*

[107] Zartman, 'Putting', *supra* note 66, at 267.

Western liberal state: 'reconstruction of the sovereign state is necessary'.[108] The point of Brons' argument seems to be, first, that the sovereign state is not indispensable, secondly that state functions can indeed be left to a well-functioning society and, thirdly, that the reconstruction of some form of state may take place through civil society.[109]

For Zartman the reconstruction of the state is one thing and the reconstruction of civil society if at all necessary, is quite another. Brons' views of the state are thus diametrically opposed it would seem to the ones held by Zartman.

## The pragmatic value of the state

Chinedu Reginald Ezetah, finally, puts forward a view of the value of the state which seems to be a combination of the non-statist and statist views or to constitute a middle-say between the two. As mentioned earlier Ezetah is of the opinion that the African state lacks legitimacy.[110] Ezetah's discussion of the dilemmas of the African state and of what measures may help reconstruct functioning states, or other kinds of communities bears a strong resemblance to the views put forward by Brons and von Hippel. All these authors want to integrate the local traditional social structures into the modern state structures which to the current author seems to be the most reasonable and realistic approach. They all apply what Brons calls a bottom-up approach to the state.

Ezetah is pointed out here as lying in between the statist and non-statist authors mainly because he seems to stick more closely to the idea of maintaining the states as an organizational form than do von Hippel and Brons. This impression may be wrong and under all circumstances Ezetah's argument comes close to the one of Brons and von Hippel. Indeed just like von Hippel, Ezetah proposes forms of confederal autonomy as a way out of the crisis of the state at least in Africa.[111] Ezetah takes as his point of departure the right to self-determination as a means of re-organizing and re-legitimizing the African state. Ezetah states that 'a re-imagination of the idea for an appropriate concept [of self-determination] is now needed as a vehicle for the legitimization of the state.'[112]

The fundamental internal reorganization of the African states that Ezetah propagates, however, should in his view to the largest extent possible be combined with an external conservation of the state, i.e. a conservation of the post-colonial

---

[108] *Ibid.*

[109] For the third argument, cf. Brons, *Society*, *supra* note 36, at 288.

[110] Cf. *supra* note 49.

[111] Cf. Ezetah, 'Legitimate Governance', *supra* note 11, at 455.

[112] *Ibid*., at 454.

state boundaries.[113] When constructing sets of criteria for the exercise of the right to self-determination Ezetah writes that this should proceed on 'an understanding that the broad goal of the process of legitimization is the reclamation of the state, or all public spheres, back to peoples; and the revitalization of the enthusiastic and patriotic embrace of the state by a citizenry.'[114]

Thus Ezetah seems to be of the opinion that the state as such has an intrinsic value, but in his case this seems to be a practical and pragmatic choice of position, and not an ideological choice, like Zartman's gives the impression of being.

As put by Ezetah, in the wide spectrum between democracy and secession, as expressions of the exercise of the right to self-determination, Ezetah thus favours democracy within existing state boundaries.[115] His pragmatic attitude is illustrated by the fact that he considers that there should be 'a *rebuttable assumption* that co-existence by African peoples in their post-colonial identities has become a historical necessity.'[116]

To quote Ezetah further, '[t]his assumption derives from the apparent difficulties of the complete desegregation of the post-colonial state boundaries; the fact that cross-cultural integration and assimilation over several decades has rendered the detection of political and cultural homogeneity very difficult in many places; and the fact that a recreation of pre-colonial political forms may be impossible or may lead to the entrapment of new minorities.'[117]

So, Ezetah clings to the idea of the state, although an internally reorganized one. Ezetah's propositions are imaginative and constructive and could be fruitful if applied. As was said earlier, however, à propos of the ideas put forward by von Hippel and Brons, the prospect of a radical decentralization and democratization and of the confederal arrangements advocated by both von Hippel and Ezetah, will most likely scare those currently in power and they will do anything to resist any such tendencies.

In any case Ezetah puts forward a large amount of constructive ideas for reform which could be put in practice all of them, or from which a selection could be made.

It may be that the international community realizes the wisdom of Ezetah's and other proposals, but from there it is a big step to assist in achieving such radical transformations of the societal structures from abroad. Faced with the presumed

---

113 *Ibid.*, at 454-455.

114 *Ibid.*

115 *Ibid.*, at 455.

116 *Ibid.*

117 *Ibid.*, at 456.

opposition of the official leadership, such an international undertaking would risk being unlawful. If there is no effective government or no central government at all and we are thus dealing with a failed state, the problem of the legality of such an international interference may be easier to solve. For practical reasons the reorganization of the state would also be easier to achieve if the foreigners are not resisted by a hostile government and its army.

Still, the kind of fundamental transformation that Ezetah and Brons have in mind would be too far-reaching a task for the international community to undertake probably, irrespective of the existence and attitude of the local government. The reclamation of the state back to peoples, as Ezetah puts it, is better even if not more easily achieved by the local inhabitants themselves.

Nevertheless, Ezetah interestingly places great emphasis on the international participation in the project of the re-organization of the African states.[118] What he has in mind is not so much any international presence in the countries actively assisting in the re-organization on the spot, but rather some international control of the process. Even so, Ezetah's proposal is radical and provoking enough. This openness towards international involvement seems to be in sharp contrast to what is propagated by Zartman. Zartman concedes that outside assistance is necessary for the reconstruction of collapsed states.[119] But, importantly, although external intervention should be available as long as it must, Zartman writes, it should leave as soon as it can.[120]

## Conclusion: Normative change must follow

With regard to the failed states there is a gap between the reality and the international norms which is so wide that it is presumed in this article that a change in the norms must come.

Robert Jackson discusses in terms of positive and negative sovereignty the discrepancy between the concept of the state in international law and the circumstances reigning on the ground in the failed states.[121] Jackson also uses the terms empirical and juridical statehood to denote the same thing. Positive sovereignty and empirical statehood is used to denote those states that, in addition to being mere legal constructions, are also able to provide their citizens with the

---

[118] See *supra* text accompanying notes 59-60.

[119] Zartman, 'Putting', *supra* note 66, at 272.

[120] *Ibid.* The thought that external interveners should leave as soon as they can is explicitly rejected by von Hippel, *Democracy*, supra note 23, at 204.

[121] Jackson, *Quasi-states*, *supra* note 1.

services and the protection normally expected of a state. Negative sovereignty and juridical statehood is used to denote those states that are states only from the formal point of view and whose populations do not enjoy many of the advantages traditionally associated with independent statehood, as put by Jackson.[122] The terms positive and negative sovereignty are inspired by the concepts of positive and negative liberty of Isaiah Berlin's. Not only are they unable to provide political goods for their citizens, as we have seen, and as Robert Jackson points out, the quasi-states or the failed states do not even fulfil the criteria of statehood in international law.[123]

Using a telling image to describe the relationship between reality and norm as far as statehood and sovereignty is concerned Robert Jackson writes that the juridical cart is before the empirical horse, and that it is the first time in the history of the sovereign states-system that this happens.[124] As we have seen, what has changed Jackson says is not the empirical conditions of states, but the international rules and institutions concerning those conditions.[125] The question is, however, whether the international rules have not changed once again since Jackson wrote his book in 1990.

Jackson correctly captured the international law in force at the time when he stated that negative sovereignty is the legal foundation upon which a society of independent and formally equal states fundamentally rests.[126] From this he draws the conclusion that independence and non-intervention are the distinctive and reciprocal rights and duties of an international social contract between states.[127]

A few comments can be made at this stage relating to Jackson's concept of negative sovereignty. What he states concerning the position of negative sovereignty and non-intervention in international law may have been true and almost

122 *Ibid*., at 21.

123 *Ibid*., at 22.

124 *Ibid.,* at 23-24.

125 *Ibid*., at 23.

126 *Ibid.,* at 27.

127 *Ibid*. For an original connection between non-intervention and decolonization, see Neta C. Crawford, 'Decolonization as an International Norm: The Evolution of Practices, Arguments and Beliefs', in Laura W. Reed and Carl Kaysen (eds.), *Emerging Norms of Justified Intervention. A Collection of Essays from a Project of the American Academy of Arts and Sciences* (American Academy of Arts and Sciences: Cambridge, Massachusetts, 1993) at 37-61. Her argument is developed in full in *Argument and Change in World Politics. Ethics, Decolonization, and Humanitarian Intervention* (Cambridge University Press, 2002).

uncontested in 1990 when his book came out,[128] but it is doubtful whether his strictly formal conception of negative sovereignty and of the principle of non-intervention is still tenable from the point of view of the law currently in force. The change suggested here in the international legal standing of negative sovereignty and non-intervention is due to the enormous development of the body of human rights law and of humanitarian concerns generally in international law and relations after 1990, a development which Jackson greatly underrates or misses to foresee in his study.

The question is whether it can still be maintained as a legally valid proposition that when negative sovereignty is held, it is held absolutely in the sense that it is not dependent on any conditions other than the international social contract between the states itself.[129]

It is also questionable from the point of view of current international law whether strict non-intervention and negative sovereignty are basically two sides of the same coin as Jackson contends. At least it would seem as if the principle of non-intervention has been largely qualified since 1990 considering not least the numerous humanitarian interventions which have been carried out within the framework of the UN Security Council or unilaterally.

If it is true that the two concepts are two sides of the same coin, then a necessary consequence would be that also the concept of negative sovereignty has been transformed since 1990. Perhaps the two concepts can be seen as related but not as closely tied to each other as Jackson suggests. Then it would be possible to claim that the principle of non-intervention has been qualified, but that the concept of negative liberty has largely stayed intact as the legal foundation of the international society, as Jackson claims it is. On the other hand, it is possible to claim that also the concept of negative sovereignty has undergone a transformation since Jackson wrote his book. Today it is possible to question even the formal equality of states in international law, not only their real equality.

The account of Robert Jackson's views made here has been made in order to show how dramatically the international community and its norms have changed since 1990. What was unthinkable then has since happened and the international legal norms have changed accordingly, although the developments in real life so far surpasses the legal developments.

The transformation of the international norms which has taken place since 1990 has occurred in two steps.

---

[128] With the exception probably of those arguing in favour of a right to humanitarian intervention, for instance Fernando Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (first published in 1988) (Transnational: Irvington-On-Hudson, NY, 1997).

[129] Cf. Jackson, *Quasi-states*, *supra* note 1, at 27.

First, the position of human rights in international law was soon considerably strengthened. The principle of non-intervention was weakened as far as the discussion and criticism of the human rights situation in foreign states was concerned. The UN Security Council started imposing sanctions on a large scale against human rights and humanitarian law abusers. Next came the development weakening the principle of non-intervention as far as the unilateral use of military force for humanitarian purposes is concerned. Today arguably humanitarian intervention is allowed in exceptional situations. The close connection made by Robert Jackson, among many others, between independence or sovereignty on the one hand and non-intervention on the other is no longer justified.

Secondly, the norm postulating the equality of states is changing due to different factors among which the phenomenon of failed states should be one of the most important. The reality of the breakdown of some states has made the norm increasingly untenable and in some cases the international community has taken the consequences of this development and has taken over the administration of certain states or parts of states. Also the more normative conception of state failure in terms of lack of democracy and disrespect for human rights has contributed to the erosion of the state equality norm. States are no longer considered equal irrespective of their system of government and the situation as far as human rights are concerned.

The previous erosion of the sovereignty norm in favour of more room for military intervention for the purposes of human rights protection would seem to have contributed to the erosion ultimately of the norm of state equality.

In the case of Iraq in 2003 all modern normative developments seem to have coincided, for better or for worse, when the US and the UK unilaterally undertook a military intervention in order to remove a regime and fundamentally restructure the government and public administration of a state which had not even broken down in empirical terms, but which did have an authoritarian system of government and showed no respect for human rights, and in addition to this was or was perceived as being externally aggressive.

So, the unthinkable in 1990 seems now to be under way, namely a relativization or gradation of the concept of the state in international law.

Once international law has freed itself of its strong ideological heritage in favour of independent equal states and in favour of states on the whole, then new normative solutions which would match the reality better might be constructively considered. If it turns out that the assumption made in this article is correct as far as the relativization of the concept of the state is concerned, the effects of the change on the international legal system as a whole may be considerable, but this article

sticks to the question of statehood only. The relativization of the state upsets one of the fundamental organizing principles of the current international law.

Chinedu Reginald Ezetah, as we have seen, has attacked the problem of statehood from the African perspective and from the perspective of the law. Ezetah writes that the proposals he makes for the reconstruction and legitimization of the African states based on the right to self-determination, and which have been presented earlier in this article, give normative expression to the realities of the post-colonial state in Africa.[130] Ezetah finds that it is the failure of the juridical assumptions upon which the post-colonial state was erected which is the root cause of state collapse in Africa.[131]

Ezetah writes further that the legal framework within which statehood of the post-colonial African state is affirmed, or its collapse redressed, is not suitable for a proper appreciation of the problem of statehood in Africa.[132] The international system, Ezetah writes, has continuously presumed the prior existence of the necessary sociological foundations of genuine statehood for the African post-colonial state.[133] These presumptions according to Ezetah are based on facile extrapolations of Western experiences.[134] The consequence of this in the African context is the creation of an ominous vacuum between the norm on statehood and the observable fact, Ezetah writes, and the international community glosses over this problem with juridical assumptions, such as a presumption about the acceptance by Africans of the overall legitimacy of the state element.[135]

The reasoning of Ezetah is applicable in general to the international law on statehood on the one hand and the reality of the failed states on the other. It can be noted that Ezetah is faithful to the idea of the state and wishes to translate the Western idea of the state to fit the African realities. He wishes to transform the internal organization of the African states so that it fits with African traditional conceptions of the state. Ezetah, however, does not imagine other entities than states participating in the international system on the part of Africa. Ezetah does point out the discrepancy between the international norms and the reality and seems to say that if the international community and the African leaders do not africanize the African state then it will be impossible to achieve functioning African states.

Translating Ezetah's argument to the level of the criteria of statehood and the world community as a whole one could say that in order to address adequately the

130 Ezetah, 'Legitimate Governance', *supra* note 11, at 458.

131 *Ibid.*, at 455.

132 *Ibid.*, at 457.

133 *Ibid.*

134 *Ibid.*

135 *Ibid.*

problem of the failed states the concept of statehood in international law needs to be rethought and adapted to reality. Not only in Africa, but so far mostly in Africa, the ominous vacuum can be observed that Ezetah mentions between the norm on statehood and the observable fact.[136]

One could play with the thought that Ezetah's idea concerning the reconstruction of the African state along local sociological and cultural lines could be applied to all cases of failed states. Even from the purely theoretical point of view this would seem difficult to combine with an intact international system of states because the kinds of states that would result from this combination of Western and local institutions would be so different from one another.[137] If the result would be viable states, however, it may be worth the blurring of the unitary statehood criteria in international law and a greater variation in the real phenomena we call states.

Ezetah's starting-point seems to be that through 'localization', and only through 'localization', can functioning states be constructed which will be able to take on the functions of a state internally and externally. Thus he does not seem to fear the fragmentation of the international system of states through the adaptation of the statehood criteria to local traditions. Whatever results from the deconstruction of the inadequate Western institutions and the ensuing reconstruction of the state along local lines may be better than the current malfunctioning state constructions.

From the formal point of view, if the state is reclaimed back to peoples, as put by Ezetah, the requirement that there exists a government for there to be a state must be reinterpreted. The concept of government must be enlarged to include not only a centralized government organized along Western liberal lines, but all kinds of decentralized more or less traditional arrangements by which the state is in fact governed. The requirements relating to the existence of a territory and of a population need not be reinterpreted, but only the requirement relating to the governmental structure. The Western conception of government will be translated into other cultural settings and thereby be transformed considerably.

One of Robert Jackson's theses is that the failed states are maintained by the surrounding international system through what he calls the negative sovereignty game. The international norms postulate that even the failed states are supposed to be regarded as states. The better functioning states of the world respect the failed states as states and contribute economic and other kind of assistance to maintain the states materially. As has been argued in this article the rules of the negative sovereignty game have changed. The prohibition of intervention for instance has

136 *Ibid.*

137 Cf. also Wallerstein, 'The New World', *supra* note 41, at 182.

been considerably weakened. Also, the failed states are not necessarily supported as (independent) states any longer, but as international (dependent) protectorates of some kind. The possibility to govern states through international administration also constitutes a radical shift in the rules of the negative sovereignty game. The question is whether international intervention and international administration of formerly independent states is compatible with the negative sovereignty game on the whole or whether the world is playing a completely different game now. Since the number of cases of international intervention and even more so of international administration is still quite small, it seems more proper to speak of a change in the rules of the largely still ongoing negative sovereignty game. Nevertheless, it is a radical shift in the rules.

The authors discussed in this article who have struggled theoretically and empirically with the phenomenon of failed states approach the problem either from a top-down or a bottom-up perspective. Those who approach the issue from the bottom-up perspective have mostly arrived at the view that the form which the states take must be relativized and more adapted to local culture in order to have better functioning states.

Zartman also approaches the issue from a bottom-up perspective, but sticks to a conception of the state as a Western liberal one and not one whose forms have been fundamentally transformed in line with local traditional authority structures.

Ezetah puts forward the most sophisticated proposal concerning the ways in which the state could be invigorated by being integrated with society and the traditional *loci* of authority and legitimacy.

Jackson is the author who approaches the issue of the failed states from a top-down perspective, he starts from the international system of states and looks downwards into the individual members of that system but he maintains a systemic perspective. He thinks that the international norms contribute to conserve states which are states only nominally. His view is static because he notes the dramatic tension between the norms but still cannot imagine that the international rules will change as a result of this tension. The fact that Jackson seems to find unthinkable any change in the rules of the negative sovereignty game shows in addition how deeply entrenched the fundamental rules on sovereign equality were at the time when his book was written.

The dynamic perspective of the bottom-up authors, however, is more fruitful both from a theoretical and empirical point of view since it is certain that the world does change. What the bottom-up authors leave behind however is the international perspective. They do not consider what the international system will look like with a great number of disparate states and other kinds of state-like social entities, probably greater than today. How will these members of the international system be able to

interact for instance? Maria Brons briefly touches upon the issue but characteristically leaves it aside.

The transnational complications of disparate states and other arrangements may contribute to put a check on the 'localization' of the states, a wish to be able to maintain international contacts may make the people more willing to organize along more conventional Western lines as far as the organization of the state is concerned. Brons states in her conclusions that judging from the Somali experience a society does not necessarily need a state in order to keep up central 'state' functions.[138]

At first glance, it seems difficult to combine the internal non-state with the external state. What Brons seems to mean, however, is that the Somali people want to reconstruct the state along Somali traditional authority structures and thus have a state on the one hand, but on the other hand a state that is differently organized from the Western inspired post-colonial state. Brons' study of Somalia would seem to confirm the more theoretical assumptions of Ezetah presented earlier.

Considering that a state reconstructed in this manner may contain institutions different from the conventional modern state structures, it may still be difficult in practice for the reconstructed states to interact with each other and with the older Western states. The rules relating to international interactions would probably have to be extensively revised. If the conventional concept of the state is clung to and other consociational arrangements are not accorded international recognition then this will ease the international interactions somewhat.

If societal arrangements which do not amount to states will have to be states on the international level if they wish to participate in the international community then they would have to form states for international purposes only, one arrangement per 'state' or several arrangements together forming a 'state' for the purposes of international interaction. This scenario admittedly is hypothetical. The most likely situation at least in the near future will be that the existing states are nowhere broken up into non-territorial entities like ethnic or linguistic groups.

If we stick with the state paradigm as the dominant one – the state being 'the most prominent form of modern social and political organization and upheld by the international system of nation states', as Brons writes[139] - but we still assume that the tension between the current international rules and the reality of the failed states must lead to a normative change of some kind, then the question becomes what such normative change could amount to.

There are several possibilities. Either the criteria of statehood may be slackened so that any geographic territory formerly recognized as a state continues

---

[138] Brons, *Society*, *supra* note 36, at 283.

[139] *Ibid.*

to be a state no matter how ineffective or inexistent the government may be. As far as the recognition of new states are concerned the old more demanding criteria might be maintained although the larger the discrepancy between the demands relating to old failed states and the ones relating to new states, the more difficult it will be to maintain the strict demands as to the effectiveness and other aspects of the government before a new state may be internationally recognized.

A variation of this scenario is that alternative governmental structures are internationally accepted so that effective decentralized traditional authority structures are recognized as an effective government. This would be a scenario in line with what is suggested by the authors studying the failed states from the bottom up.

Or there could be a gradation of the states into A-states, B-states, C-states, semi-states, or quasi-states depending on their degree of success or failure and to which different international rules apply. In all three of these scenarios the fundamental norm of sovereign equality could be kept; the B-states, C-states etc. would not be unequal because they would not be full states. On the other hand the fundamental norm of sovereign state equality could also be completely abandoned. The presumption made in this article is that practice and reality must somehow have a normative impact. It seems untenable to continue with a concept of statehood that so badly matches what goes on in reality.

# Puzzles and Solutions: Appreciating Carl Schmitt's Work on International Law as Answers to the Dilemmas of his Weimar Political Theory

Christoph Burchard*

## Introduction

Carl Schmitt and his impressive oeuvre have become focal points of today's academic interest, whilst his work on international law and international relations does so far not conjure intense discussions. It seems common to deem Schmitt's turn to geopolitics awkward and abrupt or to consider it a mere tactical maneuver to overcome academic and political isolation. Schmitt's early and deep-going entanglement with Nazi Germany and his prominent role as the *Kronjurist* of the Third Reich not only made him a *persona-non-grata* on the international parquet or in Germany's post-War scholarship, but already before the end of the Second World War had the German jurist been isolated in Nazi circles. To report an anonymous commentator, whose view seems to prevail today: Schmitt 'seeks a new field of activity in which he would like to avoid his complete marginalization, hoping eventually to regain his momentum.'[1] Somewhat ironically, this view is not referring to the contemporary disregard for Schmitt's turn to foreign affairs, but the anonymous commentator served as an operative for the Nazi secret service.

---

* German First State Exam, University of Passau, 2001; LL.M., New York University Law School, 2003; doctoral candidate under the supervision of Prof. Bernhard Haffke, University of Passau, Germany (expected 2005). The author is *Rechtsreferendar* at the Court of Appeals in Freiburg, Germany and works as a research assistant for Prof. Eser, Max Planck Institute for Foreign and International Criminal Law, Freiburg, Germany.

1 Reported by Gopal Balakrishnan, *The Enemy – An intellectual Portrait of Carl Schmitt* (Verso: New York, 2000) at 227.

In this article, I intend to challenge the contemporary academic indifference for Schmitt's reflections about the international arena. I will not argue that Schmitt's ideas on the international realm are worthwhile being introduced into contemporary debates on how to reframe the global architecture; rather, I will submit that his foundational works on international law and international relations provide answers for various dilemmas and puzzles that pervaded and even dictated his Weimar pieces on domestic political theory.

My analysis will show that considering Schmitt's shift to the international as a break in his academic life fails to notice that his foundational works on international law present continuous lines of thought. In Part I of this paper, I will focus on two interrelated parts of Schmitt's Weimar period: *Der Begriff des Politischen ('The Concept of the Political')* and his theory of democracy. I concentrate on *Der Begriff des Politischen* and Schmitt's theory of democracy not only because they are integral parts of his Weimar period, but also because they deal with substantive topics that were important for Schmitt. Both, *Der Begriff des Politischen* and his theory of democracy, hold various puzzles, dilemmas, and questions that leave open Schmitt's underlying normative agenda; questions that cannot be answered by just focusing on his Weimar writings. Firstly, I will demonstrate that the ambiguous, sometimes superficial, and brief style of *Der Begriff des Politischen* renders highly controversial the correct interpretation of Schmitt's de-moralizing concept of war and of the externalization of conflict to the international plane. As an initial puzzle, *Der Begriff des Politischen* holds the question whether Schmitt intended to limit or to unlimit recourse to force. *Der Begriff des Politischen* also raises the dilemma of whether Schmitt foresaw any intrinsic limits to international conflicts or whether he conceptualized the possibility of their total escalation. Secondly, I will turn to Schmitt's theory of democracy. I will submit that Schmitt sought to rescue a delegitimized state system by accommodating the democratic empowerment of the masses. However, as a permeating dilemma, I will suggest that Schmitt's theory of democracy failed to overcome the legitimacy crisis of the state; that Schmitt eventually had to acknowledge that his theory failed to create a conceptually stable framework for democratic government.

In Part II, bearing these dilemmas and puzzles in mind, I will turn to Schmitt's foundational works of international law. Having first presented the factual convictions that led Schmitt to configure a new world order, I will briefly deal with Schmitt's *Großraum* ('greater space') concept before discussing *Der Nomos der Erde* ('The Nomos of the Earth'). In this work, Schmitt transcends – even rejects – his previous democratic ideas and pursues new ways to legitimize the state system. Not only does *Der Nomos der Erde* demonstrate Schmitt's uneasiness about his views on democracy, but it also responds to the dilemma of *Der Begriff des Politischen* on how to

de-escalate international war. Further, *Der Nomos der Erde* elaborates extensively on the background to the de-moralizing concept of war, which had been advanced in *Der Begriff des Politischen*.

As I will submit in this paper, all these parallels and similarities between Schmitt's Weimar and post-Weimar writings indicate that Schmitt's turn to the international realm was far from a mere tactical maneuver. I rather suggest that reading Schmitt's foundational works on international relations proves vital for correctly interpreting *Der Begriff des Politischen* and his theory of democracy. His later works, therefore, should be reconsidered as developments and not as breaks in Schmitt's academic life.

## Part I: Der Begriff des Politischen and Schmitt's Theory of Democracy and its Inherent Nihilism

### Der Begriff des Politischen

One of the most striking facets of *Der Begriff des Politischen* is Schmitt's separating morality, aesthetics, economics, and politics.[2] Being the most prominent theme in *Der Begriff des Politischen*, the nature of politics, or in Schmitt's terminology: the political, materializes in a friend-enemy dichotomy. Distinguishing the political from other considerations and ultimately reducing politics to the demarcation of friend and foe bears several implications – the most troublesome that state warfare is to be only guided by politics, whilst moral or ethical reflections are conceptually foreclosed from guiding conflict behavior. This leads, for instance, Howse to conclude that the normative agenda behind *Der Begriff des Politischen* is overtly bellicose,[3] because it removes '*any* moral constraint from the conduct of war.'[4] Drawing on a reading of *Der Begriff des Politischen* and *Politische Theologie* ('Political

[2] 'Der politische Feind braucht nicht moralisch böse, er braucht nicht ästhetisch häßlich zu sein; er muß nicht als wirtschaftlicher Konkurrent auftreten, und es kann vielleicht sogar vorteilhaft scheinen, mit ihm Geschäfte zu machen. Er ist eben der andere, der Fremde, und es genügt zu seinem Wesen, daß er in einem besonders intensiven Sinne existenziell etwas anderes und Fremdes ist, so daß im extremen Fall Konflikte mit ihm möglich sind … .' 'The political enemy is not automatically morally evil, he does not have to be aesthetically ugly; he does have to act as an economical competitor, and it is very well possible that it is advantageous to make business with him. Now, he is the other, the stranger, and his being is sufficiently determined, if, in a particularly intensive way, he is something other and alien so that, in an extreme case, it is possible to conflict with him.' (Author's translation). See Carl Schmitt, *Der Begriff des Politischen* (4th edn, Duncker & Humblot: Berlin, 1963) at 27. In the following text I will refer to the 1963 edition of *Der Begriff des Politischen*.

[3] See Robert Howse, 'From Legitimacy to Dictatorship – and Back again, Leo Strauss's Critique of the Anti- Liberalism of Carl Schmitt', 10 *Canadian Journal of Law and Jurisprudence* (1997) 77 at 86.

[4] *Ibid.*

Theology'), which was published in 1922, Howse seeks to demonstrate that Schmitt's 'last word is the unconstrained rule of the strong over the weak as the one authentic form of order implied in the universality of man's animal striving.'[5] The de-moralization of war and peace nicely fits this paradigm – moralistic limitations to waging war would impede high men from dominating the weak, whilst a concept of politicized, i.e. unlimited, conflict entails all the instruments for a *Herrschaft* ('rule') of the strong.

On the one hand, the polemical tone of *Der Begriff des Politischen* supports Howse's interpretation to a certain extent. Historic incidents – like Cromwell's (verbal) attacks of papal Spain – where national antagonisms had spiraled to an extreme, and where an intensive friend-enemy contrast had surfaced, are cast in a positive light.[6] Indeed, according to Schmitt, these moments mark 'the culmination of high politics.'[7] On the other hand, several other passages of *Der Begriff des Politischen* cannot be explained by Howse's approach. These passages point to a different normative background for Schmitt's separating war from morality. For example, Schmitt warns that wars seeking to promote humanity or other supposedly ethical goals necessarily imply the eradication of the enemy. According to Schmitt, resorting to moral justifications for waging wars is but an ideological instrument that eventually degrades the enemy and places him *hors-la-loi* or *hors l'humanité*.[8] Schmitt hence introduces, however briefly, the idea that conflicts that go beyond the sphere of mere politics will become exceptionally inhumane, intensive and brutal.[9]

Therefore, the interpreter of *Der Begriff des Politischen* is confronted with seemingly contradicting lines of thought. Keeping politics and other considerations (namely economics, morality or aesthetics) apart either unlimits conflicts, or it actually limits them by foreclosing moral discrimination against the enemy. The rather pointed and brief style forbids solving this puzzle entirely by only reading *Der Begriff des Politischen*; it gives, however, several hints about the convictions that dictated Schmitt's political philosophy.

This philosophy is a perplexing crucible of, on the one hand, empirical determinations, factual assumption and existential experience, and, on the other hand, normative goals. Schmitt was a political 'realist' who did not spend much time considering utopias, ideal worlds or romantic idylls; his objectives found their

[5] *Ibid.,* at 80.

[6] See Schmitt, *Der Begriff des Politischen*, *supra* note 2, at 67.

[7] (Höhepunkte der großen Politik). *Ibid.*

[8] *Ibid.,* at 55.

[9] *Ibid.,* at 37.

boundaries in 'concrete situations,'[10] or rather in his perspectives on these concrete situations. Political philosophy, for Schmitt, was not reflecting on ideal politics, but a reflection of actual human affairs. This reflection was heavily influenced by his experiences during the breakdown of the Kaiserreich, the revolutions and counter-revolutions predating the establishment of the Weimar Republic, and the social disruption of the Weimar society by antagonized political parties ready to overturn the Weimar Constitution. His grim and almost apocalyptical convictions can only be understood against this background, in the context of a Reichspräsident[11] ruling by decree to ensure minimal stability, and of Schmitt's living in society at the brink of civil war. Schmitt was convinced that, since man was a dangerous and dynamic being,[12] there is no, or at least no imminent, possibility to create just society,[13] the civitas dei on earth.[14]

Pointing to his most fundamental empirical determination, Schmitt thought that the validity of theories and their conceptualizations depended on their appreciating and accepting the immutability of enmity and mortal conflict. As he asserted in the foreword to the 1963 edition of *Der Begriff des Politischen*, nothing less than reality necessitates a theory's descriptive part to acknowledge the ontological dimension of human enmity.[15] In his terminology, enmity isn't directed against the economic rival or the opponent in a debate,[16] but describes the potentiality of mortal clash. War and conflict, then, became the basis and focal point as well as the object and subject for Schmitt's reflections on human interactions and their reflections in politics. In *Der Begriff des Politischen*, Schmitt refrains from advancing a definition of politics and rather introduces his famous friend-enemy distinction that serves as a phenomenological criterion to capture an 'aggregate condition'[17]: the political. The friend-enemy dichotomy enshrines the antagonism that surmounts human relations and embraces enmity as its concrete source and foundation. 'Friend and enemy signify the outer limits of an association or dissociation.'[18] Once the

---

[10] (konkrete Existentialität). See Schmitt, *Der Begriff des Politischen*, *supra* note 2, at 65.

[11] The president of the Weimar republic.

[12] See Schmitt, *Der Begriff des Politischen*, *supra* note 2, at 61.

[13] See William Rasch, 'Conflict as a Vocation', 17 *Theory, Culture and Society* (6/2000) 1 at 11.

[14] This has to be marshalled against all those who reduce Carl Schmitt to a political theologian and assert that he was heavily influenced by the teaching of the Catholic Church. However, this paper in not so much concerned with deconstructing the building blocks of Schmitt's thought but rather with gaining an overall impression of Schmitt's work, which then might be used to deconstruct Schmitt.

[15] See Schmitt, *Der Begriff des Politischen*, *supra* note 2, at 15.

[16] *Ibid*., at 28.

[17] See Ellen Kennedy, 'Hostis not Inimicus: Toward a Theory of the Public in the Work of Carl Schmitt', 10 *Canadian Journal of Law and Jurisprudence* (1997) 35 at 43.

[18] See Schmitt, *Der Begriff des Politischen*, *supra* note 2, at 27.

extreme pole of dissociation is reached, i.e. once the enemy has been marked, an intense existential fight (as a matter of life and death) cannot be prevented – politics is a 'realm of danger, not safety.'[19] Note, however, that fighting itself is neither virtuous, nor a social ideal for Schmitt.[20]

It is crucial to appreciate that the insecurity raised by the ever-present potentiality of lethal conflict is not the Hobbesian state of nature, i.e. not the war of all against all. Rather, the antagonisms that Schmitt has in mind exist between groups of people. According to Schmitt, only communities that are structurally capable of deciding on an enemy and waging war against him, are political units[21] properly so called. These units can either appear in the form of a state, which Schmitt merely comprehends as a specific status within the historic narrative on human coordination[22], in the form of a party, of a union or of a church. The (so called) *Kulturkampf* in Bismarck's Prussia between the Catholic Church and the state, the first world war between various nations, the October Revolution and the fight between Lenin's communist party and Russian aristocracy, the clash of far-left and far-right parties in the Weimar Republic, all this experience is mirrored in Schmitt's

[19] See Carlo Galli, 'The Critic of Liberalism: Carl Schmitt's Antiliberalism: Its Theoretical and Historical Sources and Its Philosophical and Political Meaning', 21 *Cardozo Law Review* (2000) 1597 at 1607.

[20] 'Es ist also keineswegs so, als wäre das politische Dasein nichts als blutiger Krieg und jede politische Handlung eine militärische Kampfhandlung, als würde ununterbrochen jedes Volk jedem anderen gegenüber fortwährend vor die Alternative Freund oder Feind gestellt, und könnte das politisch Richtige nicht gerade in der Vermeidung des Krieges liegen. Die hier gegebene Definition des Politischen ist weder bellizistisch oder militaristisch, noch imperialistisch, noch pazifistisch. Sie ist auch kein Versuch, den siegreichen Krieg oder die gelungene Revolution als »soziales Ideal« hinzustellen, denn Krieg oder Revolution sind weder etwas »Soziales« noch etwas »Ideales«.' 'By no means, political existence is neither only bloody war, nor is every political action only a military combat action, neither are all nations relentlessly confronted with all other nations and with the alternative friend or enemy, nor is it impossible that the politically correct action lies in avoiding war. As coined here, the definition of the political is neither bellicose nor militaristic, neither imperialistic nor pacifistic. Similarly, this definition is not the attempt to project the victorious war or the successful revolution as a social ideal, because war or revolution is neither something social nor something ideal.' (Author's translation). See Schmitt, *Der Begriff des Politischen*, *supra* note 2, at 33. Kennedy correctly asserts that other conservative contemporaries of Schmitt like Ernst Jünger and Erich Kaufmann did in fact idealize struggle as virtue. See Kennedy, 'Hostis not Inimicus', *supra* note 17, at 44 and footnote 34. In his 1936 article 'Politik' ('Politics'), Schmitt differentiates between a bellicose (kriegerisch) and a political approach, siding with the latter. (Reported by Wolfgang Palaver, *Die mythischen Quellen des Politischen* (Kohlhammer: Stuttgart/Berlin/Köln, 1998) at 14).

[21] The following sections of the paper will take up Schmitt's definition of a political unit. When I refer to political unit or political community, etc., I mean units, communities, etc., in the Schmittian sense.

[22] See Schmitt, *Der Begriff des Politischen*, *supra* note 2, at 20.

thinking that hostility between *groups* is immutable.[23] However, Schmitt is far from conceptualizing an all-encompassing, ever-present state of war. The political only appears as the exception,[24] as the existence of an enemy is not the rule. In 'the stable state the political in this sense is latent, unseen, mere potential.'[25] But this must not obfuscate that the immutability of conflict determines Schmitt's thinking, a thinking that, so I would argue, saw the political lurking everywhere.

Bearing in mind that Schmitt was not prepared to theoretically challenge his empirical convictions, his normative project has to be explored where he refines the political, where he frames and conceptualizes conflict. Schmitt's early prescriptive focal point is the state:[26] He seeks the advantages of this specific political unit and is projecting the ideal state that is capable of guaranteeing 'peace, safety, and order'[27] within its territory. But because the state is but a certain way of regulating human relationships, is but a concrete group of people, Schmitt has to find the *demos* which constitutes the state: the *Volk*. Already in one of his first works on political philosophy, *Der Wert des Staates und die Bedeutung des Einzelnen* ('The Value of the State and the Significance of the Individual')[28], Schmitt had laid the foundation for rejecting the focus on the individual and for rather opting for a broader group-based prism.[29] In his opinion, the political unit[30] is superior to the individual: The empirical individual is neither able to protect himself or herself nor his or her rights or freedom without or even against a political unit. Rather, the individual owes his or her individuality to the law that is created and realized by a political community.

The foregoing does not, however, provide an answer for why Schmitt concentrated on the state and *Volk*, why he was not indifferent as to the form and constituting demos of the political community. Certainly, the first response is that

---

[23] For a review of the sources of Schmitt's conviction in political theology, see Palaver, *Die mythischen Quellen des Politischen*, *supra* note 20, at 16.

[24] See Kennedy, 'Hostis not Inimicus', *supra* note 17, at 42.

[25] See Benedetto Fontana, 'Notes on Carl Schmitt and Marxism', 21 *Cardozo Law Review* (2000) 1515 at 1519.

[26] Schmitt equates pre-state conditions with a condition of insecurity. Cf. Carl Schmitt, *Der Leviathan in der Staatslehre des Thomas Hobbes* (Hanseatische Verl.-Anst.: Hamburg, 1938) at 69.

[27] See Schmitt, *Der Begriff des Politischen*, *supra* note 2, at 10.

[28] See Carl Schmitt, *Der Wert des Staates und die Bedeutung des Einzelnen* (2nd edn, Duncker & Humblot: Berlin, 2004).

[29] A second possible explanation for Schmitt's focus on the group might be that Schmitt wanted to circumvent a problem of the individual centred approach of Thomas Hobbes. Hobbes rested his theory on the protection of the individual. This led to the problem, why the state, the protective body, was allowed to obligate the individual to sacrifice itself for the sake of protection.

[30] In *Der Wert des Staates und die Bedeutung des Einzelnen* Schmitt generally focuses on the state.

he was 'an occasional nationalist.'[31] Exploring further reasons we are again confronted with the question of why Schmitt reduced conflicts to politics and cleansed warfare from moral or ethical considerations: Was Schmitt focused on limiting or unlimiting war? *Der Begriff des Politischen* gives several, albeit minor, hints that Schmitt considered the Westphalian state system capable of mitigating a scenario characterized by immutable enmity. Schmitt's grand opening of *Der Begriff des Politischen*, 'the concept of the state presupposes the concept of the political,' eventually equates a distinct role of the state with a solely politicized understanding of conflict. For Schmitt, only the state ensures that antagonism remains in the public sphere so that war is not continued on non-political, for instance social or economical, realms. The state thus guarantees that an enemy is '*hostis, not inimicus*,'[32] since 'one does not have to hate the political enemy in a personal way.'[33] The constraining power of the state might also drive Schmitt's warning that once the state loses its unchallenged authority to wage war against a declared enemy, the political will reappear as civil war:[34] Whilst the state-system offers a framework to regulate the political, civil war does not know any inherent limits and the political can lash out untrammelled by any constraints. To a certain extent, this analysis disentangles the first-glance paradox that Schmitt dreads civil war whilst cherishing inter-state war. Although the state cannot transcend, let alone challenge, the existence of a mortal conflict, it can provide for de-escalation. Accordingly, Schmitt's rejection of Communism[35] is eventually rooted in its inherent lack of any protective limitations. Rather, by employing the idea of the class struggle, Communism re-introduces the political into the domestic realm and thus destroys the civilizing function of the state.

Some thirty years after the initial publication of *Der Begriff des Politischen*, Schmitt explicitly linked this piece to his international relations theory, namely to the advantages of the Westphalian world order.[36] Again, however, the original text only implies that the allocation of an enemy as an internal affair and the inter-national plane are mutually intertwined. In Schmitt's opinion, a community that discards the friend-enemy criterion cannot be called a state; rather, a people rejecting the political

---

[31] See Jan Müller, 'Carl Schmitt – An Occasional Nationalist?', 23 *History of European Ideas* (1997) 19 at 19.

[32] See Schmitt, *Der Begriff des Politschen*, *supra* note 2, at 29.

[33] (Den Feind im politischen Sinne braucht man nicht persönlich zu hassen). *Ibid.*

[34] See Kennedy, 'Hostis not Inimicus', *supra* note 17, at 44.

[35] Cf. Stephan Holmes, *The Anatomy of Anti-Liberalism* (Harvard University Press: Cambridge, 1993) at 41-43.

[36] Cf. the foreword to the 1963 edition of *Der Begriff des Politischen*.

is doomed to perish[37] and a state only exists if its *demos* is united[38] by a common enemy.[39] This enemy, then, generates domestic solidarity with the state; it conjures the internal cohesion, which is primordial for a state to radiate legitimacy and authority. From this point of view, external[40] enmity is integral for upholding a functioning state, i.e. a concept that inhibits the political from appearing as civil war. To use Schmitt's words: the 'political world is a pluriverse, not a universe. Insofar, every state theory is pluralistic […].'[41] It follows that the state assumes national homogeneity through international heterogeneity. Schmitt rests his state theory on two distinct levels: to ensure the absence of the political domestically, i.e. to prevent civil war, the political has to be possible on the inter-state realm. This approach is illustrated by Schmitt's interpretation of the 1928 Kellogg-Briand Pact:

> Ein politisch existierendes Volk kann also nicht darauf verzichten, gegebenenfalls Freund und Feind durch eigene Bestimmung auf eigene Gefahr zu unterscheiden. Es kann feierlich die Erklärung abgeben, daß es den Krieg als Mittel für die Lösung internationaler Streitfälle verdammt und auf ihn »als Werkzeug nationaler Politik« verzichtet, wie das im sogenannten Kellogg-Pakt 1928 geschehen ist. *Damit hat es weder auf den Krieg als Werkzeug internationaler Politik verzichtet* (und ein der internationalen Politik dienender Krieg kann schlimmer sein als der Krieg, der nur einer nationalen Politik dient), *noch den Krieg überhaupt »verdammt« oder »geächtet«.*[42]

---

[37] See Schmitt, *Der Begriff des Politischen*, *supra* note 2, at 54.

[38] The German word *Einheit* translates as 'unit' and 'unity'.

[39] In his 1932 *Legalität und Legitimität* ('Legality and Legitimacy'), Schmitt clarifies his opening sentence of the concept of the political ('The concept of the state presupposes the concept of the political'): 'In Zeiten stabiler Rechtsanschauungen und konsolidierten Besitzes wird der Jurisdiktionsstaat vorherrschen …. Von einem "Staat" könnte man übrigens in einem solchen Gemeinwesen kaum noch sprechen, weil an die Stelle einer politischen Einheit eine bloße, wenigstens der Fiktion nach unpolitische, Rechtsgemeinschaft getreten wäre.' 'In times of stable jurisprudence and of consolidated property relationships, a jurisprudential state will prevail …. By the way, one could hardly describe such a community as a "state", because a political unit would have been replaced by a legal community that is, at least in fiction, apolitical.' (Author's translation). See Carl Schmitt, *Legalität und Legitimität* (Duncker & Humblot: Berlin, 1932) at 10-11.

[40] Carl Schmitt saw the possibility to find an internal enemy, too. However, the civilizing thrust of his state focus could only work on the inter-state plane, so that Schmitt's primary concern was the external 'other'.

[41] (Die politische Welt ist ein Pluriversum, kein Universum. Insofern ist jede Staatstheorie pluralistisch ...). See Schmitt, *Der Begriff des Politischen*, *supra* note 2, at 54.

[42] 'A people that exists in a political sense cannot abstain from, if necessary, making its own distinction between friend and enemy at its own risk. It can declare solemnly that it desists from war as a way of solving international disputes and that it gives up war as an instrument of national politics, like it has happened in the so called 1928 Kellogg Pact. With such a declaration it neither dispenses with war as an instrument of international politics (and war that serves international politics might be worse than

Schmitt's understanding of the Kellogg-Briand Pact blatantly contradicts the outlawry of war that was (and still is) commonly associated with this international treaty. Since international enemies ensure internal unity and homogeneity, and thus are crucial for the composure of the state, Schmitt wasn't prepared to acknowledge a ban of international war – after all, doing so would have made impossible the very statist approach that he was still following in his Weimar work. As we will see later, Schmitt's *Großraum* concept eventually challenged the traditional Westphalian idea of the state – but quite strikingly, Schmitt was only prepared to conceptualize the *Großraum* after he had recognized changes in the concept of armed conflict after the First World War.

The initial question of *Der Begriff des Politischen* was whether Schmitt intended to distinguish politics from morality, aesthetics and economics in order to limit or unlimit war. Finding a solution to this puzzle, solved to the latter by internationally reputed Robert Howse, has to be linked to other facets of *Der Begriff des Politischen*. First, we saw that Schmitt held the factual conviction that enmity would always be immutable. Second, *Der Begriff des Politischen* indicates that domestic homogeneity and the possibility of inter-state conflict are interrelated. Several passages imply that Schmitt saw transferring war from the domestic to the international plane as an instrument to tame the political by reducing the chance for civil war. Finally, *Der Begriff des Politischen* contains several brief arguments against the introduction of non-political motivations into conflicts. Rather cryptically, Schmitt suggests that moral considerations only aggravate wars; that they lead to utmost inhumane conflicts. In this respect, Schmitt's appreciation of the state system might well be read as mitigating the political – only the state can ensure that wars remain in a strictly public, not private, sphere.

All these facets and possible interpretations of *Der Begriff des Politischen* reveal a further dilemma: assuming that the state is capable of mitigating the political and assuming that internal allegiance to the state is assured by transferring the political from the domestic to the international plane (i.e. that a condition of domestic order rests on international anarchy), what prevents international conflicts from total escalation? *Der Begriff des Politischen* does not provide any answer to this dilemma – as a matter of fact, Schmitt even seems to hold dear extreme conditions of international antagonism.[43] All the various levels of the supposed restraining

war that merely serves national politics) nor does it condemn or outlaw war as such.' (Author's translation). See Schmitt, *Der Begriff des Politischen*, *supra* note 2, at 51. (Emphasis added).

[43] 'Die Höhepunkte der großen Politik sind zugleich die Augenblicke, in denen der Feind in konkreter Deutlichkeit als Feind erblickt wird.' 'At the same time, those moments where the enemy is actually and in concrete perspicuity recognized as the enemy represent the culmination of high politics.' (Author's translation). See Schmitt, *Begriff des Politischen*, *supra* note 2, at 67.

influence of the state seem to be inherently flawed. A systemic framework that constrains the outbreak of unchecked civil war whilst allowing ever increasing and aggravating inter-state conflicts does not refine the political – rather, Howse's evaluation seems eventually correct: The state system and the sole focus on political considerations in times of war would lead to unlimited conflicts; Schmitt's summary of the *cogito ergo sum* of the state: *protego ergo obligo*[44], would be meaningless.

By way of a preliminary conclusion, *Der Begriff des Politischen* still raises the questions of whether Schmitt intended to erect constraints for war and conflict and whether this central Weimar piece aimed at refining and taming the immutability of enmity. In *Der Begriff des Politischen*, Schmitt's suggestion that (re)introduction of morality into conflicts would lead to atrocious consequences remains superficial and requires an in-depth analysis. After all, moral considerations are rather thought to limit warfare, instead of aggravating its effects. Further, although Schmitt indicates the importance of the international plane to bolster the domestic state system, their exact relationship remains unexplored. The German constitutional lawyer entertains, even seems to welcome, an unconstrained intensification of international antagonism. Hence, his state system might de-escalate internally, but it does not provide safeguards against the total escalation of international war. Therefore, *Der Begriff des Politischen* seems to hold unfinished and under-examined thoughts. As I will argue in Part II of the paper, Schmitt's foundational pieces on international law theory not only come back to the puzzles and dilemmas raised in *Der Begriff des Politischen* – his international work contains the answers.

## Schmitt's Theory of Democracy and its Inherent Nihilism

We can yet find an additional dilemma which permeates an integral part of Schmitt's Weimar theory and which will only find a solution in his international writings: his theory of democracy. Again, Howse's critique paves our way – according to him, Schmitt's 'romantic ideal of the nation, i.e. the dignity of a people and its way of life, … turns out to be of secondary and derivative importance.'[45] As Böckenförde aptly demonstrates, *Der Begriff des Politischen* and *Verfassungslehre*, which contains crucial reflections about the nature of democracy, share several common grounds and are systematically coherent.[46] Going a small step further, I suggest that both pieces were aimed at overcoming the legitimacy crisis of the Weimar state. In the following section, I will demonstrate that Schmitt's theory of democracy eventually proved incapable of legitimizing the state apparatus and of justifying its encompassing

[44] *Ibid.*, at 51.

[45] See Howse, 'From Legitimacy to Dictatorship', *supra* note 3, at 92.

[46] Cf. Ernst-Wolfgang Böckenförde, 'The Concept of the Political: A Key to Understanding Carl Schmitt's Constitutional Theory', 10 *Canadian Journal of Law and Jurisprudence* (1997)5 at 5 *et seq.*

influence on the citizens. Somewhat parallel to *Der Begriff des Politischen*, Schmitt sought domestic homogeneity in order to foster allegiance to the state. The substance of this homogeneity was to be erected by a democratic national identity. This substance, nevertheless, turns out to be linked to a mere myth (be it a strong *Reichspräsident* or, later, the *Führer).* Like his antagonist Kelsen, Schmitt was caught in a *cul-de-sac*, incapable of providing more than mere hypothetical foundations for a legitimate state.

In order to present Schmitt's theory of democracy as aimed at legitimizing an increasingly challenged state, I will first examine the genesis of Schmitt's acceptance of democracy, before considering his views on the origins and on the concrete manifestation of democratic statehood. After having established that Schmitt sought to reinvent a strong state under changed paradigms, namely the empowerment of the masses, I will turn to the conceptual problems of his democratic views. I will consider Schmitt's inability to formulate absolute criteria about what constitutes national democratic homogeneity. Then, I will refer to Schmitt's pessimistic approach to modernity in order to show the inherent nihilism of his democratic concepts.

Again, in order to realize Schmitt's normative goals, we have to understand the factual determinations that underlie his theory of democracy. Since the ideal of democracy is the self-rule of a people, we have to explore how and why a conservative thinker like Schmitt – who was raised in the Wilhelmian era only to see the overthrow of *Kaiser Wilhelm II* and his replacement by a *bürgerlicher Rechtsstaat* – could accept the sudden empowerment of the masses.

As a starting point, his 1922 *Politische Theologie* indicates that Schmitt, then, had not yet accepted that the legitimacy of the state rested on the integration of the people. Rather, Schmitt adopts an authoritarian, dictatorial approach to his theory of a functioning and unchallenged state. In *Politische Theologie*, Schmitt examines the concept of sovereignty and concludes: 'Sovereign is the one who decides on the state of exception.'[47] This slogan serves Schmitt to enunciate his theory of hard decisionism: Schmitt cherishes the dictator who is free to decide that the normal situation has ended and that a state of emergency has occurred. In this crisis (in Schmitt's terminology: the exception) the dictator is unbound by any normative limitations; untrammelled by law, the dictator has become absolute.[48] Schmitt's reasoning challenges rule-based legal thinking and constitutional provisions regulating emergency powers – for Schmitt, this is a futile attempt: 'The precise

[47] See Carl Schmitt, *Politische Theologie* (Dunker & Humblot: Munich, 1922) at 9.

[48] Cf. Giacomo Marramao, 'Schmitt and the Categories of the Political: The Exile of the Nomos: For a Critical Profile of Carl Schmitt', 21 *Cardozo Law Review* (2000) 1567 at 1576-1577.

details of an emergency cannot be anticipated, nor can one spell out what may take place in such a case, especially when it is truly a matter of an extreme emergency and of how it is to be eliminated.'[49] By asserting that the exception is more interesting than the normal case, by stating that while the latter proves nothing, the former proves everything,[50] Schmitt indicates that his thrust goes to instigating a permanent exception[51] - this might well have been his evaluation of the chaotic first years of the Weimar republic. Schmitt reduces 'the state to the moment of decision, to a pure decision not based on reason and discussion and not justifying itself, that is, to an absolute decision created out of nothingness.'[52] By calling for the indefinite, unrestrained and absolute reign of a dictator and by drawing on theorists like de Maistre and Donoso Cortés to develop his theory, Schmitt reveals that only actions taken by a dictatorial regime[53] can overcome the authority crisis of the state. Therefore, in *Politische Theologie,* Schmitt is part of the conservative counter-revolutionary camp. The state is validated through the decision of a strong leader, who provides the substance that justifies the state's influence and authority. We see, however, that, as a primordial theme, *Politische Theologie* responds to the legitimacy crisis of the early Weimar state.

The disintegration of the state also proved crucial in Schmitt's later writings, although he was soon to abandon[54] the dictatorial approach of *Politische Theologie*. In his 1923 article, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*[55] ("The

---

[49] See Oren Gross, 'Exception and Emergency Powers: The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy', 21 *Cardozo Law Review* (2000) 1825 at 1844. Cf. Schmitt, *Politische Theologie*, *supra* note 47, at 9-10.

[50] Cf. Marramao, 'Schmitt and the Categories of the Political', *supra* note 48, at 1574.

[51] For a more detailed overview, see Gross, 'Exception and Emergency Powers', *supra* note 49, at 1825 *et seq*. Gross presents the sound argument that Schmitt developed a hard decisionist theory in Politische Theologie. What Gross fails to take into account, however, is that the unrestrained dictatorship, as promoted by Carl Schmitt in Politische Theologie, was to re-establish order and stability. Gross is wrong when stating 'there is no substantive content against which legitimacy of such actions [sovereign decisions] can be measured'. What Gross really seems to be saying, and in this I share his critique, is that Schmitt didn't construe any procedural restraints on the absolute dictator. As a matter of fact, Schmitt later saw this flaw himself and moved to an institutional legal thinking, or as Schmitt put it: 'concrete order thinking'.

[52] Cf. Renato Cristi, 'Carl Schmitt on Liberalism, Democracy and Catholicism', 14 *History of Political Thought* (1993) 281 at 293-294.

[53] Schmitt distinguishes the 'sovereign dictator' and the 'commissarial dictator' in *Die Diktatur* (Duncker & Humblot: Munich, 1921). The sovereign dictator establishes a *nouveau régime*, whereas the commissarial dictator defends the *ancien régime* and, by fending off the threat to the pre-existing system, makes himself superfluous. In *Politische Theologie* it seems as if a commissarial dictator isn't enough to overcome the legitimacy crisis that Schmitt thought to see in the surrounding world.

[54] See generally, Balakrishnan, *The Enemy*, *supra* note 1, at 67.

[55] See Carl Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (8th edn, Duncker & Humblot: Berlin, 1996).

Intellectual-Historical Condition of Contemporary Parliamentarism[56]'), Schmitt explicitly sides with the democratic camp, although he wants to (drastically) reform parliamentary rule. Being a political realist, Schmitt had determined that the legitimate state could no longer be based on a monarch's divine right, nor on tradition, but it had to accommodate the empowerment of the masses. The legitimacy of the state thus rested on the incorporation of the *Volk*. Substance as national identity, then, was a necessary precondition to reinvent the state's authority. However, *Politische Theologie* shows Schmitt's deep suspicion about the maturity of the masses. Because of its unpredictability, the masses represent an element of instability and disorder that had to be tamed.[57] From what has been said, Schmitt's theory of democracy had to reconcile two contradicting, paradoxical convictions: The masses are both, the foundation and the possible destruction of the state. Unlike elitist theorists, who only saw a 'mob' driven by primal instincts, Schmitt had to transfer and convert the masses into the *Volk*, into the public.[58]

Schmitt conceptualized this transferral in his 1928 *Verfassungslehre*, although its paradoxical nature might obfuscate that Schmitt theorized democracy to counter the collapse of the Weimar state. *Verfassungslehre* promotes radical, Rousseauist democratic ideals, only to abandon them in the concrete suggestions for a democratic constitutional order. Untangling the tensions between Schmitt's theoretical outlook and his practical constitutional proposals, I suggest that Schmitt's ideas about the latter again signal that democracy was but a way to transcend a chaotic and unstable social environment and to reinvent a strong and orderly state. In *Verfassungslehre*, Schmitt develops the core of his theory of democracy around a deconstruction of the French revolution. In his typical polemical style, Schmitt sees two antithetical traditions in the Weimar Constitution: the liberal tradition of the *bürgerlicher Rechtsstaat* that raises limitations to the state's power, and a truly democratic tradition linked to the theorist of the French Revolution, Emmanuel Sieyès.[59] Schmitt unequivocally sides with the latter tradition. The French Revolution presents, for Schmitt, the most basic principles of

[56] As to this translation cf. Balakrishnan, *The Enemy, supra* note 1, at 278.

[57] He shared this view with 19th century liberals. See Benedetto Fontana, 'Notes on Carl Schmitt', *supra* note 25, at 1518.

[58] For a concept of the public and Schmitt's difference from elitist theories, see Kennedy, 'Hostis not Inimicus', *supra* note 17, at 46-47.

[59] Jeffrey Seitzer, and William E. Scheuerman have independently illustrated that Schmitt presents, at best, a partial and one-sided interpretation of Sieyès. See Jeffrey Seitzer, 'Carl Schmitt's Internal Critique of Liberal Constitutionalism: Verfassungslehre as a Response to the Weimar State Crisis', *10 Canadian Journal of Law and Jurisprudence* (1997) 203 at 203 *et seq*. and William E. Scheuerman, 'Revolutions and Constitutions: Hannah Arendt's Challenge to Carl Schmitt', *10 Canadian Journal of Law and Jurisprudence (*1997) 141 at 141 *et seq*.

democracy because it mirrors the first moment of the constitution: the founding moment.[60] In this very moment, the French nation used its *pouvoir constituant* to originate a new way of being, a new constitution that has to be distinguished from constitutional laws. In Schmitt's account, the French people discovered that the true democratic sovereign is the indivisible (in Schmitt words: homogeneous) nation. The nation's constituent power (and here Schmitt draws on an absolutist interpretation of Jean Bodin's[61] theory of sovereignty) is free from restraints; it is absolute, 'originary and groundless.'[62] The constitution arising from the omnipotent decision of the sovereign nation demonstrates that this nation pre-existed the state. Hence, this constitution is superior to the state and to the legal institutions – among them constitutional law – attempting to enshrine the way of being willed in the founding moment. The term constitution, Schmitt argues, doesn't represent the (written) foundational law of a new political community, but distils the way of being of an already existing one.[63] From his reading of the French Revolution Schmitt deduces that democracy presupposes an inseparable, unified nation;[64] this homogeneity, for Schmitt, is distorted by a liberal focus on individual rights and privileges. Further, the only viable form of democratic government is the identity of the ruler and the ruled, so that parliamentary representation[65] and its struggle of interest groups are outdated.[66]

At first glance, Schmitt's 'devotion' to democratic ideals seems radical. However, In the light of an examination of Schmitt's concrete ideas about democratic government and statehood, he (somewhat expectedly) turns out not to be interested in a permanent revolution, but only in a constitutional order informed by the empowerment of the masses.[67] Holmes once attacked these definite ideas

---

[60] Andreas Kalyvas rightly points to the various stages of democracy. See Andreas Kalyvas, 'Schmitt and the Categories of the Political: Carl Schmitt and the Three Moments of Democracy', 21 *Cardozo Law Review* (2000) 1525 at 1525 *et seq.*

[61] Again, Schmitt only presents a limited reading of Jean Bodin, who was far from establishing an absolute and unrestricted prince and rather limited the sovereign prince by natural law. Cf. Jean Bodin, *Six Livres de la Republique* (Du Puys: Paris, 1577), Book 1, chapter 8.

[62] See Kalyvas, 'Schmitt and the Categories of the Political', *supra* note 60, at 1535.

[63] See generally, Balakrishnan, *The Enemy*, *supra* note 1, at 91.

[64] According to Schmitt 'democracy requires, therefore, first homogeneity and second – if the need arises – elimination or eradication of heterogeneity.' (Reported by Müller, 'An Occasional Nationalist?', *supra* note 31, at 23).

[65] Schmitt shares this view openly with Rousseau.

[66] Cf. Marci A. Hamilton, 'Discussion and Discourse: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation', 69 *New York University Law Review* (1994) 477 at 487.

[67] For Schmitt, as Kalyvas correctly contends, 'the sovereign [i.e. the Volk] is also the one who "creates" the normal situation.' (Kalyvas, 'Schmitt and the Categories of the Political', *supra* note 60, at 1549). Schmitt's seeing the sovereign as the creator of peace is also apparent in his 1938 *Leviathan*, where he approves that Thomas Hobbes' 'Souverän ist nicht *Defensor Pacis* eines auf Gott

about democracy as 'perverse' and classified them as a 'soccer-stadium democracy.'[68] Basically, Schmitt aims at installing a strong leader, the *Reichspräsident*, who represents and upholds the unity of the *Volk* by articulating the *volonté générale*.[69] Being the guardian of the constitution (i.e. of the way of being of the German *Volk*), the *Reichspräsident* and his decisions make 'an invisible being publicly visible'[70]; his decisions radiate the substance that – allegedly – inheres in the *pouvoir constituant*. The state is re-legitimized by a leader hypostatizing a nation's identity through his actions. For this task, Schmitt conceptualizes Caesarism.[71] Whilst the government is openly and vitally elected, the actual influence of the Volk is reduced to mere acclamation. There is no discourse, no rational consideration, and only irrational masses cheering or booing.[72]

Schmitt's initial commitment to democracy is almost diametrically opposed to the concrete projects to shape a constitutional order. For instance, Hamilton maintains, 'Schmitt's embrace of dictatorship oversteps the problems he identifies. His democratically elected dictator is just as vulnerable as the parliamentarian to the ideal of self-rule because self-rule delegitimizes representation at any level.'[73] Schmitt's existentialist pathos and his admiration for the raw power of the *pouvoir constituant* are radically tamed – the omnipotent sovereign only resonates in yes-no decisions. The ideal of unlimited self-rule, the basis of Schmitt's theory of

zurückgehenden Friedens; er ist Schöpfer eines nichts als irdischen Friedens, *Creator Pacis*.' Thomas Hobbes' 'sovereign is not the *Defensor Pacis* of peace that relates back to god; he is the creator of no more than earthly peace, *Creator Pacis*.' (Author's translation). See Schmitt, *Leviathan*, *supra* note 26, at 50 (original italics).

[68] See Stephen Holmes, *The Anatomy of Antiliberalism*, *supra* note 35, at 49.

[69] With open approval, Carl Schmitt describes Thomas Hobbes' rector: 'Die souverän-repräsentative Person ist unverhältnismäßig mehr, als die summierte Kraft aller beteiligten Einzelwillen bewirken könnte.' 'The sovereign and representative person is disproportionately more than the added up power of all participating individual wills could bring about.' (Author's translation). See Schmitt, *Leviathan*, *supra* note 26, at 52.

[70] See Müller, 'An Occasional Nationalist?', *supra* note 31, at 25.

[71] *Ibid*., at 26.

[72] 'Das Volk kann nur Ja oder Nein sagen; es nicht beraten, deliberieren oder diskutieren; es kann nicht regieren and nicht verwalten; es kann auch nicht normieren, sondern nur einen ihm vorgelegten Normierungsentwurf durch sein Ja sanktionieren. Es kann vor allem auch keine Frage stellen, sondern nur eine ihm vorgelegte Frage mit Ja oder Nein beantworten.' 'A people can only say yea or nay; it cannot consult, deliberate or discuss; it can neither reign nor administer; it cannot legislate, but is only capable of sanctioning a submitted legislative bill with its yea. Above all, it cannot raise questions, but is only able to answer a submitted question with yea or nay.' (Author's translation). See Schmitt, *Legalität und Legitimität*, *supra* note 39, at 93.

[73] See Hamilton, 'Discussion and Discourse', *supra* note 66, at 490.

democracy, is degenerated to a publicly enthroned leader.[74] In my opinion, Schmitt did not construe a blatantly inconsistent system; rather, returning to the factual determinations that shaped Schmitt's thinking about the masses, his theory of democracy tried to maneuver between conceiving the masses as the only source of legitimacy and, at the same time, as signaling decline and decay. Schmitt's authoritarian solution to this difficulty reveals that his ideal of democracy is, to a large extent, a function to surpass the legitimacy crisis of the Weimar state. In this respect, Howse's interpretation is correct and democracy is only of derivative importance.

Similarly, the secondary significance of democracy resonates in Schmitt's indifference as to what unifies the *demos*. What is more, this indifference points to the inherent inability of his theories to thoroughly legitimize the state domestically. Schmitt only postulates that the identity of the *Volk* is crucial to ensure substantive equality and homogeneity in order to accommodate the democratic empowerment of the masses. However, Schmitt cannot advance absolute criteria that design the substance that he eventually needs to legitimize the state. In an early, yet selective[75] flirt with Mussolini's fascism, Schmitt proposes a nationalist identity. In Schmitt's opinion, the images of nationalism create stout bonds; bonds that are, for instance, stronger than Georg Sorel's Communist appeal to the general strike. Schmitt notes that even Lenin was aware of this and, accordingly, mobilized his followers by a national ideology. But by favoring Sieyes' term 'nation' over *Volk* ('a term which merely identifies a somehow ethically or culturally connected group of people that not necessarily exist in a political sense'[76]) Schmitt denotes that his quest for democratic legitimacy is relative and lacks objectivity. Eventually, Schmitt acknowledged that all nations show distinct concepts of, and individual criteria for nationality.[77]

Going even a step further, Schmitt degraded democratic substance to a fiction, to but a decision of a leader filling a cultural nothingness. Eventually building democracy on a volatile myth, on a spectre, Schmitt's theories failed to stop the domestic disintegration of the state. Rooted in his cultural perspective on modernity – on the *Zeitgeist* – published in the article *Das Zeitalter der Neutralisierungen und*

---

[74] Cristi uses the terms 'democratically elected sheriff'. In my opinion, the term sheriff is sensible, but I cannot see how an open and vital acclamation of this sheriff is to be considered 'democratic'. See Cristi, 'Liberalism, Democracy and Catholicism', *supra* note 52, at 285.

[75] See generally Balakrishnan, *The Enemy*, *supra* note 1, at 122.

[76] (... *nur* eine *irgendwie* ethnisch oder kulturell zusammengehörige, aber nicht notwendig politisch existierende Verbindung von Menschen ...). See Carl Schmitt, *Verfassungslehre* (8th edn, Duncker & Humblot: Berlin, 1993), at 79. (Emphasis added).

[77] See Carl Schmitt, *Das Zeitalter der Neutralisierungen und Entpolitisierungen*, at 84, reprinted in Schmitt, *Der Begriff des Politischen, supra* note 2, at 79 *et seq*.

*Entpolitisierungen* ('The Age of Neutralizations and Depoliticizations'), Schmitt advances that the contemporaneous religious faith in technological progress is only the last step in a passage from theology, to metaphysics, to humanitarian morality and then to economics. Each of these steps were taken by the European nations[78] to find neutral territory where groups could interact safely, but each attempt to outrun the political failed and the neutral terrain became the new battle ground.

> Auf dem neuen, zunächst für neutral gehaltenen Felde entfaltet sich sofort mit neuer Intensität der Gegensatz der Menschen und Interessen, und zwar um so stärker, je fester man das neue Sachgebiet in Besitz nimmt. Immer wandert die europäische Menschheit aus einem Kampfgebiet in neutrales Gebiet, immer wird das neu gewonnene neutrale Gebiet sofort wieder Kampfgebiet und wird es notwendig, neue neutrale Sphären zu suchen. Auch die Naturwissenschaftlichkeit konnte den Frieden nicht herbeiführen. Aus den Religionskriegen wurden die halb noch kulturell, halb bereits ökonomisch determinierten Nationalkriege des 19. Jahrhunderts und schließlich einfach Wirtschaftskriege.[79]

Again, the immutability of conflict surmounts Schmitt's thinking. Therefore, he judged believing in technocracy dull and dangerous – for what was thought to be the final neutral ground, a sphere of peace and reconciliation[80] and the ultimate flight from the political,[81] is nothing but spiritually void,[82] i.e. nothing but culturally blind.[83] Technocracy doesn't challenge the political, nor does it provide identity – it merely awaits to be used to either aggravate war or to improve peace.[84] Schmitt is calling for politics to usurp technocracy and fill it with substance so as to define new friend-enemy groupings. Nevertheless, since technocracy cannot inherently give any

---

[78] (Europäische Menschheit). *Ibid.*

[79] 'It is on this new terrain, terrain that was initially deemed neutral, where human differences and antipodal interests evolve immediately and with new ferocity – in fact, the more intensively the more thoroughly the new field of reference is occupied. The European nations always wander from a field of battle into neutral territory, the newly won neutral territory always and instantly turns into a new battleground and it becomes necessary to seek new neutral spheres. Natural sciences were also not capable of providing peace. The religious wars turned into 19th century national wars, which were still culturally determined to one half and yet already economically determined to the other half, and finally simply into economic wars.' (Author's translation). *Ibid.*

[80] *Ibid.*, at 90.

[81] (Absolute Entpolitisierung). *Ibid.,* at 94

[82] *Ibid.,* at 92.

[83] *Ibid.,* at 91.

[84] *Ibid.,* at 94.

guidance, domestic friendship – homogeneity – cannot be conjured by more than a myth.[85]

Schmitt's theory of democracy is characterized by an innately nihilistic attempt to create democratic identity. This identity had to create internal cohesion, which in turn was vital for legitimizing the state apparatus. The questioning of Schmitt's normative agenda for seeking a solution to the legitimacy crisis of the Weimar state brings us back to the puzzles of *Der Begriff des Politischen*: Schmitt's support for a strong and unchallenged state might eventually be rooted in the assumption that the state system proves capable of restraining the political, of limiting immutable enmity. However, from this point of view, Schmitt's theory of democracy seems flawed, contradictory and counterproductive: The mythical basis of democracy cannot provide real or true legitimacy. Rather, Schmitt's democratic state is founded on mere hypothetical authority. The democratic myth could not only be exchanged, thus challenging continuity; the myth could also be exposed, the exposure possibly bringing about a crisis. Therefore, Schmitt's theory of democracy not only proves incapable of really legitimizing the state; Schmitt rested his state on potential sparks of instability and discontinuity.

## Part II: Schmitt's Foundational Works on International Law & International Relations

The following Part II presents Schmitt's foundational works on international law and international relations. The main questions will be to what extent these works take issue and advance and to what extent they break with the dilemmas and questions that underlie *Der Begriff des Politischen* and Schmitt's theory of democracy. As we saw in Part I, Schmitt's normative agenda for freeing war from non-political concerns can be interpreted in almost antagonistic ways – either as limiting or as unlimiting the actions taken in times of mortal conflicts. Even when choosing the first interpretation, i.e. understanding Schmitt as constraining and refining a friend-enemy contrast, Schmitt's focus on the state seems ambiguous. First of all, his attempt to legitimize the state, which had to cope with the empowerment of the masses, rested on a myth and proved only capable of providing the state with hypothetical authority. Secondly, whilst Schmitt's Weimar political theory transferred the political to the international realm, this theory did not entail any

[85] This nihilistic logic certainly was one of the reasons for Schmitt to join the Nazis. For with the myth of the *Reichspräsident* Hindenburg failing (Schmitt noted in his diary: 'The Hindenburg myth is at an end. … Papen or Hitler is coming. The Old Man [Hindenburg] has finally gone mad.' Reported by Balakrishnan, *The Enemy*, *supra* note 1, at 175) Schmitt took refuge in the next myth: the racism promoted by Adolf Hitler, whom Schmitt perceived as a mythical figure. Reported by Balakrishnan, *The Enemy*, *supra* note 1, at 180.

concepts to deescalate the political on the inter-state plane. Therefore, internally as well as externally, his Weimar writings eventually failed to conceptualize a refinement of the political – his theory of democracy did not erect any strong safeguards against civil war, i.e. conflicts lacking any inherent constraints, and nor did his concept of the political erect any safeguards against the total intensification of international war.

As I will submit in the following section, Schmitt used his foundational writings on international law to rethink the ambiguities and puzzles of his Weimar period. As we will see in *Der Nomos der Erde*, Schmitt came up with an alternative source of legitimacy, which replaced his theory of democracy as the primary basis for the authority of the state. *Der Nomos der Erde* also introduces a concept that foreclosed the indefinite escalation of international antagonism. And finally, *Die Wendung zum diskriminierenden Kriegsbegriff* ('The Turn towards a concept of discriminating war') and *Der Nomos der Erde* elaborate extensively on the thesis that only cleansing warfare from moral considerations sets boundaries to military conflicts. All these facets of Schmitt's foundational international writings substantiate that his turn to the international arena must not be conceptualized as a break in his academic life or as a mere tactical maneuver. To the contrary, Schmitt's comments on the international realm should rather be perceived as amending, completing, and developing his Weimar work on domestic issues.

## Factual Convictions: The Death of the Leviathan and the Rise of a Discriminating Concept of War

To appreciate Schmitt's conceptual steps in international law and international relations, we first need to delve into the factual assessments that built the foundations of Schmitt's international theories. In his Weimar time, Schmitt's core criterion was the state. However, Schmitt's conception of the state was highly anachronistic, as he still operated with the 19th century elevation of the state over society and economy. The irrationality of mass democracy, societies torn apart by antagonized and diametrically opposed ideologies, technology allegedly offering a prosperous, utopian future, and politics understood as the struggle of parties and interest groups, all questioned Schmitt's understanding of the strong and unchallenged state

Under the impression of the Third Reich, a political regime that rejected the idea of the state and rather focused on the idea of empire and *Bewegung* ('movement'), Schmitt came to the conclusion that the whole European post-Westphalian system of statehood was doomed. Schmitt used his 1938 *Leviathan* to reconstruct the events leading to this conclusion. Schmitt's *Leviathan* is an

idiosyncratic description of Hobbes's original Leviathan and of the Hobbesian state that characterized, in Schmitt's opinion, the European state system since the Westphalian 'revolution' of sovereignty.[86] Somewhat romanticizing, Schmitt renders homage to the grand merits of the Hobbesian sovereign and the unchallenged state that constituted the Eurocentric world order. Schmitt maintains that the Leviathan, i.e. a state concept that was thought to provide internal depoliticization in the troubled times of the Thirty Years' War, was construed by Hobbes as a *magnus homo*, a godlike sovereign person.[87] By inverting '*veritas, non auctoritas facit legem*' and by focusing on the *summa potestas* of the prince instead of intrinsic justice or spiritual logic, Hobbes built, according to Schmitt, a value-neutral system. This system detached metaphysical truth from mere commands and inaugurated a procedural, technical theory of commands.[88] In the 18th century, this original Leviathan was hollowed out, and eventually brought down, by liberals, especially Jewish liberals like Spinoza, who destroyed the Leviathan from within by employing the private-public distinction that Hobbes recklessly had left in the system.[89] Schmitt goes on by asserting that the Leviathan survived in form of the 19th century state, a state that relied on a well-organized executive branch, army and police, as well as on a functioning bureaucracy.[90] The Leviathan was transformed into the positivistic system of legality; 18th century absolutism was replaced by the 19th century *Rechtsstaat*[91] (or rather *Gesetzesstaat).* This state, however, and here Schmitt returns to his Weimar themes, could not adapt to mass democracy and legality was not prepared for party politics without a *pouvoir neutre.* In Schmitt's narrative, the inability of multi-party politics to provide substance and party pluralism's sole reliance on procedural legality had led to – and Schmitt uses the past tense – the second death

[86] See generally Daniel Philpott, *Revolutions in Sovereignty – How Ideas Shaped Modern International Relations* (Princeton University Press: Princeton, 2001).

[87] See Carl Schmitt, *Leviathan*, *supra* note 26, at 99.

[88] *Ibid.*, at 69. Again, Schmitt's historic reading is questionable and one-sided. Schmitt fails to appreciate Hobbes' conceptual links to natural law thinking and Hobbes' requiring his sovereign to only rule in accordance with the laws of nature.

[89] *Ibid.*, at 99. Schmitt extensively criticizes Hobbes for leaving a small gap, a minor fracture in his otherwise cohesive state theory. Hobbes asserted that miracles were a public matter and that it was for the prince to command the belief in miracles; however, Hobbes conceded that each subject was free to inwardly believe or not believe in this miracle, as long as the subject avowed to the prince's decision in public. What follows this insight is Schmitt's attaching the whole liberal tradition to this distinction between inner faith and outward adherence, between public and private: In Schmitt's narrative, liberal theorists used this minor opening in Hobbes' system to promote the autonomy of society, to invert the hierarchy between the personal sphere and public obedience and to weaken the Leviathan by extracting personal liberties from the all-embracing state.

[90] *Ibid.*

[91] *Ibid.*, at 100.

of Leviathan.[92] In 1938, Schmitt thus prepared a shift away from the state of the Westphalian world order, i.e. from concepts and ideas that dictated his Weimar writings.

In his *Leviathan*, Schmitt leaves the future open – if the state is dead, can it be reinvented? Does Leviathan have a third life? Before presenting Schmitt's answer to these questions, an answer that he would give in 1939, we have to pay attention to another piece that Schmitt published in 1938,[93] i.e. in the very year he presented his *Leviathan*. Whereas *Leviathan* marks the farewell to the European state system from a domestic point of view, in *Die Wendung zum diskriminierenden Kriegsbegriff*[94] Schmitt recognizes the end of the classical, post-Westphalian inter-state system. In *Die Wendung*, Schmitt examines a shift in paradigm in international law, from a non-discriminating concept of war to a discriminating concept of war. In Schmitt's understanding, international law had a broader meaning than today and encompassed large parts of what we would call international relations. Schmitt rejects the legal-political dichotomy, sees it as wrong alternative,[95] and rather calls for 'realistic'[96] international legal scholarship, international law being close to real world problems.[97] Similar to his rejection of legal positivism domestically, he was unwilling to take a positivistic approach towards international law. As Koskenniemi argues, Schmitt marked the end of the great civilizer of nations and rather heralded the realist school of international relations, i.e. a school not believing in the effectiveness of international coordination through law.[98] In Schmitt's thinking, international law and international relations collapse and socio-factual politics and legal theorizing share the same terrain. What is more, sketching a first link to the gloomy perspectives of the Weimar period, Schmitt holds that the core of international law is war and peace, *jus belli ac pacis*. It follows that conceptual shifts within this core are not only shifts in legal paradigms but they rather mark a departure from the traditional world order and point to a novel systemic environment.

---

[92] *Ibid.*, 118.

[93] *Die Wendung zum diskriminierenden Kriegsbegriff* was finished in autumn 1937.

[94] See Carl Schmitt, *Die Wendung zum diskriminierenden Kriegsbegriff* (2nd edn, Duncker & Humblot: Berlin, 1988).

[95] See Carl Schmitt, *Völkerrechtliche Großraumordnung mit Interventionsverbot im Völkerrecht* (Deutscher Rechtsverlag: Berlin/Leipzig/Vienna, 1941) at 24.

[96] (Wirklichkeitsnah).

[97] See Schmitt, *Völkerrechtliche Großraumordnung*, *supra* note 95, at 25.

[98] See Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001), chapter 6.

Die Wendung argues that international law reflects the phenomenon of war as a certain concept[99] of war. Schmitt juxtaposes a discriminating[100] concept of war and a non-discriminating concept of war. Classical international law, which Schmitt attributed to the time before the Great War, was built on the absolute equality of sovereign states, and, since every state had the ius ad bellum, the decision to go to war was (according to Schmitt's interpretation) extra-legal, i.e. recourse to force was a mere political decision outside the realm of international law. Classical legal doctrines did not differentiate between certain types of war (for example, aggressive war or war in self-defense) and were not prepared to distinguish between actors because of their motives for recourse to force. But the Great War marked, for Schmitt, the collapse of the concepts that surmounted classical international law – what evolved was a discriminating concept of war. Schmitt grasped several developments. First, the criminalization of war: In 1919, Article 227 of the Treaty of Versailles provided for the trial of German Emperor Wilhelm II 'for a supreme offence against international morality'[101] – unthinkable under classical international law. Further, in Die Wendung, Schmitt seemed to acknowledge the outlawry of war under the 1928 Kellog-Briand Pact, thereby contradicting his interpretation in Der Begriff des Politischen. The second development observed by Schmitt was the erosion of institutionalized neutrality. Classical international law conceptualized a tête-à-tête between states to consolidate their disputes. Conversely, a non-discriminating concept of war presupposed neutral powers (i.e. powers being able to abstain from the conflict) with recognized rights.[102] Schmitt maintained that this approach was overridden by the League of Nations, which provided for an automatic sanctioning system. The third conceptual turn, similarly underlying the League of Nations, was the internationalization of war. Classical international law advanced a nationalized understanding of war – following the Realpolitik approach, war was the pursuit of national interests. The outlawry of war delegitimized wars for national objectives and elevated war to a matter of international concern. In Schmitt's polemical tone, war had become international civil war.

Schmitt would later elaborate extensively, in his 1950 Nomos der Erde, why he held this turn to a discriminating concept of war in low esteem and why he thought

---

[99] It is interesting to note that Schmitt was still entrenched in German positive legal thinking and used the term 'term' (Begriff) instead of 'concept' (Konzept, Denkgebäude), similar to the *Begriff des Politischen* (a literary translation: the term of the political).

[100] Schmitt uses the term 'discriminating' in a way that may sound odd in contemporary legal debate, and although 'discriminating' was certainly chosen due to its pejorative connotation, 'to discriminate' is in the first place a synonym for 'to distinguish' or 'to differentiate'.

[101] See <www.lib.byu.edu/~rdh/wwi/versa/versa6.html> (visited 10 September 2004).

[102] Classical international law can be understood as enshrined in 1907 The Hague Convention V and XIII.

that the classical understanding of war was more humane, less dangerous. At this point it is only crucial to note that Schmitt saw the development as irreversible.[103] Focusing on Schmitt's factual convictions, with Die Wendung Schmitt witnesses the decline of state sovereignty, expressed by the negation of the sovereign right to resort to war untrammelled by law or by the so-called international community. Not only was the Leviathan unable to evade his inner destruction by liberalism and pluralism, but it was also equally pierced from the outside. The clear-cut distinction between inside and outside was lost, the Leviathan lost his role as judge over its own affairs and the international community assumed this position – the all encompassing question that Schmitt poses to international law 'quis iudicabit?' had seen a shift in paradigm. With all these almost revolutionary conceptual turns, away from non-discrimination to discrimination, away from nationalization to internationalization, away from sovereignty to the international community, was Schmitt unable to uphold the classical state system under changed paradigms – in Weimar he had attempted to reinvent the Leviathan by negating pluralism and by introducing mass democracy. With this program failing and with the Leviathan being equally under pressure from the outside, Schmitt realized that he had to depart from the Westphalian strong and unchallenged state.

## The Großraum Concept

Only against this background can we understand Schmitt's first major theoretical attempt to reconceptualize the foundations of international law: the introduction of the *Großraum*-concept. First introduced in a lecture in 1939 in Kiel, Schmitt published this concept in *Völkerrechtliche Großraumordnung mit Interventionsverbot im Völkerrecht*[104] in the same year. *Völkerrechtliche Großraumordnung* employs an arrogant, overbearing tone – Schmitt doesn't write as the preserver of the *status quo*, maybe even of the *status quo ante* the Great War, but theorizes for a once again strong Germany, a Nazi *Reich* that fantasized a new world order. In his new model, Schmitt replaces the state as the core unit of international law with *Großräume*. A *Großraum* – a literary translation would be large space or great space – depicts a bloc, a huge territorial unit characterized by a dominating *Reich* radiating its influence throughout the *Großraum*. Schmitt maintains that *Reich* and *Großraum* are distinct and novel factors, concepts that are explainable neither by reference to each other, and nor in old and established terms. Schmitt contends that *Reich* and *Großraum* are not identical. For Schmitt, a *Reich* transcends the normal state, i.e. isn't simply an

[103] See Balakrishnan, *The Enemy*, *supra* note 1, at 250.

[104] Hereafter: *Völkerrechtliche Großraumordnung*.

enlarged state, in that it claims a *Großraum* and therefore distinguishes itself from the territorial enclosure of the state.[105] Schmitt extrapolates the idea of *Großraum* by a deconstruction of the 1823 Monroe Doctrine.[106] He suggests that the initial and basic content of the Monroe Doctrine demarcated the Western Hemisphere from European intrusion. It was the US radiating its influence and its political ideas throughout the Americas that prevented (and was intended to exclude) foreign powers from resorting to military intervention. For Schmitt, the Monroe Doctrine was a drawing of geopolitical lines and the establishment of a particular sphere of influence (that bars alien involvement) by a politically awakened *Volk*.[107] Schmitt finds the concrete dialectical nature of the Monroe Doctrine in its rejecting and antagonizing plans of France, Spain and the Holy Alliance (Russia, Prussia and Austria) to topple South America's new republics.

For the purpose of this article it is not essential to delve into the parallels and differences of *Großraum* and Nazi ideology.[108] It is not essential to delineate how much Schmitt wanted to please his masters in the Third Reich with his invention. What I would like to suggest is that, although the *Großraum* concept truly looks radical in the first place and although it appears like a complete turnaround in his thinking, Schmitt was still caught in the very paradigms he employed in his Weimar period. His existentialistic pathos points the way, though Schmitt sounds far more menacing and sinister when we appreciate the dark times, 1939, he was writing in.

> Ein zum Staat auch in diesem nur organisatorischen Sinne unfähiges Volk kann gar nicht Völkerrechtssubjekt sein. Im Frühjahr 1936 zum Beispiel hat sich gezeigt, daß Abessinien kein Staat war. Nicht alle Völker sind imstande, die Leistungsprobe zu bestehen, die in der Schaffung eines guten modernen Staatsapparates liegt, und sehr wenige sind einem modernen Materialkrieg aus eigener organisatorischer, industrieller und technischer Leistungskraft gewachsen. Zu einer neuen Ordnung der Erde und zu der Fähigkeit, heute Völkerrechtssubjekt ersten Ranges zu sein, gehört ein gewaltiges Maß nicht nur natürlicher, im Sinne 'naturhafter' ohne weiteres gegebener Eigenschaften, dazu gehört auch bewußte Disziplin, gesteigerte Organisation und die Fähigkeit, den nur mit einem großen Aufgebot menschlicher Verstandeskraft zu bewältigenden

[105] See Schmitt, *Völkerrechtliche Großraumordnung, supra* note 95, at 67.

[106] *Ibid.*, at 30.

[107] *Ibid.*

[108] For an evaluation, see Peter Stirk, 'Carl Schmitt's Völkerrechtliche Großraumordnung', 20 *History of Political Thought* (1999) 357 at 357 *et seq.*and Andrea Gattini, 'Sense and Quasisense of Schmitt's Großraum Theory in International Law – A Rejoinder to Carty's Carl Schmitt's Critique of Liberal International Legal Order', 15 *Leiden Journal of International Law* (2002) 53 at 53 *et seq.*

> Apparat eines modernen Gemeinwesens aus eigener Kraft zu schaffen und ihn sicher in der Hand zu halten.[109]

This passage perfectly relates to Schmitt's *Der Begriff des Politischen* and his notion that a weak *Volk* will perish. Breaking down formal equality, Schmitt introduces a hierarchical thinking into international law, where the *Reich* and its *Volk* are rated highest. The state and its *Volk* only hold a secondary rank since they are wrapped up in a *Großraum* and are thus under the influence of a *Reich*. And *Völker* that are unable to establish a functional state are falling off the scale, i.e. they are not subjects of international law. It is illustrative that Schmitt's focus is not the natural elevation of a certain people over others, i.e. that he does not take up the biological racism of the Nazis. Rather, the new ranking reflects a people's ability to create a functioning and ordered community. The superiority of a people is deduced from its establishing and upholding a political unit, i.e. its ability to demarcate an enemy and to wage war against him. In Schmitt's hierarchical reconfiguration of international law resonates his own call on international legal scholarship to find a way to implement what was hitherto the state's task, the provision of order[110], within new models.[111]

This is one of the reasons for why Leviathan should be seen as the godfather of the *Großraum* concept. In my understanding, Schmitt translated the characteristics of the Hobbesian inter- and intra-state system into his rethinking international law. The Hobbesian system construed the state as a territorially enclosed unit with monopolized violence. In exchange for providing internal neutral, depoliticized grounds, i.e. domestic peace, the state delegitimized the right to resist the sovereign[112]. Conversely, seen from an external point of view, international or transnational interference with national affairs was precluded – the stronger and more absolute the internal domination, the weaker and less regulated the

---

[109] 'Unquestionably, a people which is, merely from this organizational point of view, incapable of forming a state cannot possess international legal personality. For example, in spring 1936 it became visible that Abyssinia was no state. Not all nations are capable of passing yon challenge to their own capacity of building a good and modern state apparatus, and very few possess the organizational, industrial, and technical abilities to cope with modern matériel intensive warfare. A new world order and the aptitude to hold international legal primacy today is not only composed of an enormous amount of natural capacities, i.e. capacities given by nature herself, it is also composed of deliberate discipline, of heightened organizational capabilities, and of the ability to self-create and to reliably control the modern community's apparatus, an apparatus that can only be mastered with a great array of human reason.' (Author's translation). See Schmitt, *Völkerrechtliche Großraumordnung, supra* note 95, at 59.

[110] (Ordnungsleistung).

[111] See Schmitt, *Völkerrechtliche Großraumordnung, supra* note 95, at 59.

[112] (Ständisches Widerstandsrecht).

international interaction. The *Großraum* concept is built on these very facets: the provision of order within and the prohibition of intervention from the outside[113]. What is more, like the Hobbesian fragmentation of Europe into separate states, Schmitt implicitly recommends the world's division into different *Großräume* (Germany, Italy, Japan, the Soviet Union, the US). Both, the *Hobbesian* and the *Großraum* world order, presuppose a pluralistic world. Therefore, Schmitt rejected founding international law on universal values, on the hunt for total pacification, or on the elimination of war as a legal condition in international law's vocabulary. Therefore, transferring his challenges to liberalism to the international plane, *Völkerrechtliche Großraumordnung* has to be understood as refuting a (anti-pluralistic[114]) liberal approach to international law. Revisiting *Der Begriff des Politischen*, Schmitt held that universalization cannot accommodate the political, whereas the pluriverse under the *Großraum* framework would be open for it. Conceptually, the *Großraum* world order proves capable of drawing lines of demarcation – since the eradication of internal enmity depends on the externalization of conflicts, particularization has to reenter the modeling of international law.

Essentially, *Völkerrechtliche Großraumordnung* has to be seen as a snapshot – it was presented only one year after Schmitt had published his conviction of the end of the post-Westphalian inter-state system. Although Schmitt's attempt to remodel international law was well received by Nazi politicians, and although Schmitt provided new slogans for Nazi propaganda, for example, the proclamation of a German Monroe Doctrine, *Völkerrechtliche Großraumordnung* was highly disputed among Nazi academic circles. *Völkerrechtliche Großraumordnung* is characterized by vague and ambiguous language, and it lacks directions as to where the journey will go, as to what future its author envisages. For example, Reinhard Höhn, one of Schmitt's Nazi antagonists, criticized Schmitt for not having elaborated on the nature of the internal order of the *Großraum*.[115] Schmitt equally failed to specify the structure of interaction and Schmitt accepted that there should be interaction, especially world trade[116], between the hierarchically ranked players on the international arena. After all, at least nine different kinds of geopolitical – I refrain from using the term international – laws are necessary under a paradigm that distinguishes *Großraum*, *Reich* and state.[117] However, the incompleteness of

---

[113] Underlining the importance of the principle of non-intervention, Schmitt included it into the title of his lecture and book.

[114] Cf. for the distinction of pluralistic and anti-pluralistic liberalism, See Gerry Simpson, 'Two Liberalisms', 12 *European Journal of International Law* (2001), at 537 *et seq*.

[115] Cf. Stirk, 'Carl Schmitt's Völkerrechtliche Großraumordnung', *supra* note 108, at 364.

[116] See Carl Schmitt, *Völkerrechtliche Großraumordnung*, *supra* note 95, at 62.

[117] The following diagram should illustrate that nine different kinds of geopolitical laws would be necessary for coordinating the interaction of different *Großräume*, *Reiche* and states.

*Völkerrechtliche Großraumordnung* has interpretative value as it allows an insight into what was essential for Schmitt when reshaping the basics of international coordination, and when answering the question he was asked after he had presented *Die Wendung*: 'What now?'.[118] Since order and non-intervention are the keywords in *Völkerrechtliche Großraumordnung*, and since these keywords are but flip sides of the Leviathan paradigm, Schmitt reveals that his primary focus was establishing internal order and protection. It is equally illustrative that Schmitt had nothing to say, as Höhn pointed out, about the internal structure of the *Großraum*. Being open to assigning a *Großraum* to such different political systems as national-socialism (Germany), fascism (Italy), monarchy (Japan), communism (the USSR) and liberal democracy (the US), the specific nature of domestic governance seems only of derivative importance for Schmitt.

Apart from the overt congruence with his 'untainted' work, *Völkerrechtliche Großraumordnung* reinforces the unanswered dilemma of *Der Begriff des Politischen*: The remodeling of international law is based on a pluriverse that accepts the political, i.e. conflicts between *Großräume*. At the same time, Schmitt – from my point of view: seriously[119] – raises a strong principle of non-interference. The *Großräume* are supposed to uphold internal order by transferring antagonism, and eventually war, to an inter-*Großraum* plane, while they are precluded from intervening in each other's sphere of influence. Like *Der Begriff des Politischen*, *Völkerrechtliche Großraumordnung* externalizes enmity to ensure internal cohesion. Yet, both pieces face the problem of finding a middle ground between total enmity and friendship, the question of how to mitigate enmity how to render antagonism relative, and how to forestall the total intensification of the political.[120] A partial answer to these difficulties is at the core of Schmitt's *Nomos der Erde*.

| | Großraum X | Reich in Großraum X | State in Großraum X |
|---|---|---|---|
| Großraum Y | 1 | 2 | 3 |
| Reich in Großraum Y | 4 | 5 | 6 |
| State in Großraum Y | 7 | 8 | 9 |

[118] Schmitt reports this question in: *Völkerrechtliche Großraumordnung*, *supra* note 95, at 63.

[119] Basically, there are two reasons for my belief: First, the idea of non-intervention fits the translation of the Hobbesian paradigm in a novel concept of international law. Second, Schmitt obviously withdrew from the Großraum concept by the time Germany invaded the USSR and thus crossed into another Großraum.

[120] See Palaver, *Die mythischen Quellen des Politischen*, *supra* note 20, at 15.

## Nomos der Erde

*Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*[121] was published in 1950 but it is commonly believed that it was in fact completed as early as by 1945. The leitmotif of *Der Nomos der Erde* can be found in the preface of the 1963 edition of *Der Begriff des Politischen*. With the end of the Westphalian era, Schmitt found himself unable to resort to its 'marvelous concepts.'[122] Schmitt only saw two ways out: the flight into aphorism or seeking shelter in historic analyses – being a jurist, Schmitt maintained that he has to follow the latter path. *Der Nomos der Erde*, then, is Schmitt's account of the history of international law or rather of the paradigms governing international relations. In *Völkerrechtliche Großraumordnung,* Schmitt had turned to geopolitics, to perceiving international coordination as the distribution of space: spheres of influence, global lines of demarcation, the idea of the inseparability of order and its spatial allocation[123] built the framework of Schmitt's approach to international law. This approach is the prism through which he tells his story of international law's history in *Der Nomos der Erde*. For Schmitt, the keyword in rethinking international law is *Nomos*. In a highly idiosyncratic interpretation of its denotation – he maintains that already the Greek philosophers misinterpreted the Greek word *nomoi* as *schedon*, i.e. as rule or law[124] –, Schmitt understands *Nomos* as expressing the primordial partition and allocation of space, i.e. as the first seizure of land.[125] With the dawning of the global age, international coordination was based on certain spatial arrangements. With the end of the common agreement on this arrangement, i.e. with the end of this *Nomos*, an end Schmitt sees in 1890, the world was left in a condition of confusion, order was separated from its spatial allocation, and politics wasn't provided the means to attribute different meanings to different regions of the world. Schmitt advances this uncertainty as one of the reasons having led to the First and Second World War. By showing that international interaction historically was – allegedly – founded on an agreed upon *Nomos,* and that the historic concepts under classical international law were based on this very *Nomos*, Schmitt calls on international lawyers to compose a new *Nomos* for a changed world and warns against the employment of obsolete concepts that are bound to the past *Nomos*.

Before returning to how Schmitt describes the *Nomos* under classical international law, we first have to appreciate the dimension *Nomos* had in Schmitt's

---

[121] Hereafter: *Der Nomos der Erde*.

[122] See Schmitt, *Begriff des Politischen*, *supra* note 2, at 17.

[123] (Ordnung und Ortung).

[124] See Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Greven: Cologne, 1950) at 37.

[125] (Landnahme). *Ibid.*, at 36

thinking. In his Weimar work on domestic political theory, Schmitt depended on a myth that bonded together the *Volk* and that created the homogeneity required for the functioning of the state. Turning away from the counter-revolutionary, yet idiosyncratic, eschatology of a dictatorial regime in *Politische Theologie*, Schmitt construed an inherently nihilistic mythology that was open to include the empowerment of the masses. This nihilism couldn't be satisfying for Schmitt if he was searching for substance and authenticity. In addition, as Balakrishnan rightly points out, Schmitt concluded in the mid-1930s that even the decisionist hypostatization of the *volonté générale* was only hypothetical and that it was not creating substance.[126] Before referring to the *Nomos* concept, Schmitt was incapable of following either of the traditional, bipolar paradigms: Schmitt was neither willing to accept positivism – a school that fled, for Schmitt, into the theoretical negation of politics and into pure procedural thinking and hence was conceptually disabled from enshrining substantive determinations – nor prepared to pursue a natural law approach. Natural law, its focus on reason and epistemological objectivity, and its search for ontological truth, all seemed outdated in times of the reign of irrational masses. With *Nomos*, Schmitt wanted to leave behind both, these two classical solutions, positivism and natural law, and his initial response, i.e. his seeking refuge in a nihilistic myth. An initial allocation of space, a primordial disposition over the globe, *Nomos* provides the raw and concrete guidance Schmitt is looking for. For Schmitt, *Nomos* refers to a true, a factual, a historic event[127] that supersedes any social construction. The ontological[128] dimension of *Nomos* establishes a *Grundnorm* that is not hypothetical, but real. Revisiting the dichotomy of legitimacy and legality, Schmitt characterizes *Nomos* as a legitimating act that gives sense to legality.[129] Schmitt even uses his description of *Nomos* to contradict legitimacy entailed by a 'caesaristical cult of the political ruler.'[130] With other words, Schmitt implicitly revokes his myth of the *Reichspräsident*, and thus reconfigures his unsatisfying Weimar approach. In comprehending *Nomos* as the *pouvoir constituant*, as the *ordo ordinans*, as the *ordnungsbegründender Vorgang*,[131] as the founding moment of a new order, Schmitt manifestly spells out that *Der Nomos der Erde* represents no break in his work; it should be rather appreciated as a continuous line of thought. Like his

126 See Balakrishnan, *The Enemy, supra* note 1, at 196.

127 See Schmitt, *Der Nomos der Erde*, *supra* note 124, at 17.

128 *Ibid.*, at 16.

129 *Ibid.*, at 42.

130 *Ibid.*, at 45.

131 *Ibid.*, at 50 and 51.

antagonist Kelsen, Schmitt had found his *Grundnorm* not on the domestic, but on the international plane.

Within the *Nomos* concept, Schmitt distinguishes between land, sea, and air space. Since air space was a new development, Schmitt's focus in his looking back in *Der Nomos der Erde* is on the land-sea-binominal. Knowing the integral significance of *Nomos*, and interpreting Schmitt's positive characterization of land and his pejorative description of sea, is highly instructive. Schmitt eventually reverts to meta-physics to condense the implications of land and sea. Schmitt's anti-universal stance is channelled into his view on the latter. For Schmitt, the sea – its lack of limits[132] and its ignorance of any borders except coastal lines[133] – expresses universalism.[134] Commonplace mythical characteristics of the sea – the vast emptiness of the oceans, the lack of guidance, the pervading sense of insecurity, and the sea's irrepressible forces, inconceivable but ever-present depth – seem to mirror the very notions Schmitt is attempting to outrun: inhumane voids, profound and incontestable nihilism. Comparing the sea with land, Schmitt conveys, on the one hand, that the sea represents the opposite of order, symbolizes the opposite of protection and safety. On the other hand, Schmitt describes the land as radiating these very aspects. For Schmitt, land is open to lines of demarcation, whereas the sea isn't; land is open to being classified – by *Nomos* – as a safe haven, whereas the sea isn't. While land knows clear borders and while land can be distributed into territories of states and into spheres of influence[135], the sea is 'free of any kind of spatial supremacy by a state.'[136] Schmitt presents protective geopolitics and the allocation of space as necessarily tied to land, whereas the sea is described as outside of a state's spatial order.[137]

Building on the land-sea binominal, Schmitt sees two entirely different regimes, a land and a sea regime, evolving after the discovery of the new world, or, as Schmitt describes it: after the seizure of the new world's land[138]. Each of these regimes had their own concepts in international law, concepts of war, enemy, loot and freedom.[139] Seen together, these two regimes built the *ius publicum europaeum*, an international law that was inherently Euro-centric and that Schmitt dated between 1648 and 1890. The land regime distinguished between different territories: territory

---

[132] See Balakrishnan, *The Enemy*, *supra* note 1, at 242.

[133] See Schmitt, *Der Nomos der Erde*, *supra* note 124, at 143.

[134] *Ibid.*, at 144.

[135] (Staatsgebiet und Herrschaftsräume).

[136] (staatliche Raumhoheit). See Schmitt, *Der Nomos der Erde*, *supra* note 124, at 143.

[137] *Ibid.*

[138] (Landnahme einer neuen Welt).

[139] See Schmitt, *Der Nomos der Erde*, *supra* note 124, at 144.

of European states, or of non-European states that were seen as equals to European states (the keyword was civilized), and territories that were – euphemistically, from a contemporary perspective – labeled 'free'. Free land was construed as free for occupation.[140]

At the core of the spatial arrangement of Europe were the state and its territorial borders. In Schmitt's narrative, the Westphalian state was conceptualized to overcome civil war, especially the religious civil wars during the Thirty Years' War.[141] The concept of war was transformed into war between equals, i.e. sovereigns that were seen as equals. Revisiting *Die Wendung*, Schmitt reconstructs the end of the just war tradition and its replacement by a non-discriminating model of war. While the just war tradition distinguished between just and unjust wars, the concept of war in Europe during the period of the *ius publicum europaeum* didn't provide any means to differentiate between the warring parties. Schmitt suggests that the just war tradition contributed to the devastating consequences of the Thirty Years' War in the 17th century. In *Leviathan*, Schmitt had described this century with drastic language:

> [Ein Jahrhundert], daß von religiösen und theologischen Kämpfen, Disputationen und blutigen Kriegen bis zur Verzweiflung und zum Ekel erfüllt war.[142]

In these times, and Schmitt quotes the German jurist Johann Oldendorp, war was, depending on its qualification as just or unjust, either divine-like enforcement of god's own will and law or rebellion against it.[143] Schmitt dreads several implications of this dichotomous structure: First, the just war tradition provided the means to elevate one's cause over the enemy's, the means to depict one's mission as just and the enemy's as unjust, and the concepts to see oneself as the champion of justice and the enemy as the heinous villain. This created brutal and inhume wars, since the enemy was degraded and demonized. Second, because wars became punitive in nature, wars of eradication, or wars of subjugation, the termination of war was infinitely complicated. This was reinforced, because the results of a war could always be challenged on the ground that they were wrong, brought about by an unjust war. Third, the central question of '*quis iudicabit*' could not be answered by an appeal to

---

[140] *Ibid*., at 143.

[141] *Ibid*., at 129.

[142] 'A century that was filled, to the extent of desperation and revulsion, with religious and theological battles, with disputes and bloody wars.' (Author's translation). See Carl Schmitt, *Leviathan*, *supra* note 26, at 64.

[143] See Schmitt, *Der Nomos der Erde*, *supra* note 124, at 94.

justice. Most certainly having Vattel in mind, Schmitt feared that the claim of waging a just war could very well prevail on both sides of the conflict – Vattel warns that a war in which 'each party, asserting that they have justice on their own side, will arrogate to themselves all the rights of war, and maintain that their enemy has none, that his hostilities are so many acts of robbery ... [Such a] quarrel will become more bloody, more calamitous in its effects, and also more difficult to terminate.'[144]

In Schmitt's view, these problems of the just war tradition were overcome by establishing a non-discriminating understanding of war between states that replaced medieval crusades and feuds. Schmitt introduces the idea that European state war was a *'Hegung of war'* (Hegung des Krieges). Since *Hegung* bears different implications, I refrain from translating it and rather give a brief overview over the possible connotations. First, the German verb 'hegen' can be translated as 'to foster' or 'to nourish'. From this perspective, *'Hegung of war'* implies that the *ius publicum europaeum* embraced war as such, i.e. that it reduced war, to use the common definition of war in political science, to organized violence between contending political communities. Hence, mundane war could not rise to a divine-like activity. Second, the German verbs 'einhegen' or 'umhegen' have a territorial implication[145] – 'umhegen' translates into 'to enclose'. *'Hegung of war'* thus connotes that the non-discriminating concept of war was employed in a specifically demarcated region: Europe. Ultimately, translations like 'bracketing of war' or 'enclosure of war' neither take into account the positive connotation that *Hegung* has for war, nor do they capture the paradox that the limitation of war is brought about by embracing it, nor do they enshrine the spatial dimension of *Hegung*. Only by perceiving the latter is it possible to understand that Schmitt applied *'Hegung of war'* solely to land war – contrarily, war on the high seas was absolute and did not know any intrinsic limitations. Under Schmitt's land-sea binominal, sea war was excluded from *'Hegung of war',* since the sea resists enclosure.[146]

Schmitt's concept of *'Hegung of war'* has, I shall argue, two implications for problems characterizing his earlier work. The first refers back to *Der Begriff des Politischen* and answers the question of how to externalize enmity in order to unite internally, but to simultaneously prevent the total intensification of the externalized political. The second implication of *'Hegung of war'* explains why Schmitt dreaded the reemergence of the discriminating concept of war in *Die Wendung* and why he

---

144 See Emmerich de Vattel, *Law of Nations*, Book 3 of War, § 188, <www.constitution.org/vattel/vattel_03.htm>, (visited 10 September 2004).

145 This territorial implication of Hegung of war is enunciated in Schmitt, *Der Nomos der Erde*, *supra* note 124, at 22.

146 *Ibid.*, at 155.

already wrote against a concept of war guided by non-political considerations in *Der Begriff des Politischen*.

With *'Hegung of war'* Schmitt describes a self-reproducing system that establishes internal loyalty by reference to an external threat, which in turn is prevented from rising to total enmity in order to forestall the disintegration of internal obedience. Schmitt saw the Hobbesian state at the core of the *ius publicum europaeum*. Internal loyalty was ensured by providing neutral grounds, and civil war was precluded because the sovereign promised order and protection but demanded obedience in exchange. The first 'trick' was to externalize enmity – by projecting an international enemy, the sovereign was able to convincingly argue that his service, the provision of safety, was still needed. Keeping an international enemy proved crucial to remind the citizens that the political would always be immutable, that upholding a community could not be rested on renouncing war, and that the internal peace of the state must not be confused with (utopian) total pacification. The enemy was used to strengthen internal bonds. However, this system would have failed once enmity deteriorated into absolute antagonism – as Schmitt had already noted in *Völkerrechtliche Großraumordnung:* '... the system as a whole is only tolerable as long as war is not total.'[147] Total war, the ultimate intensification of the political, negates the sovereign's ability to fulfil his task and provide domestic order. *'Hegung of war'* thus points to two levels: first, embracing war and the enemy as a necessary circumstance for legitimizing the state; and secondly, the mitigation of enmity as an equally essential precondition. Both levels share the same starting point, as they are eventually rooted in the state's role in establishing internal stability. In Schmitt's thinking, the negation of international war leads to the breakdown of loyalty for the state so that the immutable political will reenter the domestic plane and destroy internal peace. The aggravation of international war into total war similarly leads to the breakdown of loyalty because the state proves itself unable to provide any shelter. Schmitt summarized both levels in *Leviathan*: 'Once the protection stops to exist, the state also stops to exist and every duty to obey is void.'[148]

At least in theory, *'Hegung of war'* is an answer to the dilemma left unresolved in Schmitt's earlier work, of how to preclude the absolute intensification of externalized war.[149] However, one has to note, that the *Hegung* concept is somewhat bound to Schmitt's historic narrative of the Westphalian Euro-centric world order. First, *'Hegung of war'* only works where Schmitt's apocalyptical factual hypotheses

147 See Schmitt, *Völkerrechtliche Großraumordnung, supra* note 90, at 70.

148 (Hört der Schutz auf, so hört auch der Staat selber auf und jede Gehorsamspflicht entfällt). See Schmitt, *Leviathan, supra* note 26, at 113.

149 Cf. Schmitt, *Der Nomos der Erde*, *supra* note 124, at. 159.

stand and the provision of protection legitimizes the state. Indeed, the intra-African foreign policy of several African states might follow Schmittian paradigms. In the Western world, existing in a 'depoliticized' context, establishing loyalty to the state depends on various other activities, such as policies oriented at equality or social justice.[150] Second, also indicating its inherent Euro-centrism, the *Hegung* concept is systemically intertwined with the Westphalian *Nomos* or world order.[151] Reading Schmitt, *'Hegung of war'* was not only *concentrated within* Europe, but it was also *limited to* Europe. Schmitt argues that amity lines drew geopolitical spheres and '*Hegung of war'* only took place within Europe – outside Europe, violence was unrestrained.[152] By portioning the world in geopolitical zones, European sovereigns provided that extra-European conflicts, however bloody they were, did not reflect back on intra-European matters – states could be at war abroad, while living in a state of peace at home.[153] Paradigmatically, Schmitt maintains that the collapse of these geopolitical areas – *'Hegung of war'* and territory of unrestrained violence –, marked the end of the historic *Nomos*. As an example, Schmitt refers to the inclusion of colonies into the territory of their European 'mother' states.[154] Historically, the political was allocated a sphere of total intensification and a region of only limited violence. As we saw earlier, the spatial connotation of *'Hegung of war'* is integral.[155] In Schmitt's account, the limitation of the *'Hegung of war'* zone signified 'an enormous relief for inner European difficulties.'[156] But if the mitigation of antagonism, the prohibition of total war, rested on a pressure relief valve,[157] i.e. a geopolitical arena of unrestrained war, *'Hegung of war' is not as readily* applied today. Obviously, the evolution of international relations, the ongoing economic and social globalization, and the technological development of weaponry – in addition to the moral implications – forestall the demarcation of a region where states, civilizations or *Großräume* can clash freely. Conversely, the conceptualization of contemporary problems of international law and international relations through a Schmittian prism is, at best, a treacherous mission – Schmitt's solutions are rooted in an outdated understanding of the state, and in an obsolete mono-polar Euro-centrism. It is highly significant that Schmitt

[150] Unsurprisingly, after WWII, Schmitt became a grim critic of the welfare state, as it eroded the very basis of '*Hegung of war*'. The welfare state rests, in a Schmittian analysis, the legitimacy of the state on activities that obfuscate the existence of the political.

[151] For a brief summary compare the preface of *Der Nomos der Erde*.

[152] See Schmitt, *Der Nomos der Erde*, *supra* note 124, at 62.

[153] Cf. Schmitt's summary on the distinction between inner-European and extra-European wars. See Schmitt, *Der Nomos der Erde*, *supra* note 124, at 155.

[154] *Ibid.*, at 207.

[155] *Ibid.*, at 43.

[156] *Ibid.*, at 62.

[157] *Ibid.*, at 66.

only related *'Hegung of war'* to classical international law and refrained from – and in my opinion, was incapable of – reinventing a similar concept in his *Großraum* model.[158]

What is more, his understanding of *'Hegung of war',* especially the implication of this concept to overcome the devastating Thirty Years' War,[159] helps explain Schmitt's rejection of a discriminating concept of war in *Die Wendung.* In Schmitt's narrative, *'Hegung of war'* is founded[160] on the principle that the enemy – the sovereign state – was accepted as an equal and thus as a *justus hostis.*[161] Because the enemy was situated on the same ethical, moral and legal level, European inter-state war was able to show tolerance towards the enemy. Under Westphalian paradigms, since wars had become viable means of dispute settlement and since they had overcome the punitive character of wars under the just war tradition, no European war in the *ius publicum europaeum* was a war of eradication, and no European state was dissolved or subjugated notwithstanding sweeping defeat on the battle field. What Schmitt eventually suggested in *Die Wendung* was that the modern concept of war, a discriminating, internationalizing approach that erodes neutrality and sovereignty, strikingly resembled the just war tradition. Both provide the means to elevate one's cause and one's belligerents over the enemy, both complicate the termination of armed conflict – for example by diffusing the classical rejection of a *status mixtus* and rather introducing gray areas between war and peace – and both lead to heightened non-transparency in international relations. Schmitt fears that modern international law and its concept of war once again provides the means to portray one's enemy as evil or ugly. The parallels to *Der Begriff des Politischen* are apparent. Here, Schmitt intentionally introduced the political as a criterion distinct from morality or aesthetics.[162] He didn't disengage conflict from moral or aesthetical considerations in order to free war from any constraints – to the contrary, Schmitt wanted to preclude the total intensification of antagonism by excluding non-political motivations. Already in a 1928 letter to Wolfgang Heller had Schmitt stated that using morality in the context of enmity was dangerous and flawed.[163] By rationalizing and humanizing war, '*Hegung* of war'[164] upheld minimal internal stability and order. Therefore, Schmitt sketches *'Hegung of war'* to counter the inevitable total

[158] This should be at least warning for all those who wish to apply the Schmittian 'trick' of externalizing enmity to create internal unity today.

[159] See Schmitt, *Der Begriff des Politischen*, *supra* note 2, at 11.

[160] See Schmitt, *Der Nomos der Erde*, *supra* note 124, at 159.

[161] *Ibid.*, at 25.

[162] See Schmitt, *Der Begriff des Politischen*, *supra* note 2, at 26.

[163] Reported by Palaver, *The mythischen Quellen des Politischen*, *supra* note 20, at 12.

[164] See Schmitt, *Der Nomos der Erde*, *supra* note 124, at 113.

intensification (through demeaning the enemy morally) of war. Conversely, Schmitt equates total war with ideologies of just war.[165]

This interpretation is persuasive in that it explains Schmitt's seemingly romanticizing[166] image of the wars under the *ius publicum europaeum*. In a 1938 Corollarium to *Der Begriff des Politischen,* Schmitt mentions wars that resemble tournaments or duels;[167] in his *Leviathan*, Schmitt refers to cabinet or combatant wars;[168] in *Völkerrechtliche Großraumordnung,* he relates the 18th century to cabinet wars, the following time to combatant wars;[169] in *Der Nomos der Erd*e, Schmitt gives the following summary:

> Die Auffassung des kontinentalen Landkrieges als eines reinen Kombattantenkrieges, der im wesentlichen eine Auseinandersetzung der beiderseitigen staatlich-organisierten Armeen ist und einen rein militärischen Bereich von allen anderen Bereichen – der Wirtschaft, dem kulturellen und geistigen Leben, von Kirche und Gesellschaft – abzutrennen sucht.[170]

Overtly, all these images seem to disregard authors like Rousseau who, as a contemporary of the times Schmitt reflects on, described warfare as horrible and brutal. Schmitt later acknowledged, in *Theorie des Partisanen*,[171] a second objection against his narrative: his ideal type of combatant war ignored the rise of irregular partisan warfare in the 19th century. Finally, *Der Nomos der Erde* lacks a detailed analysis of the potential conceptual shifts caused by the French Revolution, Napoleon's introduction of an *armée du peuple*, and the restoration of the 1815 Vienna Congress. This article isn't concerned with the falsity of Schmitt's war paradigms, but notes that Schmitt's detaching – be it his true belief or an intentionally limited perspective – of war from civilian casualties, his nostalgic, simplistic and maybe naïve tone, is directly linked to the presentation of the *'Hegung of war'*. Similarly, Schmitt's view on the antipodal character of total war can be

---

165 See Schmitt, *Leviathan*, *supra* note 26, at 73 and Schmitt, *Der Nomos der Erde*, *supra* note 124, at 113.

166 By Schmitt's own description, political romanticism is characterized by the flight to the past and by glorifying far-away developments: The romantic evades the present and moves to a different, illusionary reality.

167 See Schmitt, *Der Begriff des Politischen*, *supra* note 2, at 102.

168 (Kabinetts- und Kombattantenkrieg). See Schmitt, *Leviathan*, *supra* note 26, at 121.

169 See Schmitt, *Völkerrechtliche Großraumordnung*, *supra* note 95, at 70.

170 'The opinion that conceptualized the continental war on land as mere combatant warfare, which is essentially a contest between two mutually state-organized armies, and that seeks to disengage a strictly military sphere from all other spheres – from economics, from the cultural, intellectual and spiritual life, from church and society.' (Author's translation). See Schmitt, *Der Nomos der Erde*, *supra* note 124, at 180.

171 See Carl Schmitt, *Theorie des Partisanen* (Duncker & Humblot: Berlin, 1963) at 16.

understood as a function of *'Hegung of war'*. For Schmitt, total war (which, as a reminder, marks the end of *'Hegung of war')* meant the collapse of the combatant/non-combatant distinction, where enmity is realized in non-military ways, and where all levels of society are drawn into the conflict.[172]

Manifestly, on the one hand, Schmitt's deep appreciation of *'Hegung of war'* underscores that he did not seek unlimited warfare in Europe. On the other hand, Schmitt's most basic factual conviction, the immutability of enmity, precluded him from contemplating total pacification. Schmitt was left with the option of reflecting on means to introduce constraints into the chaos of war – Schmitt theorized '*Hegung* of war' in the *ius publicum europaeum* as such a method. Certainly being a key phrase in *Nomos der Erde*, Schmitt concludes that shaping and moderating a conflict is 'the supreme degree of order that man can bring about. It is the only protection against a circle of violence and escalating reprisals, i.e. acts driven by nihilistic hatred and vengeance, acts that senselessly aim at mutual destruction.'[173]

## Conclusion

Comparing integral parts of his Weimar work, *Der Begriff des Politischen* and his theory of democracy, with Schmitt's foundational writings on international law, especially *Der Nomos der Erde*, confirmed that they show striking similarities. As a permeating theme, Schmitt sought to overcome the legitimacy crisis of the state and to reflect on instruments to authorize the state's powers. The *Nomos* concept was intended to justify a constitutional internal order and replaced the failed myth of Caesarism, which Schmitt had conceptualized in his Weimar period. The idea of *'Hegung of war'* answered to the dilemma, first visible in *Der Begriff des Politischen*, later in *Völkerrechtliche Großraumordnung*, of how to constrain the externalized political. Finally, Schmitt used *Der Nomos der Erde* and *Die Wendung* to explain why he reduced conflicts to politics and why he did not permit morality or economics to guide the language of war; a theme prominent in *Der Begriff des Politischen*.

Schmitt's foundational writings on international law represent no distinct and separate academic work but are rather continuous lines of thought. This insight is not only of historic or biographic interest. The interpretation of Schmitt's Weimar writings has to be linked, at least cross-referred, to his later work. A good example is Howse's interpretation of the initial puzzle of *Der Begriff des Politischen*. Only by, hermeneutically, reading this Weimar piece together with *Nomos der Erde*, can we

[172] Cf. the 1938 Second Corollarium to *Der Begriff des Politischen*. See Schmitt, *Der Begriff des Politischen*, *supra* note 2, at 109.

[173] See Schmitt, *Der Nomos der Erde*, *supra* note 124, at 159.

solve the question of whether Schmitt intended to really 'remove any constraints from the conduct of war.' According to my interpretation, removing moral considerations from war and conflict was intended to limit excessive behavior, to foreclose that an enemy is ethically degraded or morally demonized. Further, by limiting his perspective on Schmitt's domestic theories, Howse could not take into account that Schmitt was never satisfied with the nihilism of his democratic theory and later withdrew from it in favor of the *Nomos* concept.

This article has focused on substantive parallels between Schmitt's Weimar and post-Weimar work. Once they are accepted, academic reflections about Schmitt might have to be broadened and receive a wider field for research. One example is the methodological similarity between the early and the late Schmitt. Schmitt often used highly idiosyncratic historic accounts to substantiate his theses. Be it in *Politische Theologie*, *Der Begriff des Politischen* or *Verfassungslehre*, Schmitt's looking back is, at best, limited. Slipping his own objectives into his historic reading, Schmitt used ancient philosophers, like Hobbes, as mouthpieces for his own views.[174] The same seems to hold true for *Der Nomos der Erde* or *Die Wendung*. Again, Schmitt shapes his historic narrative around the points he intends to make. For instance, dealing with authors like Grotius or Vitoria, Schmitt employs a sweeping style thus brushing aside their far more sophisticated attitudes.

A second methodological similarity can be traced in Schmitt's somewhat absolute approach. For example, Schmitt's rejection of domestic party pluralism in his Weimar period may well be interpreted as foreclosing potential sparks of instability. In Schmitt's account, the struggle of interest groups that was commonly associated with democratic pluralism only increases the scope of domestic controversies possibly developing into internal conflicts and eventually disrupting the unity of the state.[175] To a certain extent, Schmitt opposed theories that focused on the clash of biased parties and interest groups, without providing an intrinsic safeguard against the escalation of these clashes to the scale of civil war, because they were intra-systematically open for destabilizing incidents. The same absolute and dichotomous approach (either a theory is sound and internally resists disruption, or it has to be rejected) can be found in Schmitt's description of the novel concept of war under the League of Nations in *Die Wendung*. By equating the concept of war of the just war tradition with the post-First World War understanding of war, Schmitt failed to differentiate between *bellum justum* and *bellum legale*.[176] Schmitt did not conceptualize differences between intrinsic justice and

---

[174] Cf. Balakrishnan, *The Enemy*, *supra* note 1, at 220.

[175] See Schmitt, *Leviathan*, *supra* note 26, at 118.

[176] See Josef L. Kunz, 'Bellum Justum and Bellum Legale', 45 *American Journal of International Law* (1951) 528 at 532.

formal legality or between spiritual logic and secular procedures. Instead of reflecting on means to prevent *bellum legale* from turning into the negative effects of a *bellum justum* (for instance the demonization of the enemy), Schmitt designs *'Hegung of war'* as a categorical opposite. In my opinion, the very systemic openness of the novel concept of war (i.e. of *bellum legale* à la League of Nations) for the reintroduction of morality and ethics into a conflict's legitimacy discourse led Schmitt to favor *'Hegung of war'*.

These methodological similarities reinforce that Schmitt's post-Weimar work should not be disregarded in the current debate. By only concentrating on his Weimar writings, contemporary academic debate misses a field of research that might hold keys to insights about the true Carl Schmitt. At least, as this article suggests, Schmitt's foundational pieces on international law help interpret his often ambiguous and cloudy Weimar writings. In order not to miss Schmitt's own solutions to, and corrections of the difficulties inhering his Weimar period, academia should study his post-Weimar work more intensively.

# Implied Powers of International Organizations: On the Character of a Legal Doctrine

Viljam Engström*

## Introduction

The role and function of an international organization may change over time. Institutional development is a notable feature e.g. of European integration. The European Union of today is surely something quite different than what the drafters of the early treaties had in mind. Such a capacity for development is often provided for in the constitution of an organization in the form of an amendment mechanism.[1] However, the evolution need not have an express basis. The United Nations (UN) powers for maintaining international peace is a fairly well known example of this. Recent institutional developments of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the North Atlantic Treaty Organization have also raised questions in this respect. When express powers of an organization (or an organ of that organization) are perceived as insufficient, implied powers are invoked as a tool for extension.

On the face of it there is nothing peculiar to this. Given the idea of a distinct 'will' of organizations, a feature commonly attached to international organizations distinguishing them e.g. from conferences, a capacity to evolve seems a natural

* Doctoral Candidate, Institute of Human Rights, Åbo Akademi University, Turku, Finland. The article is a condensed version of the licentiate thesis 'Implied Powers of International Organizations', presented at the Åbo Akademi University in December 2002.

[1] 'Constitution' used as a common denominator for the basic law of an organization. See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports (1996) 66, para. 19: 'In order to delineate the field of activity or the area of competence of an international organization one must refer to the relevant rules of the organization and, in the first place, to its *constitution*.' (emphasis added) (hereinafter *WHO*).

corollary.[2] On the other hand it is easy to imagine that an independent 'will' of the organization can be at odds with a 'will' of member states (as the traditional constitutive source of international law). Perhaps for this reason e.g. the evolution of United Nations Security Council powers is often dealt with as a question of limits.[3] When striking a balance between expressly enumerated competence and a *carte blanche* for expansion, the very nature of organizations is affected. The question of the extent of competence of an organization is in this way also a question about the organizational character itself.

The purpose of this article is not to outline how organizations X and Y have used, or could come to use implied powers. Interest is instead on characterizing implied powers as a mechanism of interpretation. The starting point is a well-known tension of legal reasoning. On the one hand various claims to (or denials of) implied powers have their roots in different views on the role of international organizations in general and questions such as: what is an effective organization, what should its relationship to members be, and what are the necessary means for performing a certain task or achieving a certain goal. Emphasis on different methods of interpretation and particular uses of legal concepts can serve to express differences on these questions. On the other hand reasoning on powers relies on abstract notions such as 'fundamental change', 'political character', 'erroneous interpretation', or 'disregard of ordinary meaning' in order to define the extent of powers of organizations. While there is good reason to believe that there are always substantive arguments involved when defending or contesting certain powers, every now and then an overly formal way of reasoning (perhaps also expressing an overly formal way of thinking) nevertheless confuses the image of what is at stake when defining the competence of organizations.[4]

The implied powers doctrine can already at the outset be characterized as fundamentally 'empty'. This means that the question of whether to make use of implied powers or not, and how to make use of such powers, does not result from

---

[2] Commonly used criterion for identifying international organizations include: an international agreement, an organ with a will of its own, and establishment under international law. See e.g. Henry Schermers and Niels Blokker, *International Institutional Law* (Martinus Nijhoff Publishers: The Hague, 1995) at 20-31.

[3] The basic tension between member sovereignty and organizational independence can in fact be seen to characterize all of institutional law. See Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge University Press, 2002).

[4] Perhaps most often this occurs through a belief in a single 'correct' definition of various notions, identifiable by the interpreter. On modern (liberal) approaches in general, see Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Finnish Lawyers' Publishing Company: Helsinki, 1989), especially chapter 3. On adopting a position of the 'external observer', see Anthony Carty, *The Decay of International Law* (Manchester University Press, 1986), e.g. at 95-96.

some abstract 'suitability' of the doctrine itself, but is a result of the substantive considerations being expressed through it. While the formal character of the implied powers doctrine (perhaps even the very manner of talking of widened competence in the terms of a 'doctrine') enables it to express a variety of views, this character at the same time makes it impossible for it to strike any conclusive decision as to its proper application. The actual substance of the discussion lies elsewhere. In more general terms, although legal reasoning involves certain specialized ways of thinking, this only indicates a knowledge of legal systems and the rules of reasoning within them. Legal reasoning does not involve any form of 'additional' knowledge or particular facts that are only open to lawyers. There are no circumstances that could only be reached through legal research. There can thus be nothing substantive that distinguishes legal debates from political.[5] It is rather the language used that makes the difference.[6]

However, neither the recognition of this 'emptiness' of the implied powers doctrine (and legal concepts more generally) nor an appreciation of the formal character of implied powers reasoning manages to reveal how substance enters and is expressed. This article hopes to contribute to an understanding of powers of organizations by focusing on this question. The aim, to paraphrase R.M. Unger, is to shed some light on the shaping power of what we ordinarily take for granted.[7] Focus is on how the 'emptiness' of the doctrine establishes itself through some of the legal notions at the heart of it - or put differently - on revealing some of the ways in which implied powers reasoning is open for substantive dispute. Eventually some suggestions will also be made as to what to make of this 'emptiness'.

## A Question of Balance

It is commonly held that the implied powers doctrine has its origin in United States constitutional law. The so-called 'necessary and proper clause' of the US

[5] As it is impossible to make substantive decisions within the law which would imply no political choice, it is rather what is politically right or just that becomes the basis for legitimacy. The inspiration here is mainly Koskenniemi, *Apology*, *ibid*. See also Lars Hertzberg, *The Limits of Experience* (Acta Philosophica Fennica: Helsinki, 1994), esp. chapter 9. 'Political' here indicating all debates in which value judgments are put forward.

[6] In this vein 'law' has been described more as an 'attitude', enabling practitioners to take part in political action, while distancing them from idiosyncratic interests. Martti Koskenniemi, 'The Place of Law in Collective Security', 17 *Michigan Journal of International Law* (1996) 455-490, at 489-490.

[7] Roberto Mangabeira Unger, *False Necessity: Anti-necessitarian Social Theory in the Service of Radical Democracy* (Verso: London, New York, 2001, 2nd edn) at xvii.

Constitution was envisaged by the Constitutional Convention already in 1787. The clause authorizes Congress:

> To make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.[8]

The ratification process was characterized by the debate on how to design federalism. On the one hand the federal government was to be afforded adequate powers to achieve its ends. On the other hand state autonomy and liberty was to be preserved.[9] Early commentary by James Madison held that:

> Without the substance of this power, the whole constitution would be a dead letter … Had the convention attempted a positive enumeration of the powers necessary and proper for carrying their other powers into effect, the attempt would have involved a complete digest of laws on every subject to which the constitution relates; accommodated too not only to the existing state of things, but to all the possible changes which futurity may produce; … Had the constitution been silent on this head, there can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government by unavoidable implication. *No axiom is more clearly established by law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included.*[10]

Anti-federalists, fearing that use of the clause would have no limits, labelled it the 'sweeping clause'. Anti-federalists preferred a definition permitting only incidental means or means without which express powers would be nugatory, whereas for the federalists the only true 'necessity' test was a lack of prohibition.[11] In 1819 it was the federalist approach that gained legal authority through the US Supreme Court in *McCulloch v The State of Maryland et al.* The famous line of Chief Justice Marshall captures the spirit of implied powers reasoning:

---

[8] The Constitution of the United States of America, 17 September 1787.

[9] See J. Randy Beck, 'The New Jurisprudence of the Necessary and Proper Clause', *University of Illinois Law Review* (2002) 581-649.

[10] Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (Mentor: New York, 1961) no. 44 (emphasis added).

[11] Beck, 'New Jurisprudence', *supra* note 9, at 593-598.

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are plainly adapted to that end, which are not prohibited, but which consist with the letter and the spirit of the constitution, are constitutional.[12]

The twists and turns in US Constitutional Law on the interpretation of the clause have been several ever since. Also international case law shows some variety in approaching the question of proper reach of organizations.

## A Perplexing International History

The early cases of the Permanent Court of International Justice (PCIJ) in the 1920s struggled to identify anything similar to the mechanism used by the US Supreme Court. In the *Agricultural Productions* opinions (1922), the *Personal Work of Employers* (1926) opinion, and the *Jurisdiction of the European Commission of the Danube* opinion (1927), the PCIJ hesitated to establish any special character of organizations beyond that of 'ordinary' treaties.[13] In the last of these the PCIJ even expressly enumerated the doctrine of 'attributed powers' as the basis of powers of the Commission, meaning that the Commission can only work on the basis of 'functions bestowed upon it'.[14] In many ways this is the opposite assumption to that of implied powers. However, the court expressed itself somewhat ambiguously, simultaneously recognizing that the performance of duties could also entail rights not enumerated in the constituent instrument (*effet utile*).[15] A change of mind seemed to be under way, and only one year later in the *Greco-Turkish Agreement* case, the PCIJ went even further and argued that although no provisions expressly indicated a power of the Mixed Commission for the Exchange of Greek and Turkish Populations to submit disputes to arbitration, such a power could be implied.[16]

It is however in the case law of the International Court of Justice (ICJ) that the doctrine gets a more detailed shape. The *Reparation for Injuries* case is the milestone in this respect. In deciding that the UN does have the competence to bring an

---

[12] *McCulloch v The State of Maryland et al.*, 1819, 17 US (4 Wheat.) 316, at 421 (hereinafter *McCulloch*).

[13] *Competence of the ILO to Regulate the Conditions of Labour of Persons Employed in Agriculture* and *Competence of the ILO to Examine Proposals for the Organization and Development of Methods of Agricultural Production*, PCIJ Series B, Nos 2 and 3 (1922), *Competence of the International Labour Organization to Regulate, incidentally, the Personal Work of the Employer*, PCIJ Series B, No. 13 (1926), *Jurisdiction of the European Commission of the Danube*, PCIJ Series B, No. 14 (1927) (hereinafter *Danube*).

[14] *Danube*, *ibid.*, at 64.

[15] *Ibid.*, at 67.

[16] *Interpretation of the Greco-Turkish Agreement of December 1st, 1926*, PCIJ Series B, No. 16 (1928), at 20.

international claim in respect of damage caused, not only to the organization, but also to its agents, the ICJ defined the scope of UN powers by stating that:

> Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication, as being essential to the performance of its duties.[17]

Powers were found necessary both in order to ensure the efficient and independent performance of the missions, and in order to provide effective support to agents:

> Upon examination of the character of the functions entrusted to the Organization and of the nature of the missions of its agents, it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter.[18]

This reasoning was opposed to (among others) by Judge Hackworth. He denied the existence of any 'necessity' and asserted his understanding of a proper theory of implied powers in the following way:

> The conclusion that power in the Organization to sponsor private claims is conferred by 'necessary implication' is not believed to be warranted under rules laid down by tribunals for filling lacunae in specific grants of powers.
>
> There can be no gainsaying the fact that the Organization is one of delegated and enumerated powers. It has to be presumed that such powers as the Member States desired to confer upon it are stated either in the Charter or in complementary agreements concluded by them. Powers not expressed cannot be freely implied. Implied powers flow from a grant of expressed powers, and are limited to those that are 'necessary' to the exercise of powers expressly granted. No necessity for the exercise of the power here in question has been shown to exist. … The exercise of an additional extraordinary power in the field of private claims has not been shown to be necessary to the efficient performance of duty by either the Organization or its agents. … The results of this liberality of judicial construction transcend, by far, anything to be found in the Charter, as well as any known purpose entertained by the drafters of the Charter.[19]

Judge Hackworth based his arguments on the fact that agents of the UN were nationals of their respective countries, hereby enjoying the customary methods of

---

[17] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports (1949) 174, at 182-183 (hereinafter *Reparation for Injuries*).

[18] *Ibid.*, at 184.

[19] *Ibid.*, at 198-199.

handling claims. According to him reliance on the protection offered by nation states would not compromise their independence. His approach would:

> … [G]ive the organization all that it needs from a practical point of view. If it desires to go further and to espouse claims on behalf of employees, the conventional method is open. … [A]nd the whole procedure would be free from uncertainty and irregularity.[20]

In the *Effect of Awards* case the question arose whether the UN General Assembly could establish a tribunal competent to render judgements binding on the organization. The court relied on its arguments in *Reparation for Injuries*:

> … [T]he power to establish a tribunal, to do justice between the Organization and the staff members, was essential to ensure the efficient working of the secretariat, and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity. Capacity to do this arises by necessary intendment out of the Charter.[21]

As part of the question the ICJ had to decide whether the Assembly had competence to establish a tribunal with authority to make decisions binding on itself. This had been contested with the claim that any implied power could not extend this far.[22] The criticism was (again) shared by Judge Hackworth:

> The doctrine of implied powers is designed to implement, within reasonable limitations, and not to supplant or vary, express powers. The General Assembly was given express authority by Article 22 of the Charter to establish such subsidiary organs as might be necessary for the performance of its functions … Under this authorization the Assembly may establish any tribunal needed for the implementation of its functions. It is not, therefore, permissible, in the face of this express power, to invoke the doctrine of implied powers to establish a tribunal of a supposedly different kind … [with authority to make binding decisions].[23]

No doubt to Judge Hackworth's great dismay, the ICJ broadened its reasoning even further in the *Certain Expenses* case. The purposes of the UN, the court said:

---

[20] *Ibid.*, at 204.

[21] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports (1954) 1, at 57 (hereinafter *Effect of Awards*).

[22] *Ibid.*, at 57-58.

[23] *Ibid.*, at 80-81. Reference to this case was made in the Appeals Chamber decision *The Prosecutor v Dušco Tadić* by the ICTY in establishing that the Tribunal has competence to examine a plea against its jurisdiction. See ICTY, Case No. IT-94-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995), paras 16-18.

> … [A]re broad indeed, but neither they nor the powers conferred to effectuate them are unlimited. Save as they have entrusted the Organization with the attainment of these common ends, the Member States retain their freedom of action. But when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization.[24]

The court suggested that as long as a power pertains to fulfil a purpose it will also be legal.[25]

In the WHO case of 1996, in denying the power of the WHO to request an advisory opinion on the legality of the use of nuclear weapons the circle of reasoning on powers of organizations closes. The ICJ identified the 'principle of speciality' as qualifying evolutive interpretations:

> The Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.[26]

In defining the 'principle of speciality', the court referred to the *Danube* case of the PCIJ, thus making it clear that this in fact was another name for the principle of 'attributed powers':

> The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments. Nevertheless, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers …. It is generally accepted that international organizations can exercise such powers, known as 'implied' powers. … In the opinion of the Court, to ascribe to the WHO the competence to address the legality of the use of nuclear weapons - even in view of their health and environmental effects - would be tantamount to disregarding the principle of speciality; for such competence could not be deemed a necessary

---

[24] *Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)*, Advisory Opinion, ICJ Reports (1962) 151, at 168 (hereinafter *Certain Expenses*).

[25] This in fact seemed to extend the implied competence of organizations so far that a theory of inherent powers emerged, according to which powers inhere in 'organizationhood' itself. For an overview and critique of the inherent powers idea, see Klabbers, *Introduction*, *supra* note 3, at 75-78.

[26] *WHO*, *supra* note 1, para. 25.

> implication of the Constitution of the Organization in the light of the purposes assigned to it by its member States.[27]

The historical outline gives rise to some thoughts. First, this latest twist demonstrates that reasoning on the extent of powers of organizations is capable of full 360 degree turns. If there in the 1950s and 60s had been something of an automatic assumption in favour of the existence of implied powers of organizations, this now came to an abrupt end. The dramatic effect of the shift is emphasized by the fact that a similar change took place in EC law as well.[28] This means that 'attribution' can be emphasized in one case and 'implication' in the next (and back again).[29] On the one hand an extreme functionalism seems to make a presumption against *ultra vires* seem practically immune to rebuttal. On the other hand, in the opposite case, where a claimed power is indeed considered *ultra vires* (as in the *WHO* case), the reference to attribution seems irreconcilable with the idea of implied powers.[30] Nevertheless, the two ideas – attributed powers and implied powers – exist simultaneously. Secondly, even within a single case (as e.g. in *Certain Expenses*), different constructions of the 'correct' extent of implied powers can be put forward. The uncertainty surrounding the question of powers of organizations does not hereby only concern whether a certain power exists or not, but is also a question of degree. There are some common elements to the discussions through which these determinations are made.

---

[27] *Ibid.*, para. 25.

[28] This is true both in respect of use of Article 308 EC and the so-called parallelism mechanism. See e.g. Opinion 2/94 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759. Marise Cremona, 'External Relations and External Competence: The Emergence of an Integrated Policy', in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 1999) 137-175.

[29] In fact the reference by the ICJ to 'necessary intendment' in both the *Reparation for Injuries* and *Effect of Awards* cases indicate that even implied powers are in its mind 'intended' and hereby, in a sense, attributed. However interesting this may be for a theoretical discussion on the origin of powers of organizations, the 'intended' character of powers did not in those cases serve as a restriction upon the claim to widened competence.

[30] See Shabtai Rosenne, *Breach of Treaty* (Grotius Publications: Cambridge, 1985) at 121, and Klabbers, *Introduction*, *supra* note 3, at 73 and 237-238.

# The Many Sources of Indeterminacy

## Methods of Interpretation as Guidance

Methods of interpretation, it is sometimes claimed, are needed in order for a legal order and judicial settlement to maintain its predictability.[31] This suggests that there inheres in those methods some predictions regarding the interpretative outcome. Whether and to what extent this is true is one of the basic questions in conceptualizing implied powers.

For an organization to operate independently (and hereby to be characterized as an organization), it should be able to fulfil its objects and purposes effectively - by recourse to 'necessary means'. This inherent dynamic is the primary argument in favour of evolutive interpretation.[32] Also the basic rule of interpretation of the Vienna Convention on the Law of Treaties emphasizes interpretation in light of the object and purpose.[33] In legal terms 'effectiveness', as a core element of teleological interpretation, is captured in the maxim *ut res magis valeat quam pereat*.[34] Within this principle, two inherent aspects have been identified, both justifying use of teleology as an interpretative device. *La règle de l´effet utile* embraces the rule that all provisions of a treaty must presumably be significant and necessary in order to establish the meaning of the text. The more common definition is that in a choice between several plausible interpretations, the one is to be chosen which best fulfils the purpose of the treaty. The second aspect, *la règle de l´efficacité*, covers the entire instrument and implies that all provisions are intended to achieve a certain goal. An interpretation that would make the text ineffective in this effort would be inadmissible. In interpreting constitutions of organizations this idea captures the essence of the implied powers doctrine.[35]

---

[31] See Aleksander Peczenik, *On Law and Reason*, (Kluwer Academic Publishers: Dordrecht, 1989) at 31-35.

[32] Georg Ress, 'The Interpretation of the Charter', in Bruno Simma (ed.), *The Charter of the United Nations, a Commentary*, (Oxford University Press, 1994) 25-44, and Schermers and Blokker, *Institutional Law*, *supra* note 2, at 158.

[33] See Article 31 of the Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 *United Nations Treaty Series* 331.

[34] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (Second Phase), Advisory Opinion, ICJ Reports (1950) 64 (hereinafter *Peace Treaties*): 'The principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat*, often referred to as the rule of effectiveness….', at 229. *Ut res magis valeat quam pereat* has been translated as: 'The thing may rather have effect than be destroyed', Henry Black, *Black´s Law Dictionary* (West Publishing Company: St. Paul Minnesota, 5th edn, 1979).

[35] See C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge University Press, 1996) at 45.

One way of defining whether a constitution (and its interpretation) is more or less teleological has been to point out differences in degree of imbalance between normativity and actual practice, i.e. that general clauses, legal principles, and evaluative concepts have only incompletely been transformed into textual normativity.[36] In such a definition a higher degree of teleology would equal with increased reliance on principles that are context bound, hereby capable of coping with social, economic, and political change. A similar logic could also be present in the hopes of restricting teleological interpretation of the competence of an organization through a high degree of enumeration and detail.[37] An underlying assumption in such a characterization of teleological argumentation is that textual interpretation is of a more 'objective' character, whereas increased teleology removes legal reasoning away from 'pure application' of law. This is also the spirit oozed by Judge Hackworth in *Reparation for Injuries*. In his mind a change of mechanism used - the shift from effectiveness to *effet utile* - would have rendered the interpretation more 'conventional' and unambiguous. However, the accuracy of such a claim can be doubted.[38]

The so-called 'textual' (even sometimes misleadingly called the 'objective') method of interpretation draws its inspiration from the classical statement by Vattel, that it is not permissible to interpret anything that doesn't need to be interpreted. This highly oversimplified picture of interpretation means that the 'clear', 'natural', 'plain', or 'ordinary' meaning of the words shall have priority.[39] Given the underlying idea of an 'objective' meaning of legal notions, the supposed advantage of textual interpretation in this sense would be reduced ambiguity and increasing coherence. Such hopes were also in the mind of Special Rapporteur Waldock in suggesting the

---

[36] See e.g. Hannu Tapani Klami, *Methodological Problems in European and Comparative Law* (Publications of the Institute for Jurisprudence, University of Helsinki, No. 14, 1997) at 34-35.

[37] This was not an unfamiliar suggestion during the work of the European Convention. See e.g. the Discussion Paper on Delimitation of Competence between the European Union and the Member States – Existing system, problems and avenues to be explored, CONV 47/02, 15 May 2002.

[38] Even if it would be maintained that Judge Hackworths argument was basically constructed around the contention that it would suffice for agents of the UN to enjoy customary methods of handling claims, there remains a belief in a less ambiguous character of his choice of 'method'. See quote accompanying note 20.

[39] For a useful analysis, see Myres McDougal, Harold Lasswell, and James Miller, *The Interpretation of International Agreements and World Public Order* (Martinus Nijhoff Publishers: Dordrecht, 1994) at 7. The ICJ has also used such logic: 'When the Court can give effect to a provision of a treaty by giving to the words used in it natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning. In the present case the Court finds no difficulty in ascertaining the natural and ordinary meaning of the words in question and no difficulty in giving effect to them.', *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, ICJ Reports (1950) 1, at 8.

following article (article 72) during the drafting of the 1969 Vienna Convention on the Law of Treaties:

> *Effective interpretation of the terms (ut res magis valeat quam pereat)*
>
> In the application of Articles 70 and 71 [current Articles 31 and 32] a term of a treaty shall be so interpreted as to give it the fullest weight and effect consistent:
>
> a) With its natural and ordinary meaning and that of the other terms of the treaty,
>
> b) With the objects and purposes of the treaty.[40]

Waldock considered the article a necessary restriction so as to prevent too innovative teleological interpretations. Special mention was made of constitutions of international organizations and the fact that, due to the functional character of those instruments, teleological methods of interpretation are more frequently used. The fear was that if left unrestricted, these methods could exceed 'proper' interpretation. The proposed article would in his mind restrict 'effectivity' arguments, but at the same time allow (and define) an acceptable degree of teleology.[41] The article was left out of the final convention and it is doubtful whether it would have had the effect Waldock hoped for. As every determination of effectiveness will build on a balance between different considerations, it is hard to see how the article could be useful in deciding which of two conflicting interpretations would be the proper one. In other words, a claim to a 'natural meaning' only begs the question of what that meaning is. If anything, the draft article then rather serves as a demonstration of the fact that a 'natural meaning' and emphasis on objects and purposes are part of the same definition of effectiveness.

This latter idea was possibly also in the mind of Judge Weeramantry, dissenter to the ICJ majority conclusions in the *WHO* case, in concluding:

> With much respect, I must therefore disagree with the Court's conclusion that 'WHO is not empowered to seek an opinion on the interpretation of its Constitution in relation to matters outside the scope of its functions' (Advisory Opinion, para. 28). The finding that the matter is 'outside the scope of its functions' is itself an interpretation of WHO's Constitution and, in reaching this

---

[40] Sir Humphrey Waldock, *Third Report on the Law of Treaties*, UN Doc. A/CN.4/167 and Add. 1-3 (3 March, 9 June, 12 June, and 7 July 1964).

[41] *Ibid.* See even Tetsuo Sato, *Evolving Constitutions of International Organizations* (Kluwer Law International: Hague, 1996) at 27-28.

> conclusion, the Court is in effect interpreting WHO's Constitution in response to WHO's Request.[42]

Although not directly referring to methods of interpretation, his reasoning builds on the idea that even when preferring textual interpretation, this is simultaneously also a statement on the teleology of the constitution. This way, as far as textual interpretation denies that it is in itself an interpretation and expression of a view on the 'proper' extent of the constitution, it assumes a false objectivity. Reliance on a 'plain', 'proper', or 'natural' meaning cannot assume that such a meaning can be established prior to any interpretation taking place, i.e. without that meaning already being based on a prior set of preferences and values. This means e.g. that the restrictive effect of the article proposed by Waldock, had it been included, could not have derived from any abstract 'natural meaning' without this already being an interpretation of the effectiveness of an organization. This further means that any turn from 'effectiveness' to *effet utile* or even to strictly textual reasoning does not necessarily remove ambiguity from the interpretation.

To doubt the accuracy of objectivity-claims does not do away with the textual approach (although it does affect its alleged objectivity). To the contrary, the relationship between the 'objective' and 'teleological' methods is still interesting, especially if reconstructed as a question of degree of teleology. Although textual and teleological interpretations do not differ by way of 'objectivity', they do serve as tools for expressing different aspirations. Whereas teleology sees the end goal (promotion of the objects and purposes of an organization) as decisive, a textual emphasis *can* be used to express a different approach. The degree of conflict between the two will be conditioned by the emphasis on either method of parties involved. Moreover, this question is seldom of an either – or character.[43]

So when the ICJ in its early practice in the *Peace Treaties* case held that teleological interpretation cannot contradict the text itself, while in the *Certain Expenses* case claiming that the text of the UN Charter can be qualified implicitly, there is in neither case no necessary misuse of methods of interpretation in any abstract sense. When 'misuse' is claimed, this rather puts forward a diverging interpretation.[44] As every interpretation will entail balancing against other interests,

---

[42] See *WHO*, Dissenting Opinion of Judge Weeramantry, *supra* note 1, at 128.

[43] In the words of one author, in teleological interpretation: 'The interpreter is usually confronted not with a choice of giving either no effect or unlimited effect to a treaty, but rather with the problem of deciding how effective the treaty should be made', Edward Gordon, 'The World Court and the Interpretation of Constitutive Treaties', 59 *American Journal of International Law* (1965) 794-833 at 797.

[44] See *Peace Treaties*, *supra* note 34, at 229, and *Certain Expenses*, *supra* note 24, at 159. Indeed, 'misuse' is often the language through which the question is dealt with, see e.g. Dapo Akande, 'The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice', 9 *European Journal of International Law* (1998) 437-467.

the extent to which implied powers are subsequently utilized will come to depend on the weight given to competing arguments. A typical example would be a situation where state-centred interpretations will give rise to restrictive arguments on the competences of an organization and vice versa (although a choice between teleological and textual interpretation need not always reflect a disagreement in the member – organization relationship). In such a case either emphasis takes a stand on what the proper balance between functionality and maintaining the *status quo* is. Adherence to any method of interpretation is an expression of an understanding of the proper extent of additional powers (or, as may be the case, the absence of any additional powers). Hereby, although a 'plain' meaning of the text is often invoked as a counterargument to teleological interpretation, this meaning will also rely on a conception of what is 'just'.[45] There is hereby nothing unquestionable or automatically unambiguous to a claim, backed by any method of interpretation, to possess the 'correct' view of things.[46]

## Determining the 'Necessity' of a Power

The link between the legal basis and the power implied is constituted through demonstrating a 'necessity'. A lack of necessity then serves to deny implied powers. In the *McCulloch* case the US Supreme Court did not accept the suggestion that the 'necessity' notion limits the right to pass laws for the execution of the granted powers only to those indispensable, without which the power would be nugatory. In characterizing the concept the Supreme Court recognized the absence of any fixed definition.

> To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a

[45] But, for a claim that teleology goes beyond proper interpretation into 'decision-making on the basis of judicial policy' (hereby suggesting that other methods of interpretation would not involve decisions of policy), see e.g. Trevor Hartley, *The Foundations of European Community Law* (Oxford University Press, 2003) at 79-80.

[46] This conclusion can also be used to question the usefulness of 'methods' of interpretation themselves. However, it can be submitted that they are useful as abstractions, indicating different interpretative preferences. For some remarks, see Derek C. Smith, 'Beyond Indeterminacy and Self-Contradiction in Law: Transnational Abductions and Treaty Interpretation in U.S. v Alvarez-Machain', 6 *European Journal of International Law* (1995) 1-31.

> figurative sense. … The word 'necessary' is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison…[47]

In ICJ cases the 'necessity' concept has showed differences in extent and grammatical design. The court speaks both of powers arising by *necessary implication as being essential to the performance of duties*, of powers *necessitated by the discharge of functions*, and of powers that are *appropriate for the fulfilment of stated purposes*. Surely there is a difference between necessity and essentiality, as well as between duties and functions.[48] Those critical of enlarged competence will rely on a narrower definition of 'necessity', this way utilizing it to delimit the powers of organizations. In fact, in more recent restrictive ECJ case law the 'necessity' criterion has even been presented as a requirement of an 'inextricable link'.[49]

Although a difference in emphasis can be identified in the use of different concepts (e.g. necessity/essentiality), a *prima facie* distinction between them would be problematic.[50] It would be akin to make a definition of implied powers for all organizations and all situations to come. Just as a 'necessity' does not serve as a material determinant in the context of organizational privileges and immunities, neither can it do that in the implied powers context. It is rather a justifying notion, used in order to detect a need.[51] The 'necessity' concept admits of substantial disagreement. Its 'contestable' character means that correct descriptions of its contents compete with one another.[52] Such disagreement (on 'correct' descriptions) can in fact be said to characterize constitutional interpretation in general. There are rarely provisions in constitutions for solving individual practical issues (and at least not for *all* possible issues arising). Instead the constitution provides the organization with a framework for coping with questions that arise before it. The implied powers doctrine can be seen to constitute part of such tools. The desirability (or undesirability) of powers is expressed through references to 'necessity' (or lack of it).

---

[47] McCulloch, *supra* note 12, at 414.

[48] See Amerasinghe, *Principles*, *supra* note 35, at 97, and A.I.L. Campbell, 'The Limits of Powers of International Organizations', 32 *International and Comparative Law Quarterly* (1983) 523-533 at 532-533.

[49] Opinion 1/94 (Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property - Article 228(6) of the EC Treaty) [1994] ECR I-5267, para. 86.

[50] A fairly uninformative attempt has been made in this respect by Lauterpacht. Necessity is accordingly: 'Something more than "important", but less than "indispensably requisite"', E. Lauterpacht, 'The Development of the Law of International Organizations by the Decisions of International Tribunals', IV *Recueil des Cours* (1976) 377-478 at 430-431.

[51] Peter Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (Martinus Nijhoff Publishers: Dordrecht, 1994) at 113.

[52] On 'essentially contested concepts', see S.L. Hurley, 'Objectivity and Disagreement', in Ted Honderich (ed.), *Morality and Objectivity* (Routledge: London, 1985) 54-97 at 83.

Hereby the process of defining a 'necessity' is a balancing act between different arguments. As it can not be assumed that the highest possible degree of effectivity would always be among the desires of members, different 'necessities' will emphasize different constructions of the constitution. And as any 'necessity' can not be determined in the abstract, the question must be settled in the individual case.[53]

The 'liberality of judicial construction' that hereby inheres in implied powers reasoning has often met with an accusation of involving political aspirations. In the *South West Africa* cases (second phase) the ICJ stated that:

> … [T]he whole 'necessity' argument appears, in the final analysis, to be based on *considerations of an extra-legal character*, the product of a process of after-knowledge…. [T]hat necessity, if it exists, lies in the political field. It does not constitute necessity in the eyes of the law. If the Court, in order to parry the consequences of these events, were now to read into the mandates system, by way of, so to speak, remedial action, *an element wholly foreign to its real character and structure* as originally contemplated when the system was instituted, it would be engaging in an *ex post facto* process, exceeding its functions as a court of law….
>
> It may be urged that the Court is entitled to engage in a process of 'filling in the gaps' in the application of a teleological principle of interpretation …. [I]t is clear that it can have no application in circumstances in which the Court would have to go beyond what can reasonably be regarded as being a process of interpretation, and would have to engage in a process of rectification or revision. Rights cannot be presumed to exist merely because it might seem desirable that they should.[54]

Judge Gros reasoned along the same lines in the *Namibia* case:

> To say that a power is necessary, that it logically results from a certain situation, is to admit the non-existence of any legal justification. Necessity knows no law, it is said; and indeed to invoke necessity is to step outside the law.[55]

This critique, targeting the very heart of the implied powers argument for being loaded with subjective judgement, disregards that even a finding of a lack of 'necessity' will build on a conception on the 'correct' functions of the organization.

---

[53] For indications in this vein, see e.g. Amerasinghe, *Principles*, *supra* note 35, at 97-98, and Campbell, 'Limits', *supra* note 48, at 532-533.

[54] *South West Africa (Ethiopia v South Africa; Liberia v South Africa)*, Second Phase, Judgement, ICJ Reports (1966) 5, paras 89 and 91.

[55] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports (1971) 1, (hereinafter *Namibia*) at 339.

For if any definition of powers will entail a stand on their 'necessity', then the argument defending restrictive interpretation cannot be more apolitical than the argument in favour of enlarged competence. The intensely political character of 'necessity' arguments affect every determination of it. The critique claiming that the more emphasis is on teleology and practice, the more politics will be involved, and the more such an interpretation may run counter to textual interpretation (and even interpretation 'properly so called') ignores that *any* interpretative choice entails a balancing between the textual and the teleological. Both the finding of 'necessity' and '*un*necessity' require taking a stand on the appropriateness of the powers at stake. Thus, similarly to the previous discussion on methods of interpretation, it would seem too simplified to conclude that 'necessity' reasoning is 'extra-legal'. Instead, an accusation of reliance on 'extra-legal' elements seems more of a confession that, in the eyes of the interpreter, the claimed need of an implied power is not convincing enough.

## 'The Express' as a Restraint on 'the Implied'

In addition that expanded competence is to be 'necessary', it should also be related to the objects and purposes of an organization. The 'object and purpose' test is a precondition for implied powers to exist in the sense that there must be something that the powers aim to fulfil. Subsequently this test also limits an organization to such powers *only* that fall within its objects and purposes. The ICJ and ECJ reasoning is as clear on this as the express reference of Article 308 EC.[56] As the purposes of an organization constitute its *raison d´être*, modification of these would entail a risk of undermining the existence of the organization. In this respect the objects and purposes stand out as absolute limits on widened competence.

However, especially in EC law the interpretation of Community objectives in applying Article 308 EC has been perceived as very generous - even to the degree that it has been doubted whether there is any area which could *not* be included within those objectives.[57] Such doubts highlight that the limiting function of the objects and purposes is a mirror image of the interpretation of the *raison d´être* of the organization. As to intergovernmental organizations, apparently e.g. the purposes of the UN (to maintain international peace and security, to develop friendly relations,

[56] 'If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures', see Article 308 of the Consolidated Version of the Treaty Establishing the European Community, OJ 2002 No. C325/1, 24 December 2002 (hereinafter *EC Treaty*).

[57] See e.g. Joseph Weiler, *The Constitution of Europe* (Cambridge University Press, 1999) at 54.

to achieve international co-operation in solving international problems, to be a centre for harmonizing the actions of nations), can easily allow for a variety of interpretations.[58] These purposes will perhaps never be 'fulfilled' to a degree which would render the organization useless. How can e.g. the purpose of 'developing friendly relations' be exhausted? And further, can the contents of this purpose be exhaustively defined? Perhaps not. A better characterization would then be that the fulfilment of purposes is an ongoing task.[59] This also means that any absolute limiting function of purposes upon enlarged competence cannot be stated in the abstract. The exact contents of the objects and purposes can only be determined *in casu*.[60] It could in fact be argued that one of the very reasons for establishing an organization to begin with is to enable functionality not available through 'traditional' treaty methods.[61] The very idea of establishing an organization (or at least one of the ideas) is that the exact content of the cooperation is to be formed in the individual case and in relation to the political ambitions prevailing. And while the UN may admittedly be something of a special case in respect of broadly defined purposes, the same characterization nevertheless also applies to the purposes of more technical organizations.[62]

The objects and purposes are not the only express provisions of constitutions that have an impact on defining the proper extent of the competence of organizations. The *Effect of Awards, Namibia,* and *Application for Review* cases all deal with aspects of the relationship between implied powers and express powers. The indication e.g. in the *Namibia* case was that the existence of express powers did not rule out similar implied powers:

---

[58] Charter of the United Nations, 26 June 1945, in force 24 October 1945, 1 *United Nations Treaty Series* xvi, Article 1.

[59] In this vein European integration has been characterized as an 'expression of a political unity, of which the form and shape are to a large extent open'. Ulrich Everling, 'Reflections on the Structure of the European Union', 29 *Common Market Law Review* (1992) 1053-1077 at 1060.

[60] Additionally, the object and purpose of an organization may contain several elements, some of which may be in conflict in particular situations. This way several parties to a dispute can rely on the object and purpose of the same organization to support their case. See Jan Klabbers, 'Some Problems Regarding the Object and Purpose of Treaties', VIII *The Finnish Yearbook of International Law* (1997) 138-160.

[61] See Klabbers, *Introduction*, *supra* note 3, e.g. at 12-13.

[62] Although e.g. the 'objectives' of the International Atomic Energy Agency ('to accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world') indicate a quite specific focus of the organization, it still does not in itself rule out any specific activities for furthering that objective. Statute of the International Atomic Energy Agency, 26 October 1956, in force 29 July 1957, 276 *United Nations Treaty Series* 3, Article II.

> The reference in paragraph 2 of this Article [Article 24 UN] to specific powers of the Security Council under certain chapters of the Charter does not exclude the existence of general powers to discharge the responsibilities conferred in paragraph 1.[63]

This does not mean that the use of implied powers *could not* be restricted by express powers. The indication in the *Effect of Awards* case was that an implied power incompatible with an express power would be legally inadmissible. Further, the ICJ noted that powers might even be expressly excluded, and that it would consider such a prohibition as absolute. The court also carefully concluded that the binding jurisdiction of the established tribunal did not affect the budgetary or administrative powers of the General Assembly, hereby making absolutely certain that existing powers were not infringed.[64] Similarly in the *Voting Procedure* case, express features (decision-making procedures) were considered absolute. The ICJ denied a possibility for constitutional development, as:

> These two systems [majority voting and unanimity] are characteristics of different organs, and *one system cannot be substituted for the other* without constitutional amendment.[65]

The UN Charter defines the functions and powers of the UN Security Council in chapters VI, VII, VIII, and XII. Naturally it would be unfortunate if by reference to purposes the entire enumeration of Security Council powers could be rendered irrelevant.[66] While it is true that the possibility of using implied powers in itself reduces the relevance of attempts to identify the *totality* of powers of the Security Council (or any organization for that matter), the situation would however be completely different, extinguishing all legal certainty if the existence of *at least* the expressly enumerated powers could not be assumed.

The case law of the ICJ suggests that although express powers do not exclude evolution of alternatives, this may only be done to the degree that the constitution doesn't require certain procedures or exclude certain possibilities. Consequently this would mean that if members have denied powers or the constitution is

---

[63] *Namibia*, *supra* note 55, para. 110. See also *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports (1973) 165, paras 16-23, and *Effect of Awards*, *supra* note 21, at 60, and Campbell, 'Limits', *supra* note 48, at 526-527.

[64] *Effect of Awards*, *supra* note 21, at 59.

[65] *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa*, Advisory Opinion, ICJ Reports (1955) 66, at 75 (emphasis added). See even Campbell, 'Limits', *supra* note 48, at 527-528.

[66] Bernd Martenczuk, 'The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?', 10 *European Journal of International Law* (1999) 517-547 at 537.

unambiguous, there is less room for implication.[67] On an abstract level it would then make good sense to claim that the *raison d´être* of an organization, including both the objects and purposes and express competence, cannot be altered implicitly. Such a contention also suggests an answer to the problem of how to avoid too far reaching teleological interpretations. The higher the degree of enumeration, i.e. the more exactly defined provisions there are (not to mention express exclusion of acts or policies), the less room for implied powers there would be. Something of a general 'principle' to this effect was formulated by Judge Shahabuddeen:

> However elastic may be the test to be applied in determining the existence and extent of implied powers - and undue rigidity is surely to be avoided - it seems in any event clear that a constituent instrument cannot be read as implying the existence of powers which contradict the essential nature of the organization which creates to exercise them. Powers of that kind could not be described as 'required' or 'essential' (within the meaning of the *Reparation* case) to enable the organization effectively to discharge the functions laid upon it by its organic text.[68]

The passage was part of his argument in dissenting to the majority decision that it was for the Chamber formed to deal with the case to decide whether the application for permission to intervene should be granted. The main objection of Shahabuddeen concerned whether parties should be given a say in the election of the judges of the Chamber. In his mind this election was a task for the ICJ alone and an attribute of a judicial character that could not be circumvented by use of any implied powers.[69]

The quoted part of Judge Shahabuddeens opinion sounds convincing. In fact it sounds so convincing that even the majority would probably have agreed on that part of his reasoning. This way the usefulness of the general contention in order to come to terms with the extent of implied powers seems quite limited. What is decisive is the view on *when* a power contradicts the constitution, and what actually is regarded as the 'essential nature' of the organization (or organ). While it would make good sense to identify a 'principle' of safeguarding the core features of the organization in the abstract, this does not do away with the ambiguity of the decision of when a contradiction is at hand. The formal 'principle' is too abstract to be helpful, as any claim that an implied power has a 'fundamental' impact upon the

---

[67] This is a common conclusion in the literature on organizations. See e.g. Amerasinghe, *Principles*, *supra* note 35, at 97-98, Sato, *Evolving*, *supra* note 41, at 261, and Campbell, 'Limits', *supra* note 48, at 524.

[68] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) (Application to Intervene),* ICJ Reports (1990) 1, at 41-42.

[69] *Ibid.*, at 40-41.

character of the organization (thus rendering the implied power impermissible) will build on a view on what the relevant 'fundamentals' are, why they are relevant, and how the 'fundamentality' is affected.[70]

This does not mean that identifying e.g. objects and purposes of the organization as the most fundamental characteristics of organizations would be of no use. To the contrary, a presumption to the effect that purposes or express provisions of an organization could be contradicted at any time would render them useless to begin with. This would make it impossible to know the character of an organization e.g. when considering membership in it. If this was the case it is easy to see that organizations would have a hard time attracting members. However, the question of when an implied power contradicts other elements of the constitution cannot be separated from the question of how the express wording is to be interpreted. Again, an expansive argument will not only create an implied power, but will as a precondition also interpret the limits to creating such a power teleologically. In the end then, although more detailed drafting *can* provide for more exact and detailed arguments in assessing the legality of implied powers, it does not suggest any automatic turn to textual interpretation. For however technical or detailed a constitution may seem, a teleological interpretation of its provisions will concern both those provisions enabling expansion, and those aiming at restricting it. A less teleologically inspired interpretation on the extent of powers will utilize a more 'textual' way of reasoning for asserting the limiting effect of the same provisions. This way no general contents for the restrictive effect of any elements of the *raison d´être* can be given.[71]

---

[70] As a demonstration of how a highly political question is masked behind similar reasoning, see e.g. Opinion 2/94 of the ECJ, where the court was content to deny the Community accession to the European Convention on Human Rights on the basis that this would entail: '… [A] substantial change in the present Community system for the protection of Human Rights, in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order. … Such a modification … with equally fundamental institutional implications … [and] of constitutional significance … could be brought about only by way of Treaty amendment.', *supra* note 28, paras 34-35. This is not to say that the argument could not make sense e.g. in light of the fact that the ECJ would have been subordinated to the European Court of Human Rights.

[71] The OAS Charter is an interesting case in this respect in providing that: 'The Organization of American States has no powers other than those expressly conferred upon it by this charter…'. Charter of the Organization of American States, 30 April 1948, in force 13 December 1951, 119 *United Nations Treaty Series* 4 (as amended on 5 December 1985 (25 *International Legal Materials* 527)), Article 1. At first sight this seems to exclude any implied powers. However, assuming that every organization aims to stretch in time (at least for *some* time), the underlying thought behind the reference of the OAS Article to 'express provisions' should perhaps not be seen as excluding effective fulfilment of those express powers (*effet utile*). And if this is carried further, to regarding express powers as functions (which has been done by both the US Supreme Court and the ICJ), then by way of a right to exercise express powers to their full extent the sphere of potential powers of the OAS all of a sudden expand

## The Limiting Function of Member Sovereignty

A perhaps even more apparent example of how expansive interpretation of the competence of an organization will also affect limits to those powers is provided by so-called safeguard clauses. Already early days of international case law denied an assumption that national sovereignty could not be restricted through state consent.[72] As far as organizations possess powers that states do not have, or certain powers have been withheld for the organization, the sovereignty of members is restricted.[73] Hereby participation in the work of international organizations, regardless of whether the organization exercises any implied powers, can have an impact on member jurisdiction. The more extensive the powers of an organization, the greater that impact will be. The further the move in favour of organizational independence, the further the impact on member sovereignty.[74]

The 'balance' between institutional competence and member jurisdiction is affected by any implied powers the organization might utilize. Hereby any claim that members cannot object to the impact of their membership upon their sovereignty since they have agreed to it (when joining), is only accurate for a certain moment in time. More effective co-operation and action is perhaps not among the future desires of all members, while the effective functioning of the organization, as it appears by the time of joining, may. While it could be argued that members should anticipate that the organization *may* develop in time and perhaps come to possess powers not foreseen at the time of drafting the organization (or becoming a member), there is of course no way a member can tell exactly *what* those powers will be.

---

substantially. In fact, it has been argued that e.g. the powers of the OAS Secretary-General have expanded in a way not explicitly envisaged in the Charter. See Hugo Caminos and Roberto Lavalle, 'New Departures in the Exercise of Inherent Powers by the UN and OAS Secretaries-General: The Central American Situation', 83 *American Journal of International Law* (1989) 395-402 at 396.

[72] '... [A]s the Court has had occasion to state in previous judgments and opinions, restrictions on the exercise of sovereign rights accepted by treaty by the State concerned cannot be considered as an infringement of sovereignty', *Danube*, *supra* note 13, at 36.

[73] Nigel D White, *The Law of International Organizations* (Manchester University Press, 1996) at 57. The ECJ in *Costa v ENEL* described the 'transfer of power from the States to the Community' as a permanent limit to the sovereign rights of members. Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585, at 593-594.

[74] 'Jurisdiction' as used here denotes the power of a state to have an impact upon circumstances e.g. concerning people and property. As an exercise of authority which may alter or create legal relationships and obligations it is a central feature of state sovereignty. 'Impact on sovereignty' and 'impact on jurisdiction' synonymously indicate an effect upon the exercise of this authority.

In order to meet with possible future challenges to member jurisdiction, most constitutions of organizations entail domestic jurisdiction clauses.[75] Such clauses anticipate organizational change and provide a counterforce to evolutive practices of organizations by safeguarding member *domaine réservé*. Article 2(7) UN provides that:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state …[76]

The effect and impact of the clause as a counterbalance to widened competence apparently hinges upon the interpretation of the sphere of member state *domaine réservé*. Article 5 EC demonstrates even more complex balancing mechanisms:

> The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.[77]

There are two interesting aspects to this clause. First of all member jurisdiction is safeguarded by the principle of subsidiarity. Secondly the article introduces a more general proportionality test. The impact of the principle of subsidiarity is determined by a qualitative assessment on effectiveness (is there a need for Community action?) and efficiency (can the Community achieve the objectives better?). To challenge a measure on the basis of subsidiarity, the applicant must show that the objectives of the measure could have been equally well attained by the member. This raises a complicated question of comparative efficiency. As to the proportionality test, it also inheres in the requirement of appropriateness of Article 308 EC.[78] Proportionality goes down to the core of the 'necessity' criterion in the sense that it regulates the relationship between the objectives to be fulfilled and the means to pursue them. It requires that the measure adopted must be suitable for attaining the

---

[75] On such clauses in general, see Schermers and Blokker, *Institutional Law*, *supra* note 2, at 142-147. On the UN Article specifically see also e.g. Magdalena Martin Martinez, *National Sovereignty and International Organizations* (Kluwer Law International: The Hague, 1996) at 66-70 and 94-97.

[76] UN Charter, *supra* note 58, Article 2(7).

[77] *EC Treaty*, Article 5, *supra* note 56.

[78] John Usher, *EC Institutions and Legislation* (Longman: London, 1998) at 90-91.

objective and remain within the proportions of that end.[79] Proportionality differs from subsidiarity in that the latter involves relative efficiency. Thus, proportionality does not weight interests of the organization and members against each other.[80] Nevertheless, any definition of which measures go 'beyond the necessary' is bound to be as contentious as an assessment of who would be better equipped to attain certain objectives.[81]

The inherent tension between the 'will' of the organization and member jurisdiction is reflected in the opposing driving forces behind implied powers and domestic jurisdiction. The underlying assumption of any implied power is that the jurisdiction of the organization is insufficient. The additional or enlarged competence comes into existence as a correctional measure, the function of which is to provide more efficient means for the organization. Such a characterization will also build on a presumption that domestic jurisdiction is not an obstacle. The same also works the other way around. This way an extension of either principle restricts the application of the other. An emphasis on national sovereignty will consider an extensive implied power incompatible (assuming that it has an impact on national sovereignty).

As the two principles will require balancing against each other, it might be safe to conclude that there is nothing that would prevent the use of an implied power of *not* the (theoretically) least impact upon member jurisdiction, if political agreement on the course of action can be attained. In this vein domestic jurisdiction issues were already in the *Nationality Decrees* case identified as 'essentially relative' by the PCIJ.[82] In the heydays of internationalism the absence of challenges to the jurisdiction of organizations by use of domestic jurisdiction clauses even got some authors to characterize them as of symbolic interest only. In light of the discussion above, such characterizations are more telling on the attitude of those authors towards international organizations than anything else.[83]

---

[79] Furthermore, it includes the requirement that the measure must be chosen that least affects individuals. See e.g. Francis G. Jacobs, 'Recent Developments in the Principle of Proportionality in European Community Law', in Evelyn Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing: Oxford, 1999) 1-21.

[80] The proportionality principle has hereby even (misguidingly perhaps) been characterized as more justiciable. See Renaud Dehousse, 'Community Competences: Are there Limits to Growth?', in Renaud Dehousse (ed.), *Europe After Maastricht: An Ever Closer Union?* (Beck: München, 1994) 103-125 at 114-115.

[81] E.g. Hartley, *Community Law*, *supra* note 45, at 114-118 argues that the contents of the principle will subsequently become dependent upon ECJ policy.

[82] *Nationality Decrees Issued in Tunis and Morocco (French zone)*, PCIJ Series B, No. 4 (1923), at 24.

[83] See e.g. Schermers and Blokker, *Institutional Law*, *supra* note 2, at 146. In EC law the absence of precedents on the use of subsidiarity as a challenge to legislation even lead some authors to consider

## Indeterminacy as an Element of Law

The features dealt with so far - methods of interpretation, the 'necessity' test, the limiting function of express provisions and member sovereignty - all form part of the language through which the proper extent of powers of organizations is defined. They constitute elements of a *vires* test of a claimed power. Especially the more recent case law of the ECJ and the ICJ suggest that the competence of organizations can be *ultra vires*. If there in the aftermath of the *Certain Expenses* case were doubts as to whether a *vires* test is necessary, it must now be clear that claims to powers can be excessive. A better characterization would in fact be that the *vires* test was only seemingly absent, due to the extraordinary enthusiasm towards international organizations that characterized much of the second half of the 20th century.

But the claim that an organ must follow its legal order is also a truism. To claim that an implied power should respect e.g. purposes and express powers merely begs the question of how the restrictive effect of these provisions is interpreted. As an expansion of powers will simultaneously interpret restrictions 'restrictively' and vice versa, any 'functional necessity' claim whereby restrictions and powers are balanced against each other renders the two doctrines (implied powers and *ultra vires*) intertwined. In this regard they have even been referred to as different sides of the same coin. This means that *ultra vires* claims can in themselves be reformulated as different interpretations. The more teleological a reasoning is agreed upon, the more narrow the scope of an *ultra vires* determination will be – this is in itself an expression of the perceived need of widened competence.[84]

As several different constructions can be correct on formal grounds, decisions cannot be considered 'legal' merely because they are formally correct. Instead, in order to reach the very reasons for adopting a certain interpretation, interest must be turned from the construction of the legal argument to what is expressed through it. This has been the underlying theme, aspects of which the chapters above have mapped out by demonstrating how some of the notions at the heart of the definition of implied powers serve as an entry point for substantive reasoning and

such challenges impossible. See e.g. Usher, *EC Institutions*, *supra* note 79, at 99-100. However, in the *Tobacco Advertising* case the ECJ asserted that: 'To construe that article [Article 95] as meaning that it vests in the Community legislature a general power to regulate the internal market would not only be contrary to the express wording if the provisions … but would also be incompatible with the principle embodied in Article 3b of the EC Treaty (now Article 5 EC) that the powers of the Community are limited to those specifically conferred on it.', C-376/98 *Federal Republic of Germany v European Parliament and Council of European Union* [2000] ECR I-8419, para. 83.

[84] As a wide use of implied powers makes the restrictive role of the *ultra vires* doctrine seem rather theoretical, many authors did hereby, especially before the *WHO* case, consider an *ultra vires* finding to be a possibility in principle only. See e.g. Schermers and Blokker, *Institutional Law*, *supra* note 2, at 140.

disagreement. However, by doing this little has been said about how contents enter those concepts. Some remarks should be made on this question, as it has an important bearing on how to assess the ambiguity at the heart of the implied powers doctrine.

A useful abstraction for denoting that it is neither a text nor the individual reader that produces meanings could be the notion of 'interpretive community'.[85] On the one hand it is not the formal legal concept that settles the question of extent of powers. On the other hand that legal concept cannot assume any definition whatsoever. In emphasizing these aspects the 'interpretive community' notion does not indicate any static or easily definable reference-group from which the contents of law could be derived, but is rather an indication of the social embeddedness of law.[86] Defending a particular interpretation does not mean demonstrating any 'true meaning', but is rather a process of convincing (the other party or the entire 'community'). Any 'objectivity' of law (or an interpretation) will hereby mean that it expresses a conventional view. This view is never apolitical as it will always express the values of the public.[87] The situatedness of the interpreter within a 'community' in which the interpretation arrived at is meaningful and acceptable is also what keeps the interpretative process from degenerating into mere subjectivism. For it will not follow that the extent of powers can be interpreted in 'any possible way' at any given time. This 'legal certainty' derives from that the interpretation must conform to common values in order to be perceived as 'authoritative'.[88] Perhaps something to this effect was in fact in the minds of the ICJ in the *WHO* case in defining the limits to powers of organizations as 'a function of the common interests'.[89]

The relevant 'community' is different in different contexts. When assessing the relationship of a power to peremptory norms, the organization cannot make such an

---

[85] The concept derives from Stanley Fish, *Is there a Text in this Class?: The Authority of Interpretive Communities* (Harvard University Press, 1980).

[86] For a related account of the Wittgensteinian idea of 'rules as a social practice', see Jane Radin, 'Reconsidering the Rule of Law', 69 *Boston University Law Review* (1989) 781-819.

[87] Fish, *Text*, *supra* note 85: 'The interpretative community itself is not objective because as a bundle of interests, or particular purposes and goals, its perspective is interested rather than neutral; but by the very same reasoning, the meanings and texts produced by an interpretive community are not subjective because they do not proceed from an isolated individual but from a public and conventional point of view', at 14.

[88] In general, see e.g. Ian Johnstone, 'Treaty Interpretation: The Authority of Interpretive Communities', 12 *Michigan Journal of International Law* (1991) 371-419. 'Authoritative' here taking hold of 'power, convention, and the consensus of a dominant perspective' as distinguished from an 'authority' that derives from the power of legal authorities. See Margaret Davies, 'Authority, Meaning, Legitimacy', in Jeffrey Goldsworthy and Tom Campbell (eds), *Legal Interpretation in Democratic States* (Ashgate: Burlington, 2002) 115-129 at 123-126.

[89] See quote *supra* at 8.

interpretation without regard to the international community at large (who defines the content of peremptory norms).[90] It is hereby inconceivable e.g. that an organization could imply a power to commit crimes and regard this as valid law on the basis of acceptance by the membership of the organization – the 'interpretive community' that determines the question of validity would in this case be wider. The relevant 'community' can be considerably narrower when determining whether a power accords to a division of competence between organs of an organization. Importantly, in either case 'acceptability' by the relevant 'community' becomes the decisive difference between arbitrariness and a system of justice.[91]

This does not suggest that there would exist a single 'correct' interpretation waiting to be discovered. Instead there is good reason to believe that there will always exist competing claims to the 'correct' order of things. Members between themselves, organs of an organization, and members and the organization, will have different views regarding desirable future development. These will be reflected in different approaches to the acceptability of widened competence. It is the deliberation between these approaches that will eventually arrive at a 'correct' definition of the powers of an organization. Dissenters will on their part refer e.g. to the 'erroneous' construction of purposes, functions, or powers, a disregard of the 'true' meaning, or a false construction of the necessity of a power. They hereby put forward a competing conception of the 'correct' content of those concepts.[92]

## Conclusion

On the one hand the 'emptiness' of the implied powers doctrine takes hold of an open-endedness of implied powers reasoning. This means that the doctrine is capable of different constructions, expressing different views as to the correct extent of powers of organizations. On the other hand this means that the doctrine is incapable of providing any substantive guidance on questions of interpretation on its own terms – it fails to prefer any of the 'correct' interpretations in the abstract. Thus, while implied powers are both legitimized and limited by the objects and

[90] A *jus cogens* characterization of a norm, while not removing indeterminacy from a definition of implied powers, might however provide some guidance regarding the effect of an *ultra vires* finding. See Ebere Osieke, 'The Legal Validity of Ultra Vires Decisions of International Organizations', 77 *American Journal of International Law* (1983) 239-256 at 243.

[91] See Hertzberg, *Limits*, *supra* note 5.

[92] As the substance of implied powers can only be identified by reference to the deliberation on what is acceptable, this also emphasizes the capacities for facilitating such debate. As the legitimacy of implied powers will hereby be affected by the ability to arrive at (and express in legal terms) the expectations on how to develop the organization, e.g. any 'democratic deficits' seem highly unfortunate.

purposes of an organization, such a claim is useless as such. The 'correct' interpretation of implied powers is impossible to arrive at through a focus on legal concepts only - or more to the point - such a focus leaves out something essential about the sources of that 'correctness'.

This 'emptiness', characteristic of many doctrines and concepts of international law, establishes itself as an image of indeterminacy and ambiguity. One way to deal with this has been to discredit the doctrine (and especially the 'necessity' reasoning at the heart of it) as a distortion of law, and a tool for the politically powerful. However, this need not be the case. Implied powers reasoning need not be seen as a problem. Instead, the indeterminacy at the heart of the doctrine can be understood and appreciated as an element of law. In fact an absence of any abstract fixed content even stands out as essential in order to arrive at a proper definition of the powers of organizations. By emphasizing that values and preferences permeate all human action - including the legal profession – arguments on the 'necessary' or 'unnecessary' character of powers, on the textual or teleological character of an interpretation, on a natural meaning, on a 'false' construction of the doctrine or the constitution etc., all disguise an opinion as to which interpretation is to be preferred. Consequently, emphasizing one 'necessity' to another, purposes one day but effectivity the next, seemingly ignoring the express wording on one question but appreciating it on another, will not stand out as making a mockery of law, but can be appreciated as expressions of policy.

An 'emptiness' of the doctrine does not hereby indicate a limitlessness, but rather the incapacity of the formal appearance to communicate its contents. An implied power will always be related to purposes and express powers of an organization, but the question as to whether (and when) that relationship becomes restrictive upon the scope of powers evades any general answer. Certain interpretations might certainly stretch e.g. purposes more than others. However, a characterization of the interpretation as 'stretching' only indicates that it is being challenged.

Eventually this characterization of implied powers reasoning does not do away with the ambiguity of the doctrine, and fortunately so. For as soon as a claim to a 'necessary' or 'correct' interpretation is made it will entail a choice towards competing interpretations. But as preferences of both the organization and members change, a balance e.g. between purposes and powers must not only be reconstituted for individual organizations and in individual cases, but must also be tested in time. Competing claims to the 'correct' interpretation is what keeps the discourse on the legitimate use of implied powers alive. To maintain legitimacy powers must be subject to redefinition and reconfirmation. Otherwise, as member

desires change, the extent of the competence of an organization will no longer reflect a conventional view.

# The 'Belgian Thesis' Revisited: United Nations Member States' Obligation to Develop Autonomy for Indigenous Peoples

Samuel De Jaegere*

## Introduction

'If we are to recognize the inner dignity of the particular man, this obligation extends to all positive characteristics with which he connects his dignity; if we love a man we must love his nation, which he loves and from which he does not separate himself'.[1] This ethical consideration may imply a duty for the state to develop autonomy for its nations. In international law, such a general duty is, however, disputed. In the midst of the anti-colonial attack in the 1950's, Belgian delegates at the UN maintained that all states were internationally obliged to develop self-government for indigenous nations. The so-called 'Belgian thesis' became legendary in the struggle of indigenous peoples for independence. Some still use it today to add weight to their claims.

It is bizarre that a colonial power, like Belgium, would have sung the praises of independence for all indigenous peoples. It is bizarre that a divided society, like Belgium, made up of linguistically diverse communities, would have preached unreasonable 'love' for all indigenous nations. Was Belgium ignoring its interest in territorial integrity? Was it insincere? Or has it been misunderstood? How come, what did it really say and is this still valuable today?

---

* E.MA (Venice). This essay was written as an E.MA. thesis at the Raoul Wallenberg Institute in Lund, Sweden. I wish to acknowledge Prof. G. Alfredsson for supervising my thesis, Dr. Z. Skurbaty for introducing me to the subject matter, and Prof. J. Klabbers for supporting the publication. Thanks are also due to the editing team of the Yearbook, in particular Ms. T. Tuori and Dr. J. Summers.

1 V. Solovyev quoted in E. Kamenka, 'Human Rights: Peoples' Rights' in J. Crawford (ed.), *The Rights of Peoples* (first published 1988) (Clarendon Press: Oxford, 2001) at 131.

# The 'Belgian Thesis'

> The United Nations has the interests of peoples at heart; territories are important only because of the people who live there and suffer.[2]

## The Normative Blueprint for 'Non-Self-Governing Territories'

### The Origin

Chapter XI of the UN Charter, entitled 'Declaration regarding non-self-governing territories', encapsulates the normative blueprint for all territories 'whose peoples have not yet attained a full measure of self-government'.

> Members of the UN which have or assume responsibilities for the administration of [such] territories … recognize the principle that the interests of the inhabitants of these territories are paramount, and accept … to ensure … their political, economic, social and educational advancement, their just treatment, … [and] to develop self-government.[3]

The Chapter is grounded in the idea that, 'all political power … set over men … ought to be some way or other exercised ultimately for their benefit'.[4] Colonial rule, accordingly, must primarily benefit the colonized population. This train of thought was developed in the sixteenth century by Spanish legal scholars and theologians, especially by de las Casas and de Vitoria and later also by Edmund Burke.[5] The

---

[2] P. Ryckmans, Statement at the Seventh Session of the General Assembly, Meeting of the Fourth Committee (19 November 1952) reproduced in *The Sacred Mission of Civilization: To which peoples should the benefits be extended? The Belgian Thesis* (Belgian Government Information Center: New York, 1953) at 28.

[3] Article 73 of the Charter of the United Nations, 26 June 1945, in force 24 October 1945, 1 *United Nations Treaty Series* xvi.

[4] E. Burke, Speech delivered before the House of Commons in 1783 in the course of a debate on a law concerning the Indies, quoted in F. van Langenhove, *The Question of the Aborigines before the United Nations: The Belgian Thesis* (Royal Colonial Institute of Belgium: Brussels, 1954) at 60.

[5] D. Rauschning, 'Article 75' in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (C. H. Beck: Munich, 1994) at 1099, van Langenhove, *The Question of the Aborigines*, *supra* note 4, at 32 and 60-62, G. C. Marks, 'Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolomé de las Casas', 13 *Australian Year Book of International Law* (1992) at 8, and D. Sanders, 'The Re-emergence of Indigenous Questions in International Law', 3 *Canadian Human Rights Yearbook* (1983) at 5, both reproduced in S. J. Anaya (ed.), *International Law and Indigenous Peoples* (Dartmouth and Ashgate: Aldershot, 2003) at 3 and 55.

theory became known as the 'sacred trust of civilization'.[6] 'Advanced nations'[7] were entrusted with the guardianship of so-called 'backwards peoples', like parents take care of their children.[8] The idea was particularly taken to heart by the British and was expressed on the international scene in several multipartite treaties during the nineteenth century.[9] It was finally codified as the principle of trusteeship in Article 22 of the Covenant of the League of Nations, instituting the system of mandates.[10]

Under this system, the entrusted powers had the duty to guide at least certain of the mandated territories to independence.[11] The system only applied to the dependent territories of Germany and the Ottoman Empire, the ex-enemy states of World War I. The other dependent territories of League of Nations' Members and, more precisely, their native inhabitants were guaranteed 'just treatment' – not self-government - under Article 23 (b) of the Covenant.[12] Dependencies of ex-enemies had better prospects than the dependent territories of victorious countries.

In the aftermath of World War II, the mandate system was succeeded by trusteeship. The Allies felt, however, that the *Zeitgeist* no longer allowed them to exclude from the beneficial status their own dependent territories, whose peoples had contributed to the victory.[13] Thus, Chapters XII and XIII of the UN Charter, which lay down the international trusteeship system, provided the possibility of placing any dependent territory under the system by way of treaty (trusteeship agreement).[14] Moreover, these Chapters were preceded by Chapter XI which was

---

[6] Article 22, paragraph 1 of the Covenant of the League of Nations. The Covenant is part of the Treaty of Versailles, 28 June 1919, in force 10 January 1920.

[7] *Ibid.*, Article 22, paragraph 2.

[8] van Langenhove, *The Question of the Aborigines*, *supra* note 4, at 61.

[9] J. L. Kunz, 'Chapter XI of the United Nations Charter in Action', 48 *American Journal of International Law* (1954) at 103. See for example: article 6 of the Berlin Act of 1885. One should, however, never forget that often the worst crimes were committed under the banner of 'civilization', often guided by a 'sacred thirst' for wealth. One may think of the atrocities committed under the authority of King Leopold II of Belgium in the former Congo. See R. A. Plumelle-Uribe, *La férocité blanche: des non-blancs aux non-aryens, génocides occultés de 1492 à nos jours* (Albin Michel: Paris, 2001) at 96 *et seq.*

[10] Kunz, 'Chapter XI', *supra* note 9, at 103.

[11] K. Doehring, 'Self-determination' in Simma (ed.), *The Charter*, *supra* note 5, at 51 and A. Eide, 'In Search of Constructive Alternatives to Secession' in C. Thomuschat, *Modern Law of Self-Determination* (Martinus Nijhoff: Dordrecht, 1993) at 150 and Article 22, paragraph 4 of the Covenant of the League of Nations, *supra* note 6.

[12] Article 23 (b) of the Covenant of the League of Nations and Sanders, 'The Re-emergence', *supra* note 5, at 18.

[13] M. Bedjaoui, 'Article 73' in J-P. Cot, A. Pellet (eds), *La Charte des Nations Unies: Commentaire article par article* (2nd edn, Economica: Paris, 1991) at 1078-1079.

[14] Article 77 (c) of the UN Charter, *supra* note 3.

initially - during the drafting process - conceived as a Chapter on 'general policy' in regard to all dependent territories of all Members of the UN.[15]

## The Content

Chapter XI consists of Articles 73 and 74. The ensuing legal obligations towards dependent territories are 'distinctly less' demanding than the ones administering states assume with regard to their trust territories.[16] The main difference is that Article 73 (b) solely provides for the development of 'self-government', whilst 'independence' is stipulated as a goal of trusteeship. Whether 'self-government' excludes independence depends, however, upon its interpretation. Recourse to the *travaux préparatoires* is necessary for Chapter XI is vague in its formulations, both with regard to obligations and with regard to basic definitions.[17]

Reaching consensus on the policy for non-self-governing territories was not an easy task. It was a hot potato that only got to the table in San Francisco itself,[18] where a sui generis procedure was followed for handling it.[19] To grasp how sensitive the topic was at that time, it is helpful to consider Churchill's assertion in 1942 that he had not become British prime minister 'in order to preside over the liquidation of the British Empire'.[20] No doubt, serious diplomacy was needed. In A History of the United Nations Charter: the Role of the United States 1940-1945, R.B. Russell gives an account of how things developed.[21] The objective of 'self-government' for dependent territories was very controversial. It was the United Kingdom who initially favoured the term 'self-government'. France argued for some form of federal unity between the dependent peoples and the metropolitan country, but disliked the term 'self-government' in part for not translating well. China and the Soviet Union, however, wanted to add 'independence' as a goal of the policy. They got support for this demand from Iraq, the Philippines and Egypt, in later phases of the drafting procedure. The colonial powers, however, argued that granting independence would lead to an undesirable and confusing multiplication of states,

---

[15] Bedjaoui, 'Article 73', *supra* note 13, at 1079 and F. van Langenhove, 'Le Problème de la Protection des Populations Aborigènes aux Nations Unies' 89 *Recueil des Cours* (1956) at 403. See also R. B. Russel and J. E. Muther, *A History of the United Nations Charter: The role of the United States 1940-1945* (Brookings Institution: Washington, D.C., 1958) at 814.

[16] Fastenrath, 'Chapter XI' in Simma (ed.), *The Charter*, *supra* note 5, at 1090.

[17] Kunz, 'Chapter XI', *supra* note 9, at 104.

[18] Other issues in the UN Charter had been dealt with before in the Dumbarton Oak conversations.

[19] See Russel and Muther, *A History*, *supra* note 15, at 808-810.

[20] *The Times*, 11 November 1942, quoted by Fastenrath, 'Chapter XI', *supra* note 16, at 1090, footnote 8.

[21] See Russel and Muther, *A History*, *supra* note 15, at 813-824. My account of the proceedings is entirely based upon theirs.

might also result in the reluctance of administering powers to continue to invest their resources into those territories and could be against the will of the peoples living in those places. China replied that no people ought to be deprived of the prospect of achieving independence, but added some diplomatic language in order to bridge the concerns: 'as may be appropriate to the particular circumstances of each territory and its people'. United States' diplomacy then ingeniously highlighted the convenient ambiguity of the term 'self-government'. 'Self-government' can take many forms and independence is one of them. The term 'self-government', the United States argued, in fact contained the Chinese compromise. After some more bargaining, all parties finally agreed upon the term 'self-government' as not excluding 'independence in appropriate circumstances'.[22] It is in that particular sense that 'self-government' formed an essential part of the normative blueprint.

Equally essential was paragraph (e) of Article 73. It reads as follows: 'Members of the UN … accept … to transmit regularly to the Secretary-General … information … relating to economic, social, and educational conditions in [their non-self-governing] territories'. The paragraph instituted a form of international supervision to assure compliance with Article 73. Hence, the development of 'self-government' depended upon this paragraph's application.[23] Application of the paragraph demanded identification of the bearers of the duty to report. This, in turn, required a definition of 'non-self-governing territory'. As a result, a controversy arose. It transformed the blueprint into 'another theatre of the struggle between the white man and the non–white humanity'. It is there that the Belgian thesis played its cunning role.[24]

## The 'Belgian Thesis' in Defining 'Non-Self-Governing Territories'

### What is a 'Non-Self-Governing Territory'?

#### The Charter

Article 73 defines a 'non-self-governing territory' as one 'whose peoples have not yet attained a full measure of self-government'. This is 'particularly vague'.[25] The terminology used during the drafting process was also equivocal: diplomats spoke

[22] *Ibid.*, see also C. E. Toussaint, 'The Colonial Controversy in the United Nations', 10 *Yearbook of World Affairs* (1956) at 185 and Fastenrath, 'Chapter XI', *supra* note 16, at 1091.

[23] Bedjaoui, 'Article 73', *supra* note 13, at 1080.

[24] Kunz, 'Chapter XI', *supra* note 9, at 106.

[25] *Ibid.*, at 104.

about 'dependant peoples', 'dependencies', 'dependant territories', but also about 'colonial territories' or 'colonies' and initially about 'dependent territories inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world'.[26] The intentions are not self-evident except that Chapter XI excludes the problem of minorities living scattered throughout a State.[27] It is only concerned with defined territories. But what defined territories exactly? The Charter's lack of definition was not compensated by the designation of somebody responsible for deciding what territories were to be regarded as 'non-self-governing'.[28] Yet, whoever decided upon this matter in effect interpreted 'self-government',[29] determined the geographical ambit of a territory considered and ultimately defined 'non-self-governing territories'.

### Who Decides?

Initially, it was left to the respective Members of the UN to decide what was intended by 'non-self-governing territory'. In 1946 the Secretary-General of the UN sent them each a letter in which they were invited to express their opinion on the factors to be borne in mind in determining the territories envisaged by Chapter XI and to designate such territories subject to their jurisdiction.[30] 'Out of only twenty-two replies … only ten commented on these two questions. Moreover, only eight Members voluntarily enumerated territories on which they would transmit information'.[31] These territories were subsequently listed in General Assembly Resolution 66 (I), which lists 74 territories under eight different administering states.[32] Almost all were colonies or protectorates and were separated by 'salt water' from the states concerned.[33] Consequently a small number of so-called 'colonial

---

[26] N. Veïcopoulos, *Traité des territoires dépendant. Tome III: Les territoires non-autonomes* (Paris, 1985) at 1076, footnote 2149 (for a different opinion) and Russel and Muther, *A History*, *supra* note 15, at 813 *et seq.*

[27] J. Crawford, *The Creation of States in International Law* (Clarendon Press: Oxford, 1979) at 359.

[28] A. Rigo Sureda, *The Evolution of the Right of Self-Determination: A Study of United Nations Practice* (A.W. Sijthoff: Leiden, 1973) at 53.

[29] Toussaint, 'The Colonial Controversy', *supra* note 22, at 187 and Veïcopoulos, *Traité*, *supra* note 26, at 1104.

[30] Kunz, 'Chapter XI', *supra* note 9, at 106, Rigo Sureda, *The Evolution*, *supra* note 28, at 49, Crawford, *The Creation of States*, *supra* note 27, at 360 and J.E. Falkowski, *Indian Law/Race Law: A Five-Hundred-Year History* (Praeger Publishers: New York, 1992) at 49. The letter dated 29 June 1946.

[31] Falkowski, *Indian Law*, *supra* note 30, at 49. The Members were Australia, Belgium, Denmark, France, New Zealand, The Netherlands, United Kingdom and United States.

[32] GA Res. 66 (I), 14 December 1946.

[33] The exceptions for one or the other reason constituted the Cook Islands, the Tokelau Islands and Alaska.

powers' became ensnared in a system of international accountability for their colonial administration. They faced 'a large and non-benevolent majority consisting, first of all, of the Asian-African bloc - the core of the colonial rebellion, and the Soviet states, promoting the colonial rebellion for their own reasons,[34] joined by the Latin American Republics'.[35] A struggle began wherein the majority attempted to remove the colonial yoke and wherein the colonial powers tried to avoid the unavoidable.

As early as 1948, the trapped colonial powers ceased providing information on not less than 11 of the 74 listed territories.[36] They claimed that these territories had acquired full self-government in the light of new legal changes made to the constitutional interrelations with them.[37] Therefore, it was argued, the territories in question - being no longer 'non-self-governing' - no longer fell under Article 73 and omission of information in their regard was justified. This sequence of events was a predictable outcome of having left to each individual UN Member the decision-making power with regard to the 'non-self-governing' label.

The majority of the UN Members, however, would not allow the colonial powers to evade international supervision by by-passing their crucial obligation to report under Article 73 (e). First the General Assembly adopted a resolution, which demanded member states to 'communicate to the Secretary-General, within a period of six months, such information as might be appropriate' relating to 'the constitutional position and status of any such territory' regarding which transmission of information was no longer deemed necessary.[38] Then, one year later, in 1949, the General Assembly openly asserted its competence to decide what was a 'non-self-governing territory'. It considered itself apt, 'to express its opinion on the principles which [had] guided or which in the future [would] guide the Members concerned in enumerating the territories for which the obligation [existed] to transmit information'. Consequently, it established the Ad Hoc Committee on Factors, which was, 'to examine the factors which [would have to] be taken into account in deciding whether any territory [was] or [was] not a territory whose people [had] not yet attained a full measure of self-government'.[39]

---

[34] 'It was to lead to the liberation of oppressed peoples which was, in turn, to contribute to the success of the socialist revolution'. See A. Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (Cambridge University Press, 1996) at 15.

[35] Kunz, 'Chapter XI', *supra* note 9, at 106.

[36] Fastenrath, 'Chapter XI', *supra* note 16, at 1092 and Rigo Sureda, *The Evolution*, *supra* note 28, at 54.

[37] *Ibid.*

[38] GA Res. 222 (III), 3 November 1948.

[39] GA Res. 334 (IV), 2 December 1949.

Thus, the General Assembly asserted its competence to decide.[40] It was just one of the moves in the battle between anti-colonialists and the colonial powers. It was just one of the ruses used to transform Chapter XI into a system of supervision similar to the one provided for trust territories.[41] The direct challenge to the jurisdiction of the administering powers pushed them into a defensive position.[42] They hid behind the legally non-binding character of the adopted resolutions. But Belgium took a strong counter-offensive in different fora of the UN, such as the Ad Hoc Committee on Factors and the plenary sessions of the General Assembly.[43] The Belgian delegates P. van Zeeland, P. Ryckmans and F. van Langenhove developed a theory, which has been referred to ever since as the 'Belgian thesis'.

## The 'Belgian Thesis'

### The Thesis

The 'Belgian thesis' began by reminding the members of the UN that the General Assembly was not empowered to decide what was a 'non-self-governing territory' in a legally binding way.[44] The decision remained the prerogative of each individual Member. Nevertheless, Belgium recognized the power of recommendation of the Assembly derived from Article 10 of the Charter.[45] Belgium hoped to convince the Assembly of its interpretation of Article 73.

As is described above, 'non-self-governing territories' were generally equated with the 74 territories voluntarily listed by eight states as falling under Chapter XI. Belgium argued that this interpretation was too restrictive. It pointed out that the Charter had not specified 'colonies' and 'protectorates', but 'non-self-governing territories'.[46] In its opinion, this terminology comprised all territories in which

[40] Veïcopoulos, *Traité*, *supra* note 26, at 1109.

[41] Fastenrath, 'Chapter XI', *supra* note 16, at 1091 *et seq.* and van Langenhove, *The Question of the Aborigines*, *supra* note 4, at 80-84.

[42] Kunz, 'Chapter XI', *supra* note 9 at 108.

[43] *Ibid.*, at 108. Belgium was appointed member of the Ad Hoc Committee. See GA Res. 567 (VI), 18 January 1952 and GA Res. 648 (VII), 10 December 1952.

[44] *Memorandum of the Belgian Government Relative to Non-Self-Governing Territories*, in *Replies of governments indicating their views on the factors to be taken into account in deciding whether a territory is or is not a territory whose people have not yet attained a full measure of self-government*, Ad Hoc Committee on Factors, UN Doc. A/AC.67/2 and Corr. 1 and 2 (8 May 1953) at 3 and 23, also reproduced in *The Sacred Mission*, *supra* note 2.

[45] *Ibid.*, at 4 and 23.

[46] P. Thornberry, *International Law and the Rights of Minorities* (Clarendon Press: Oxford, 1991) at 16 and Veïcopoulos, *Traité*, *supra* note 26, at 1107, footnote 2202.

'indigenous populations' lived who were, 'insufficiently developed to be able to govern themselves'.[47] All these populations were to 'benefit from the same guarantees' as provided by Article 73.[48] 'Belgium perceived the issue as involving the exploitation of people at a lower stage of civilization by those on a higher stage of civilization and as having nothing to do with geography'.[49] It asserted: 'The United Nations has the interests of peoples at heart; territories are important only because of the people who live there and suffer'.[50] It is peoples that were to delineate a territory and not the reverse. When peoples were 'non-self-governing', the territories where they lived were to be regarded as 'non-self-governing' too, whether these territories were designated as geographically separate or not from so-called 'metropolitan areas'.[51] The wording 'territories whose peoples have not yet attained a full measure of self-government' was not to exclude *a priori* territories of indigenous peoples living in so-called 'metropolitan areas'. Article 73 could not be restricted to colonies and protectorates.

This was the core of the 'Belgian thesis'. As stated above, it was advanced in response to the query: Who is obliged to provide information to the Secretary-General under Article 73 (e)? Answering the question was necessary, according to the General Assembly, 'in order that … a decision may be taken by the General Assembly on the continuation or cessation of the transmission of information'.[52] Belgium, however, noted that all members were 'concerned not only with determining when an administering state may be allowed to *cease* transmitting information, but also with determining when a state is obliged to *begin* submitting information'.[53] In accordance with its view on 'non-self-governing territories', it expressed its indignation regarding the 'anomalous situation'[54], where only eight Members had submitted information to the Secretary-General, 'although more than half the sixty Members of the United Nations had backward indigenous peoples in their territories'.[55] Belgium contended that it 'had a great deal of documentation to

---

[47] F. van Langenhove, Statement at the Plenary Session (16 December 1952) reproduced in *The Sacred Mission*, *supra* note 2, at 31.

[48] *Ibid.*

[49] Falkowski, *Indian Law*, *supra* note 30, at 49.

[50] Ryckmans, Statement at the Seventh Session of the General Assembly, Meeting of the Fourth Committee (19 November 1952), *supra* note 2, at 28.

[51] *Memorandum of the Belgian Government*, *supra* note 44, at 19.

[52] GA Res. 742 (VIII), 27 November 1953.

[53] Ryckmans, Statement at the Seventh Session of the General Assembly, Meeting of the Fourth Committee (19 November 1952), *supra* note 2, at 18.

[54] *Memorandum of the Belgian Government*, *supra* note 44, at 19.

[55] P. Ryckmans, Statement at the Seventh Session of the General Assembly, Meeting of the Fourth Committee (23 October 1952), *Official Records of the seventh session of the General Assembly*, Fourth Committee, 253rd Meeting, para. 17.

prove that a number of states were administering, within their own frontiers, territories which were not governed by the ordinary law; territories with well-defined limits, inhabited by homogeneous peoples differing from the rest of the population in race, language and culture. Those populations were disenfranchised; they took no part in the national life; they did not enjoy self-government in any sense of the word. Some of them were still unconquered. Entry into many of those territories was prohibited by law'.[56] Belgium 'could not see how anyone could claim that the states administering such territories were not what the Charter called states "which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government"'.[57] By withholding information on their indigenous peoples, Belgium believed that these UN members were hiding from the 'sacred trust of civilization' with which they too had been entrusted by Chapter XI. Indeed, in its eyes the 'sacred trust' was not limited to a few states administering territories known as colonies. Any state, in whose territory there lived peoples who had not attained the 'normal level of civilization', was bound by the trust.[58]

## The Arguments

Belgium advanced many arguments for its thesis. Foremost, 'it viewed the history, spirit and meaning of the Charter to require a universal application of the "sacred trust"'.[59] Moreover, it criticized the justification for the narrow interpretation of 'non-self-governing territories' as colonies and protectorates. It also used resolutions adopted by the General Assembly to support its view. Finally, Belgium pointed out the discriminating and absurd results of the restrictive interpretation.

Primarily, Belgium believed that 'problems were the same everywhere' and that, so being, 'they imposed the same duties'.[60] Indigenous peoples around the globe, whether living in 'colonies' or not, confronted the same troubles. Whether it came from explorers and ethnographers or emanated from official sources, the available information showed:

---

[56] P. Ryckmans, Statement at the Ninth Session of the General Assembly, Meeting of the Fourth Committee, (2 November 1954), *Official Records of the ninth session of the General Assembly*, Fourth Committee, 419th Meeting, para. 20.

[57] *Ibid.*

[58] P. van Zeeland, Statement at the Seventh Session of the General Assembly, plenary session (10 November 1952), reproduced in *The Sacred Mission*, *supra* note 2, at 8.

[59] Falkowski, *Indian Law*, *supra* note 30, at 49.

[60] Ryckmans, Statement at the Seventh Session of the General Assembly, Meeting of the Fourth Committee (23 October 1952), *supra* note 55, paras 17 and 30 and *Memorandum of the Belgian Government*, *supra* note 44, at 8

> [T]hat certain peoples [were] still 'completely savage' or 'inaccessible'; that some still [pursued] the barbarous practice of head-hunting; that many [stagnated] in conditions of economic destitution; that they [lived] in a constant state of undernourishment and in unsanitary conditions …; that there [was] an almost complete lack of welfare services for them.[61]

The 'civilizing work' had thus surely not been completed upon achievement of independence by many countries in America, Asia and Africa. These countries 'inherited' the 'trust of civilization'.[62] The obligations flowing from Chapter XI were essentially humanitarian, dealing with prosperity and political, economic, social and cultural progress.[63] There was 'no inherent reason why they should be restricted to colonies only'.[64] The Preamble of the Charter had proclaimed solemnly that the UN Members were resolved, 'to employ international machinery for the promotion of the economic and social advancement of all peoples'.[65] It was arbitrary and discriminatory to deny certain indigenous peoples protection because of geographic criteria.[66] It was against the spirit of Chapter XI.

Belgium also viewed Chapter XI as 'the direct successor' in history of the so-called 'native inhabitants clause of the League of Nations', Article 23 (b) of the Covenant.[67] Article 23 (b) of the Covenant had been the only disposition under the League of Nations addressing all dependent territories. Similarly, Chapter XI was drafted as the only chapter laying down the 'general policy' towards dependent territories under the UN. Logically, both having such a general ambit, Chapter XI was believed to substitute the clause concerning native inhabitants.[68] With this in mind, Belgium defiantly stated:

> [T]he majority of the States, which refuse to accept what is called the Belgian thesis, were members of the League of Nations. They have never explained why, what was admissible 25 years ago is no longer so today. Twenty-five years ago, they were obliged by the League of Nations to secure just treatment of all their

---

[61] van Langenhove, *The Question of the Aborigines*, *supra* note 4, at 85-86.

[62] *Ibid.*, at 77 and *Memorandum of the Belgian Government*, *supra* note 44, at 9.

[63] *Memorandum of the Belgian Government*, *supra* note 44, at 22.

[64] *Ibid.*

[65] Preamble of the UN Charter and P. Ryckmans, Statement at the Seventh Session of the General Assembly, Meeting of the Fourth Committee (23 October 1952), reproduced in *The Sacred Mission*, *supra* note 2, at 14.

[66] Falkowski, *Indian Law*, *supra* note 30, at 51, *Memorandum of the Belgian Government*, *supra* note 44, at 21 and van Langenhove, 'Le Problème de la Protection', *supra* note 15, at 426.

[67] Falkowski, *Indian Law*, *supra* note 30, at 49, See also *Memorandum of the Belgian Government*, *supra* note 44, at 23.

[68] van Langenhove, 'Le Problème de la Protection', *supra* note 15, at 404, See also *Memorandum of the Belgian Government*, *supra* note 44, at 23.

> native peoples wherever they were, in overseas territories, or so-called colonial territories or metropolitan territories. Why don't they accept today what they accepted when they were members of the League of Nations? Does this show international-minded progress?[69]

To Belgium it looked more like 'turning back the pages of history'.[70]

Most UN Members still maintained that the authors of the Charter only envisaged colonies and protectorates when stipulating 'non-self-governing territories'. It was however impossible to be sure of those intentions.[71] Moreover, none of the drafters in San Francisco had challenged the rule set by Article 23 (b), none of them had expressed the intention to free themselves of the obligation to secure just treatment to native inhabitants.[72] Belgium quoted Professor Hans Kelsen: 'the authors of the Charter probably referred only to territories inhabited by relatively primitive natives still in a backwards state of civilization'.[73] Lacking proof either way, the reading of 'non-self-governing territories' remained doubtful. Was it then not appropriate to revert to de Vitoria's seminal principle that the interest of indigenous peoples ought to be paramount?[74] Belgium asked: should we not, 'give the benefit of doubt to the populations concerned by taking the interpretation … most favourable to them?'[75]

The majority of the Members of the UN found, however, another strategy to interpret the contentious terminology. The wording of Article 74, the second article under Chapter XI, distinguishes between 'territories to which this Chapter applies' and 'metropolitan areas'. By defining the latter as designating all territories other than the ones qualified as colonies or protectorates, it was easily demonstrated that colonies and protectorates were the only 'territories to which this Chapter applies'.[76] However, the assumption that the term 'metropolitan areas' referred to all territories

---

[69] Ryckmans, Statement at the Seventh Session of the General Assembly, Meeting of the Fourth Committee, (19 November 1952), *supra* note 2, at 27. See also other Statements in *The Sacred Mission*, *supra* note 2, at 8 and 28-29 and *Memorandum of the Belgian Government*, *supra* note 44, at 31.

[70] Ryckmans, Statement at the Seventh Session of the General Assembly, Meeting of the Fourth Committee (23 October 1952), *supra* note 65, at 11.

[71] van Langenhove, 'Le Problème de la Protection', *supra* note 15, at 410.

[72] van Langenhove, Statement at the Plenary Session (16 December 1952), *supra* note 47, at 31 and *Memorandum of the Belgian Government*, *supra* note 44, at p 31.

[73] Ryckmans, Statement at the Seventh Session of the General Assembly, Meeting of the Fourth Committee (23 October 1952), *supra* note 65, at 12.

[74] van Langenhove, 'Le Problème de la Protection', *supra* note 15, at 425-426.

[75] Ryckmans, Statement at the Seventh Session of the General Assembly, Meeting of the Fourth Committee (23 October 1952), *supra* note 65, at 12.

[76] van Langenhove, 'Le Problème de la Protection', *supra* note 15, at 408.

except colonies or protectorates had no legal foundation. There was no legal definition in the Charter, nor in customary law since the words 'metropolitan areas' had usually received a residual meaning in contrast to other defined terms, different in each and every treaty.[77] 'Territories to which this Chapter applies' were thus not to be determined in contrast to 'metropolitan areas', but in accordance with the definition given by Article 73: 'territories whose peoples have not yet attained a full measure of self-government'. This definition was coached in general terms and mentioned no exceptions.[78] The meaning was not to be restrictive. In last resort, those opposing the 'Belgian thesis' referred to the General Assembly resolutions in which the core of Article 73 had been developed.[79] 'Self-government' was understood to mean independence, free association, or integration. 'Peoples' were to be to a certain degree 'of different race, language or religion or have a distinct cultural heritage, interests or aspirations, distinguishing them from the metropolitan peoples.'[80]

To this extent, the conclusions of the Ad Hoc Committee on Factors did not upset the 'Belgian thesis'.[81] The findings regarding 'territories' were, however, intended to offset the thesis. Territories were to be geographically separated in some measure 'by land, sea or other natural obstacles' hence inhibiting easy relations with the 'capital of the metropolitan government'.[82] It was believed that colonies and protectorates would be singled out and other indigenous peoples would be excluded from the definition. Belgium took 'legal cognisance' of the fact that the established Factors represented the majority opinion.[83] It then sarcastically continued: 'But we are obliged to admit that such as they are [the Factors], they confirm our thesis'.[84] This was, at least, partially true since many, though not all, indigenous peoples, inhabiting areas considered to be territorially contiguous with the metropolitan land, lived isolated and were fairly inaccessible.[85] Nothing was to be surprising about that: 'In tropical areas, stretches of land are obstacles far harder to surmount than

---

[77] *Ibid.*, at 409.

[78] *Memorandum of the Belgian Government*, *supra* note 44, at 21.

[79] GA Res. 567 (VI), 18 January 1952, GA Res. 648 (VII), 10 December 1952 and GA Res. 742 (VIII), 27 November 1953 were the result of the work of the *Ad Hoc* Committee on Factors.

[80] GA Res. 567 (VI), 18 January 1952, GA Res. 648 (VII), 10 December 1952 and GA Res. 742 (VIII), 27 November 1953.

[81] *Memorandum of the Belgian Government*, *supra* note 44, at 11-13.

[82] GA Res. 567 (VI), 18 January 1952, GA Res. 648 (VII), 10 December 1952 and GA Res. 742 (VIII), 27 November 1953.

[83] Ryckmans, Statement at the Seventh Session of the General Assembly, Meeting of the Fourth Committee (19 November 1952) *supra* note 2, at 18.

[84] *Ibid.*

[85] *Memorandum of the Belgian Government*, *supra* note 44, at 12.

stretches of sea. This has always been true; for centuries, virgin forests and jungle have been barriers impassable to civilization, whereas the seas and oceans have from the remotest antiquity made contacts possible and even facilitated them. With the development of sea and air communications they are speedily crossed'.[86]

Belgium demonstrated that not a single reasonable argument rebutted their thesis regarding the identification of 'non-self-governing territories'. Furthermore, it concluded that adopting the restrictive viewpoint would create discriminatory and absurd situations: On the ground of geographical whereabouts, similar indigenous peoples would not all enjoy self-government.[87] Belgium also warned for another form of discrimination.

> Two categories of Members were being created in the UN: on the one hand, the privileged Members who refused to supply any information, but who arrogated to themselves the function of censorship; and, on the other hand, a number of states which had voluntarily recognized the obligations deriving from Chapter XI. … Such discrimination could only hamper the 'harmonious development of international relations' and lead to a situation that could hardly be tolerated.[88]

Belgium had forcefully and with great conviction defended its position, but what was to be the outcome?

## The Outcome

### A Cunning Idea, But Wishful Thinking

#### A Cunning Idea

Belgium foresaw 'a situation that could hardly be tolerated'. It most likely referred to the situation of decolonization. It was not ready to loose its colony, the Congo. One way to refute decolonization was to deny the very existence of 'colonialism'. Belgium tried the line of argument:

> We often hear of colonialism spoken of as an evil which should be eradicated ... If the evil still existed, I should agree with those who denounce it. The word

[86] *Memorandum of the Belgian Government*, *supra* note 44, at 9.

[87] See van Langenhove, 'Le Problème de la Protection', *supra* note 15, at 410.

[88] Ryckmans, Statement at the Seventh Session of the General Assembly, Meeting of the Fourth Committee (23 October 1952), *supra* note 55, paras 28-29.

> 'colonialism', as traditionally used, conjures up a picture of the exploitation of people at a lower stage of civilization by others at a higher stage … But we believe that with a few rare exceptions … this type of colonialism is obsolete.[89]

Belgium no longer exploited. It civilized. No doubt about that. As King Albert I of Belgium stated in 1909: 'For a people who love justice, the effort in the colonies can be nothing else than a civilizing mission'.[90] This majestic play of words did not change the minds of the anti-colonialists. Their actions, Belgium noted, were inspired by 'prejudices of a political nature against the task of the administrating Powers' and these 'prejudices doubtless had their causes in history'.[91] Hence, Belgium realized it had to adopt another strategy if it wanted to avert decolonization.

In San Francisco the responsibility to develop 'self-government' was understood to comprise the obligation to grant independence, in appropriate circumstances. A majority of the members of the UN, however, now read it as, independence whatever the circumstances. This 'exaggeration and overbidding', Belgium believed, resulted from anti-colonial states' regrettable 'absence of responsibility' to develop 'self-government' within their own borders.[92] The 'Belgian thesis' was to change their irresponsible behaviour. By arguing in favour of millions of indigenous peoples, Belgium attempted to bring as many anti-colonial states possible within the scope of Chapter XI. It provided a concrete list of countries harbouring non-self-governing indigenous peoples in almost every region of the world, including Africa, North and South America, Asia, Australia and a number of Pacific Islands.[93] All these countries had to bear equal responsibility to develop 'self-government'. The cunning idea was that, once enlightened by responsibility, many anti-colonial states would abjure fighting for 'independence whatever the circumstances' as to preserve their own territorial integrity. F. van Langenhove wrote in respect of the 'Belgian thesis' that some countries 'apparently recognized the difficulty of contesting its merits … For this reason, it [had] prompted them to maintain an attitude of prudent reserve, for it [had] given them to understand that an offensive aimed at the colonial powers might have repercussions in their own

---

[89] van Zeeland, Statement at the Seventh Session of the General Assembly, plenary session (10 November 1952), *supra* note 58, at 7.

[90] *Ibid.*, at 7.

[91] Ryckmans, Statement at the Seventh Session of the General Assembly, Meeting of the Fourth Committee (23 October 1952), *supra* note 55, para. 29.

[92] F. van Langenhove, Statement at the Plenary Session (10 December 1952), reproduced in *The Sacred Mission*, *supra* note 2, at 30.

[93] See *The Sacred Mission*, *supra* note 2, at 59 *et seq.*

countries'.[94] The prospect of territorial dismemberment was to neutralize decolonization efforts. Accordingly, G. Alfredsson exposed the, 'insincerity of the proposals', in that they were, 'mainly intended to delay or derail the decolonisation'.[95] And P. Thornberry deduced that, 'van Langenhove effectively admitted to the thesis as a Belgian tactic'.[96] In convincing the General Assembly of 'non-self-governing territories' including indigenous peoples, Belgium cunningly tried to introduce a 'Trojan Horse' into the stronghold of the anti-colonialists.

### Wishful Thinking

The 'Belgian thesis' was implementing a cunning scheme, but this scheme rested on wishful thinking. Decolonization could not be stopped. It was a historical movement propelled by the conjunction of diverse forces mutually reinforcing each other: the decline of the colonial empires following World War II, the awakening among indigenous elites of a consciousness regarding colonial exploitation, East-West rivalry, the UN tribune …[97] The movement was characterized as 'irresistible, irreversible and irrepressible' by the UN organs.[98] It was 'inevitable'[99] and the 'historical necessity' was to be transformed into a juridical obligation by means of the right to self-determination.[100]

On 14 December 1960, the General Assembly proclaimed solemnly in Resolution 1514 (XV), better known as the 'Declaration on Granting Independence to Colonial Countries and Peoples', 'the necessity of bringing to a speedy and unconditional end colonialism' and to this end declared that 'all peoples have a right to self-determination' and that 'immediate steps shall be taken in Trust and Non-

---

[94] van Langenhove, *The Question of the Aborigines*, *supra* note 4, at 84.

[95] G. Alfredsson, 'Greenland and the Law of Political Decolonization', 25 *German Yearbook of International Law* (1982) at 295. See also P. Thornberry, 'Self-Determination and Indigenous Peoples: Objections and Responses' in P. Aikio and M. Scheinin (eds), *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Institute for Human Rights, Åbo Akademi University: Turku/Åbo, 2000) at 54.

[96] Thornberry, *International Law*, *supra* note 46, at 17.

[97] J. Charpentier, 'Autodétermination et décolonisation' in *Mélanges offerts à Charles Chaumont* (A Pendone: Paris 1984) at 119. See also R. Falk, 'Self-Determination Under International Law: The Coherence of Doctrine Versus the Incoherence of Experience' in W. Danspeckgruber (ed.), *The Self-Determination of Peoples: Community, nation, and state in an interdependent world* (Boulder, Lynne Rienner in association with the Liechtenstein Institute on Self-Determination, Princeton Univesity, 2002) at 42-43.

[98] Bedjaoui, 'Article 73', *supra* note 13, at 1075. See also GA Res. 1514 (XV), 14 December 1960.

[99] Thornberry, *International Law*, *supra* note 46, at 17.

[100] Charpentier, 'Autodétermination', *supra* note 97, at 119. See also A. Cristescu, *The Right to Self-Determination: Historical and Current Development on the Basis of the United Nations Instruments*, UN Doc. E/CN.4/Sub2/404/Rev 1 (1981) at 39.

Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories'.[101] One day later, Resolution 1541 (XV) was adopted, in the Annex of which the General Assembly set out the 'Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for in Article 73 (e) of the Charter'.[102]

This last resolution had been prepared by another Ad Hoc Committee instituted after the denial of several new Members of the UN that they administered non-self-governing territories.[103] Principle VI of the Resolution defined 'self-government' once again as independence, free association, or integration. Principle IV disposed that, '*Prima facie* there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it'. This is believed to have been the *coup de grâce* of the 'Belgian thesis'. It was, 'clearly intended to exclude from the scope of Chapter XI indigenous peoples in independent countries'.[104] Thus, the 'Belgian thesis' was rejected in favour of the 'salt water' theory.[105] A number of states, mostly Latin American, but also the Philippines, Ethiopia, Mexico, refused to accept the comparison made between their internal situation and the colonial one.[106] Their problems were economic and cultural, not colonial, they contended. Whether or not a '*parvenu*' reaction of young States,[107] 'salt water' decolonization has been borne out by UN practice ever since.[108]

One author has noticed that the language of the resolution was in fact ill suited to its purpose, for many island communities were 'geographically separate' from the administering country, though not normally described as colonial peoples.[109] For this reason the representative of the United Kingdom once spoke about the 'myth

---

[101] GA Res. 1514 (XV), 14 December 1960.

[102] GA Res. 1541 (XV), 15 December 1960.

[103] Rigo Sureda, *The Evolution*, *supra* note 28, at 56-57. Among these new members were Spain and Portugal. See Crawford, *The Creation of States*, *supra* note 27, at 360-361.

[104] G. Bennett, 'The Developing Law of Aboriginal Rights' 22 *International Commission of Jurists. The Review* (1979) at 42.

[105] Thornberry, *International Law*, *supra* note 46, at 17.

[106] *Ibid.*, Falkowski, *Indian Law*, *supra* note 30, at 52, Z. Skurbaty, *As if Peoples Mattered: Critical appraisal of 'peoples' and 'minorities' from the international human rights perspective and beyond* (Martinus Nijhoff: The Hague, 2000) at 217.

[107] Skurbaty, *ibid.*, at 218. See also Cassese, *Self-Determination*, *supra* note 34, at 318.

[108] Crawford, *The Creation of States*, *supra* note 27, at 362, J. Castellino, *International Law and Self-determination: The interplay of the Politics of Territorial Possession with Formulations of Post-Colonial 'National' Identity* (Martinus Nijhoff: The Hague, 2000) at 87 and Alfredsson, 'Greenland', *supra* note 95, at 295.

[109] Bennett, 'Aboriginal Rights', *supra* note 104, at 42.

of salt water'.[110] And it also prompted Belgium to satirize the theory by questioning, 'which stretch of sea [was precisely] necessary for a country to be considered as being included within the metropolitan frontiers'.[111] These critical observations could not prevent the 'salt water' theory from transforming into a customary law requiring that all colonial peoples be granted self-determination.[112] The European powers had defended their interests well and '*horum omnium fortissimo [erant] belgae*',[113] but once again the Belgian people were defeated on all fronts. The 'Belgian thesis' was discarded and control was lost over their colony in 1960.

## Appearance and Historical Fact

UN practice, 'gave the weak provisions of Article 73 an infusion of the principle of self-determination'.[114] Anticipating this, the 'Belgian thesis' contended that, 'an interpretation of Chapter XI … would be subject to particular criticism should it result in limiting to some peoples only the right of self-determination ensured by the Charter to all peoples'.[115] Therefore, it appears as if 'the thesis radicalises self-determination',[116] operating in 'statist/secessionist models' [117] during the era of decolonization. Hence, usually, it is assumed that the 'Belgian thesis' favoured the expansion of external[118] self-determination to indigenous peoples.[119]

---

[110] Ryckmans, Statement at the Seventh Session of the General Assembly, Meeting of the Fourth Committee (19 November 1952), *supra* note 2, at 26.

[111] *Ibid*.

[112] Cassese, *Self-Determination*, *supra* note 34, at 129.

[113] C. J. Caesar, *Commentarii de bello Gallico*: *commentarius primus* or *The Gallic War*: *book I*. Ironically, it is followed by the words: '*propterea quod a cultu at humanitate provinciae longissime absunt*'. The entire translation reads: From all these, the Belgae [were] the bravest, because they are the furthest from the civilization and the refinement of [our] Province.

[114] I. Brownlie, 'An Essay in the History of the Principle of Self-Determination' in C. N. Alexandrowicz (ed.), *Grotian Society Papers: Studies in the History of the Law of Nations, 1968* (Martinus Nijhoff: The Hague, 1970) at 98.

[115] van Langenhove, Statement at the Plenary Session (16 December 1952), *supra* note 47, at 31.

[116] Thornberry, *International Law*, *supra* note 46, at 17. See also Skurbaty, *As if Peoples Mattered*, *supra* note 106, at 218 and S. Trifunovska, 'One Theme in Two Variations – Self Determination for Minorities and Indigenous Peoples', 5 *International Journal on Minority and Group Rights* (1997) at 187-188.

[117] G. J. Simpson, 'The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age', 32 *Stanford Journal of International Law* (1996) at 282.

[118] See *infra* the section on the distinction between external and internal self-determination.

[119] G. T. Morris, 'International Law and Politics: Towards a Right to Self-Determination for Indigenous Peoples' <www.cwis.org/fwdp/International/int.txt> (visited 10 September 2004) at 18, J. Castellino, 'Order and Justice: National Minorities and the Right to Secession' 6 *International Journal on Minority and Group Rights* (1999) at 395-396, G. Alfredsson, 'The Right of Self-Determination and Indigenous Peoples' in C. Tomuschat (ed.), *Modern Law of Self-Determination* (Martinus Nijhoff:

This was not, however, Belgium's intention when speaking about 'self-determination'. One must not loose sight of the historical fact that already in San Francisco 'numerous delegates understood self-determination merely in the sense of self-government, which they in turn took to mean internal autonomy … they did not, however, connect it with any right to independent statehood'.[120] This was far from foolish considering that the terms 'self-determination', 'autonomy' and 'self-government' are almost semantically identical.[121] Belgium, at that time, led, 'the attempt to narrow the application of the principle [of self-determination] to freedom of self-government within the sovereignty of member states'.[122] And some years later, when Belgium was defending its thesis, its conception of self-determination or self-government had not changed. It did not read Chapter XI as a threat to state sovereignty.[123] 'In Chapter XI States undertook to develop self-government, not to promote independence'.[124]

Moreover, Belgium did not ignore the compromise understanding of 'self-government' as not excluding independence in appropriate circumstances, but according to the 'Belgian thesis', most non-self-governing peoples were, 'unfit to found or administer a lawful State up to the standard required by human and civil claims'.[125] In most cases, appropriate circumstances were non-existent. For instance, 'it could not reasonably be claimed that, in spite of the considerable progress they had achieved, the peoples of the Belgian Congo were immediately capable of complete self-administration in accordance with the requirements of the modern world'.[126] The undertone of the argument was often shamelessly racist.[127] Hence, the

Dordrecht, 1993) at 47 and 'Different Forms of and Claims to the Right of Self-Determination' in D. Clark and R. Williamson (eds), *Self-Determination: International perspectives* (Mc Millan Press: London, 1996) at 68.

120 Fastenrath, 'Chapter XI', *supra* note 16, at 1090. See also Cassese, *Self-determination*, *supra* note 34, at 46 and at 65.

121 "'Autonomy" derives from the Greek words: "auto" meaning "self" and "nomos" meaning "law" or "legal rule"'. See L. Hannikainen, 'Self-Determination and Autonomy in International Law' in M. Suksi (ed.), *Autonomy: Applications and Implications* (Kluwer Law International: The Hague, 1998) at 79.

122 Russel and Muther, *A History*, *supra* note 15, at 812. It proposed an amendment stating: "To strengthen international order on the basis of respect for the essential rights and equality of the states and of the peoples' right of self-determination."

123 Falkowski, *Indian Law*, *supra* note 30, at 51. See also Ryckmans, Statement at the Ninth Session of the General Assembly, Meeting of the Fourth Committee (2 November 1954), *supra* note 56, para. 23.

124 *Memorandum of the Belgian Government*, *supra* note 44, at 25.

125 Expression used in Francisco de Vitoria's epoch regarding the aborigines of America. Quoted in van Langenhove, *The Question of the Aborigines*, *supra* note 4, at 62. See also van Langenhove, 'Le Problème de la Protection', *supra* note 15, at 407-408.

126 Ryckmans, Statement at the Seventh Session of the General Assembly, Meeting of the Fourth Committee (23 October 1952), *supra* note 55, para. 29.

then popular slogan, 'good government is no substitute for self-government' was considered naïve.[128] If an administering state, 'brought independence to a people that had not reached a sufficient stage of advancement to ensure its independent existence, it would fail in its task [its sacred trust], particularly in its obligation to promote the "political, economic and social" advancement of the people'.[129]

Thus, Belgium, in its 'Belgian thesis', never supported an expansion of the numbers of right-holders to independence. It favoured (internal) autonomy for all non-self-governing peoples and referred to the idea of 'integrated self-government' exposed by an Indian representative.[130] Moreover, it pointed out that under domestic legislation, many indigenous peoples already lived in territories treated as distinct administrative entities, sometimes enjoying 'considerable *de jure* or *de facto* self-government'.[131] Chapter XI and its reporting procedure provided the legal possibility to add international supervision. By widening the interpretation of 'non-self-governing territories', international attention could be expanded to indigenous peoples.[132] So, the 'Belgian thesis' was not only a defence of colonialism, but also constituted a 'counter-offensive' against the majority of the UN Members, 'in favour of millions of backwards peoples not protected by Chapter XI'.[133] Belgium had focused its attention on peoples and not on territories. Belgium criticized the factors established by the Ad Hoc Committee on Factors as 'arbitrary' and 'drawn up in a somewhat random fashion'.[134] Chapter XI was to apply to all non-self-governing peoples living in well-defined territories. Rejecting the 'Belgian thesis' fortunately opened the door for decolonization, but also closed one for international monitoring of indigenous peoples' right to autonomy.

Today, decolonization draws to an end. External state boundaries, foundations of our current world order are generally undisputed. They appear largely legitimate. Self-determination discourse has shifted focus from 'territories' to 'peoples'.

---

[127] See for example the expression: 'a more highly developed race' or the following quotation: 'the error of considering the Indian as an autonomous and intelligent being'. van Zeeland, Statement at the Seventh Session of the General Assembly, plenary session (10 November 1952) *supra* note 58, at 8 and *Memorandum of the Belgian Government*, *supra* note 44, at 13.

[128] van Langenhove, *The Question of the Aborigines*, *supra* note 4, at 78.

[129] *Memorandum of the Belgian Government*, *supra* note 44, at 27.

[130] *Ibid*, at 15.

[131] *Ibid*, at 10.

[132] Toussaint, 'The Colonial Controversy', *supra* note 22, at 175.

[133] Kunz, 'Chapter XI', *supra* note 9, at 109.

[134] van Langenhove, *The Question of the Aborigines*, *supra* note 4, at 76; Ryckmans, Statement at the Seventh Session of the General Assembly, Meeting of the Fourth Committee (19 November 1952) *supra* note 2, at 18.

Reviving the legal conclusions reached by the 'Belgian thesis' – indigenous peoples and autonomy – now seems possible, to be sure, on different grounds.

# Indigenous Peoples' Right to Self-Government

'Eendracht maakt macht'.
'L' union fait la force'.[135]

## The term 'peoples'

### Semantics

'All peoples' have a right to self-determination. It is recurring wording throughout numerous international instruments, such as the International Bill of Human Rights,[136] the Friendly Relations Declaration,[137] the OSCE Helsinki Final Act,[138] the African Charter on Human and Peoples' Rights,[139] and the 1993 Vienna Declaration.[140] At first sight, the language seems clear and universal in scope. Any human community considered a 'people' seems to hold a right to self-determination. Laymen might seek assurance in their Oxford English Dictionary. The dictionary, however, defines 'people' in more than one sense. 'People' means 'the whole body of enfranchised or qualified citizens, considered as the source of power; esp. in a democratic state, the electorate',[141] but it may also designate 'a body of persons

[135] Heraldic device of Belgium. A translation could be: 'United we stand, divided we fall'.

[136] See common Article 1 of the International Covenant on Civil and Political Rights (hereinafter the ICCPR), New York, 16 December 1966, in force 23 March 1976, and the International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, in force 3 January 1976, in *Human Rights, A Compilation of International Instruments*, 2 vols, (UN, New York/Geneva, 2002), vol I, at 17 and 7.

[137] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the UN (hereinafter the 'Friendly Relations Declaration'), GA Res. 2625 (XXV), 24 October 1970, Principle V, para. 1.

[138] See Principle VIII. 'Guiding Relations between Participating States', 14 *International Law Materials* (1975), at 1292.

[139] See Article 20 (1), Organisation of the African Union Doc. CAB/LEG/67/3 rev. 5, 58 *International Law Materials* (1982), at 21.

[140] See Chapter I (2) Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on 25 June 1993, UN Doc. A/CONF.157/23, 12 July 1993.

[141] *The Oxford English Dictionary* (20 vols, Claredon Press: Oxford, 1989), vol. XI, at 505.

composing a community, tribe, race, or nation; = FOLK'.[142] This reflects a well known dichotomy: *demos*[143] vs. *ethnos*,[144] political vs. cultural conception,[145] 'classical' vs. 'romantic' approach,[146] 'artificial' vs. 'authentic' community,[147] state- or citizen-nationalism vs. ethno-nationalism,[148] 'common sympathies'[149] vs. common 'race, ethnicity, culture, tradition, history, language, religion'.[150] The dual conception of 'people' in ordinary understanding is the problem, but also the solution for the legal understanding of – the seemingly clear word - 'peoples'.[151] Awareness of the dual conception clarifies confusion and frustration as to the actual right-holders of self-determination in the eyes of the law. In what follows, '*demoi*' stands for 'peoples' in the political sense, whilst '*ethnoi*', refers to ethnically, culturally, religiously or linguistically distinct 'peoples'.

## Sed Lex

The term 'peoples' is an international legal concept. Characteristically such concepts 'are formally independent of the non-legal world'.[152] They may not be confused with ordinary understandings. The 'Vienna Convention on the Law of Treaties (VCLT)' provides legal practitioners with the appropriate tools for interpreting them.[153]

---

[142] *Ibid.*, at 504.

[143] 'One of the divisions of ancient Attica; […] The people or commons of an ancient Greek state, esp. of a democratic state, such as Athens' See *The Oxford English Dictionary* (20 vols, Claredon Press: Oxford, 1989), vol. IV, at 449. See also T. Makkonen, *Identity, Difference and Otherness: the Concepts of 'Peoples', 'Indigenous Peoples' and 'Minority' in International Law* (University of Helsinki, Faculty of Law, 2000) at 65 and K. Knop, *Diversity and Self-Determination in International Law*, (Cambridge University Press, 2002) at 55.

[144] In ancient Greek this means 'race, tribe, gentile', a foreign community. See Greek-English-Greek dictionary, <www.kypros.org/cgi-bin/lexicon> (visited 10 September 2004). See also Makkonen, *Identity*, *supra* note 143, at 23 and Knop, *Diversity*, *supra* note 143, at 55.

[145] A. Cobban, *The Nation State and National Self-Determination* (T.Y. Crowell: New York, 1969) at 118-124. See also Rigo Sureda, *The Evolution*, *supra* note 28, at 23-24.

[146] M. Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice', 43 *International and Comparative Law Quarterly* (1994), at 249-250.

[147] *Ibid.*

[148] Makkonen, *Identity*, *supra* note 143, at 65 and Eide, 'Constructive Alternatives', *supra* note 11, at 143.

[149] J. S. Mill, 'Considerations on Representative Governement' in J. Gray (ed.), *On Liberty and Other Essays* (Oxford University Press, 1991) at 427.

[150] J. C. Duursma, *Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood* (Cambridge University Press, 1996) at 73.

[151] See Makkonen, *Identity*, *supra* note 143, at 65.

[152] *Ibid.*, at 55.

[153] See Articles 31-33 of the 1969 Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 8 *International Legal Materials* (1969) 679.

'Ordinary meaning' is a primary tool, but not the only one. The object and purpose of a treaty, the intentions of the drafters and the context[154] of the contentious terms can be employed in the heuristic enterprise.

The legal history of 'self-determination' and simultaneously of the term 'peoples' started with the UN Charter in 1945 and was boosted by the two 1966 UN Covenants on Human Rights.[155] Although the 1969 VCLT states that it has no retroactive working,[156] its rules of interpretation must be applied, for they are assumed part of customary international law.[157] According to the *travaux préparatoires* of the 1966 Covenants, 'the term "peoples" should be understood in its most general sense'.[158] The Special Rapporteur A. Cristescu also stressed this. He wrote that, 'the right to self-determination is universal: it should be applied to all peoples and all nations'.[159] In fact, it was the West that, inadvertently, 'contributed to the widening of the scope of the Article', by insisting that self-determination was not to be limited to colonial situations.[160] In memory of the 'Belgian thesis' strategy, some even raised a conception of people as *ethnos* during the drafting process to avoid the inclusion of the right to self-determination.[161] Such a conception of people as *ethnos*, however, gained no currency in subsequent state practice. As we will see later, practice essentially upheld a conception of people as *demos*.[162] This went hand in hand with an external conception of self-determination and political decolonization,

---

154 Comprised within the context is any subsequent practice in application of the treaty.

155 Cassese, *Self-Determination*, *supra* note 34, at 43 and 65.

156 Article 4 of the 1969 VCLT, *supra* note 153.

157 G. Ress, 'Interpretation', in B. Simma (ed.), *The Charter*, *supra* note 5, at 18.

158 M. Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Martinus Nijhoff: Dordrecht, 1987) at 32.

159 Cristescu, *Self-Determination*, *supra* note 100, at 39.

160 Cassese, *Self-Determination*, *supra* note 34, at 52.

161 *Ibid.*, at 51-52. See also Makkonen, *Identity*, *supra* note 143, at 63.

162 In the early days of decolonization the General Assembly took a 'pragmatic approach': 'when ethnic differences in […] territories seemed to portend future instability, the General Assembly was quite willing to divide those territories into separate political entities along ethnic lines'. Examples are the partition of the Palestine mandate and the divide of the trust territory of the British Cameroon. This approach was 'abandoned after the adoption of Res. 1514 (XV) in 1960'. See T. D. Musgrave, *Self-Determination and National Minorities* (first published 1997) (Oxford University Press, 2000) at 157-158. See also Cassese, *Self-Determination*, *supra* note 34, at 78-79. This does not undermine the contention that customary law consolidated a conception of people as *demos*. As is well known, since the *Nicaragua* case, it is not necessary for practice to be 'in absolutely rigorous conformity' with the purported customary rule. See *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States*), 76 *International Law Reports* (1988) 1, at 432, referred to in M. N. Shaw, *International Law*, (Cambridge UP, Cambridge, 4th ed., 2000) at 61.

which was, 'a quest for people's sovereignty, rather than for national self-determination in its ethnic sense'.[163]

Self-determination has, however, not been restricted to decolonization. As A. Cassese has written, 'self-determination, instead of withering away with the demise of colonialism, is showing its resilience and indeed is even acquiring a new lease of life'.[164] So, the end of colonialism marks the beginning of a new era evidenced by, 'the gradual crystallization of a customary norm proclaiming internal self-determination as a principle of democratic governance'.[165] It is this, 'diluted notion of self-determination', that, 'opens the way to an equally radical reunderstanding of the notion of a "people", to cover any collectivity that feels itself united by some degree of cultural or other affinity [sic]'.[166] Indeed, such a notion of self-determination is no longer incompatible with territorial integrity and consequently, the legal understanding of 'people' may expand to embrace the conception of people as *ethnos*. Such expansion in accordance with semantics might cure international law of its current 'blindness', 'to the demands of ethnic groups, and national, religious, cultural, or linguistic minorities'.[167] 'Universal in scope', benefiting, 'all segments of humanity', self-determination may become a real human rights norm.[168] In this respect it is interesting to note that the Human Rights Committee in its General Comment on Article 1 ICCPR, 'upholds and confirms the meaning [of peoples] to be derived from a literal meaning of the provision'.[169]

The legal meaning of 'people' is accordingly bound up with the 'inherent duality' of self-determination (external-internal).[170] The holders of the right to self-determination and its content are preferably not separated.[171] Already the Secretariat in San Francisco made this clear when it provided the negotiators with the following

---

[163] Eide, 'Constructive Alternatives', *supra* note 11, at 148.

[164] Cassese, *Self-Determination*, *supra* note 34, at 323.

[165] *Ibid*.

[166] D. Makinson, 'Rights of Peoples: A Logician's Point of View' in Crawford (ed.), *The Rights of Peoples*, *supra* note 1, at 76. See also A. Kiss, 'The Peoples' Right to Self-Determination', 7 *Human Rights Law Journal* (1986) at 173, Koskenniemi, 'National Self-Determination', *supra* note 146, at 256 and K. Henrard, *Devising an Adequate System of Minority Protection: Individual human rights, minority rights and the right to self-determination* (Martinus Nijhoff: The Hague, 2000) at 306.

[167] Cassese, *Self-Determination*, *supra* note 34, at 328.

[168] S. J. Anaya, 'The Contours of Self-Determination and its Implementation: Implications of Developments Concerning Indigenous Peoples' in G. Alfredsson and M. Stavropoulou (eds), *Justice Pending: Indigenous Peoples and Other Good Causes* (Kluwer International Law: The Hague, 2002) at 9.

[169] C. Tomuschat, 'Self-Determination in a Post-Colonial World' in Tomuschat (ed.), *Modern Law of Self-Determination*, *supra* note 119, at 3. See also Skurbaty, *As if Peoples Mattered*, *supra* note 106, at 233.

[170] Makkonen, *Identity*, *supra* note 143, at 62.

[171] *Ibid.*, at 65.

somewhat awkward and enigmatic 'definition' of 'peoples': 'the word "peoples" is used in connexion with the phrase "self-determination of peoples". This phrase is in such common usage that no other word would seem appropriate'.[172] Mindful of this, an attempt will now be made to bring to the surface this intimate connexion between holders and content. The reader must, however, not forget that this area has been called a 'conceptual morass'.[173]

## External and Internal Self-Determination

### The Distinction

The distinction between external and internal self-determination was initially an 'invention of political talking and scholarly writing'.[174] Today, jurisprudence, state and UN practice have added legal weight to the phenomenon. The first explicit political reference to the distinction was made in the OSCE Helsinki Final Act.[175] A. Cassese explored as one of the first scholars the duality of self-determination.[176] He defines 'external' self-determination as, 'the ability of a people … to choose freely in the field of international relations', its political status. 'Internal' self-determination is about choosing one's own government and being free from oppression by the central government.

External and internal self-determination are not 'different rights', but 'different modes of implementation' of one and the same right to self-determination.[177] In their turn, each of these two 'modes of implementation' realizes self-determination through various forms. External self-determination can take the form of independence, integration in, or association with a third state.[178] Internal self-determination can be shaped in multiple ways, ranging from federal schemes and

---

[172] Cristescu, *Self-Determination*, *supra* note 100, at 38.

[173] B. Kingsbury, 'Reconstructing Self-Determination: A Relational Approach' in P. Aikio and M. Scheinin (eds), *Operationalising*, *supra* note 95, at 20.

[174] Alfredsson, 'Self-Determination and Indigenous Peoples', *supra* note 119, at 50.

[175] See Principle VIII. 'Guiding Relations between Participating States', 14 *International Legal Materials* (1975) at 1292.

[176] A. Cassese, 'Political Self-Determination-Old Concepts and New Developments' in A. Cassese (ed.), *UN Law/Fundamental Rights: Two Topics in International Law* (Sijthoff & Noordhoff: Alphen aan den Rijn 1979) at 137.

[177] D. Raič, *Statehood and the Law of Self-Determination* (Kluwer Law International: The Hague, 2002) at 227.

[178] See Friendly Relations Declaration, Principle V, para. 4, *supra* note 137.

autonomy arrangements to minority rights and guarantees of non-discrimination.[179] In essence, internal self-determination encompasses a right, 'to participate (a right to have a say) in the decision-making processes of the State'.[180] Hence, it can be said to have a 'continuous' character.[181] In contrast, external self-determination only has a 'temporary nature', meaning that once a certain political status has been chosen the right is normally consumed in its external dimension.[182]

What is the legal 'surplus value' of this distinction? Some commentators have argued that internal self-determination adds value to the human rights protection system by taking care of group interests.[183] The assumption that individual rights sufficiently promote group interests has been proven wrong, according to them. Others, on the contrary, have argued that the existing legal set of instruments, when used in a creative manner, can achieve the goals all commentators share.[184] A. Rosas has in turn questioned this, as internal self-determination would provide the existing legal set of instruments with the 'enhanced status' of customary law, non-derogatory right, and even *jus cogens*.[185] Whatever the outcome of this doctrinal debate, the distinction between external and internal self-determination has been consolidated

[179] Makkonen, *Identity*, *supra* note 143, at 69 referring to M. Pomerance, *Self-Determination in Law and Practice* (Martinus Nijhoff: The Hague, 1982) at 74. See also R. McCorquodale, 'Self-Determination: A Human Rights Approach', 43 *International Comparative Law Quarterly* (1994) at 864, reproduced in R. McCorquodale (ed.), *Self-Determination in International Law* (Dartmouth and Ashgate: Aldershot, 2000) at 477, P. Thornberry, 'The Democratic or Internal Aspect of Self-Determination with some remarks on Federalism' in C. Tomuschat (ed.), *Modern Law of Self-Determination*, *supra* note 119, at 133-134, Eide, 'Constructive Alternatives', *supra* note 11, at 165 and pp. 170-172 and Cassese, *Self-Determination*, *supra* note 34, at 352-359.

[180] Raič, *Statehood*, *supra* note 177, at 237. See also A. Rosas, 'Internal Self-Determination' in C. Tomuschat (ed.), *Modern Law of Self-Determination*, *supra* note 119, at 227-232.

[181] Raič, *Statehood*, *supra* note 177, at 234.

[182] *Ibid*., at 226.

[183] K. Henrard, *Devising an Adequate System*, *supra* note 166, at 296, 316-317 and 239-242 and I. Brownlie, 'The Rights of Peoples in Modern International Law' in Crawford (ed.), *The Rights of Peoples*, *supra* note 1, at 2 *et seq*.

[184] G. Alfredsson, 'Access to International Monitoring Procedures: Choices between Self-Determination and the Human Rights of Groups' in Michael C. van Walt van Praag, Onno Seroo (eds), *Report of the International Conference of Experts Held in Barcelona from 21 to 27 November 1998: The implementation of the Right to Self-Determination as a Contribution to Conflict Prevention* (UNESCO Division of Human Rights, Democracy and Peace/ UNESCO, Centre of Catalonia) at 203. See also C. Tomuschat, 'Democratic Pluralism: The Right to Political Opposition', in A. Rosas and J. Helgesen (eds), *The Strength of Diversity: Human Rights and Pluralist Democracy* (Martinus Nijhoff: Dordrecht, 1992) at 39 referred to by A. Rosas, 'Internal Self-Determination', *supra* note 180, at 246.

[185] Rosas, 'Internal Self-Determination', *supra* note 180, at 246-248.

by jurisprudence,[186] state practice[187] and UN practice.[188] In this light, the right-holders of self-determination can be examined.

## Right-Holders of External Self-Determination

It is generally accepted that there are at least three 'categories'[189] of peoples who enjoy the right to external self-determination under customary international law: populations of territories under colonial rule, populations of territories subjected to foreign military occupation and populations of sovereign states.[190] In one go, G. Alfredsson has defined 'people' as 'the population of a separate political unit, with

[186] *Reference re Secession of Quebec*, S.C.R., vol.2, 1998. This was a reference to the Supreme Court of Canada by the Canadian Government relating to the secession of Quebec. Quebec declined to appear before the Court but an *Amicus Curiae* was appointed and the Court heard the opinions of a number of international lawyers. Another case is *Katangese Peoples' Congress v. Zaire*, where the complainant requested the African Commission to recognize the independence of Katanga, but where the fore mentioned Commission held 'the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and the territorial integrity of Zaire'. See N. Enonchong, 'Foreign State Assistance in Enforcing the Right to Self-Determination Under the African Charter: *Gunme & Ors* v. *Nigeria*', 46 *Journal of African Law* (2002) at 252-255. See also the ruling by the Constitutional Court of the Russian Federation on the constitutionality of a decision by Tatarstan to hold a referendum on the status of the Republic. The Court held that: 'the Republic of Tatarstan has the right to submit to the vote the issue of its legal status, because this right follows from the right of peoples to self-determination'. To sustain its findings the Court also referred to international instruments such as common Article 1 of the 1966 Covenants and the Friendly Relations Declaration. See Raič, *Statehood*, *supra* note 177, at 256-257.

[187] See US Deputy Secretary of State in the Clinton administration stating that: 'democracy is the political system most explicitly designed to ensure self-determination' in S. Talbott, 'Self-Determination in an interdependent world', *Foreign Policy* (spring 2000) at 159. See also the reports of numerous parties to the ICCPR, where references are made, implicitly and explicitly, to internal self-determination. See Raič, *Statehood*, *supra* note 177, at 285. See also H. Quane, 'A Right to Self-Determination for the Kosovo Albanians?', 13 *Leiden Journal of International Law* (2000) at 221: Of 97 studied states, '87 commented on self-determination. Of these, 69 states or 79% commented directly or indirectly on internal self-determination'.

[188] Raič, *Statehood*, *supra* note 177, at 236, referring to the condemnations by the Security Council of the Apartheid regime in South Africa and many other statements of UN organs. See in particular also the 1996 General Recommendation XXI on self-determination of the Committee on the Elimination of Racial Discrimination, which upholds the distinction. See K. Myntti, 'The Right of Indigenous Peoples to Self-Determination and Effective Participation' in Aikio and Scheinin (eds), *Operationalising*, *supra* note 95, at 105-106. P. Alston, 'Peoples' Rights: Their Rise and Fall' in P. Alston (ed.), *People's Rights* (Oxford University Press, 2001) at 270 and Rosas, 'Internal Self-Determination', *supra* note 180, at 229.

[189] One author has characterized this way of determining the beneficiaries of self-determination as the 'categories approach' as opposed to the 'coherence approach', which establishes a general definition of 'peoples' that makes sense of the colonial identity. See Knop, *Diversity*, *supra* note 143, at 54.

[190] Cassese, *Self-Determination*, *supra* note 34, at 59, 90-99, 129, 287-288 and 327, A. Eide, 'Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples' in Commission on Human Rights, *Prevention of Discrimination against and the protection of Minorities*, UN doc. E/CN.4/Sub.2/2000/10, at 5.

delimited territory and with a background in mainly colonial history or recent occupation' … 'People' has been coherently defined as, 'the geographical entity … rather than the popular entity'.[191] When self-determination became a legal principle, all *demoi*, i.e. all populations living in internationally recognized boundaries, were granted a right to implement self-determination externally.

Colonial peoples constituted *demoi*,[192] since they lived within internationally recognized boundaries[193] somehow distinct from the boundaries of the colonial powers and since they had developed common sympathies through their fight for liberation.[194] This was later confirmed in the Friendly Relations Declaration, which stipulated that their territories have, 'under the Charter of the United Nations, a status separate and distinct from the territory of the State administering' them.[195] This is also the reason why some scholars have expressed the view that, 'the creation of a new State in a colonial context is not, strictly speaking, a secession'.[196] Upon independence, the colonial boundaries transformed into state boundaries in accordance with the principle of *uti possidetis juris*.[197] In essence, however, the territorial integrity of the colonial power remained legally unaffected.[198]

The two other types of peoples with a right to external self-determination – peoples under foreign military occupation and peoples of sovereign states – are also *demoi*. These types essentially overlap. Peoples under foreign occupation coincide with the peoples of the sovereign states to which they belong when exercising external self-determination. Their right flows from the prohibition on international

---

191 Alfredsson, 'Different Forms', *supra* note 119, at 59-60. See also Eide, 'Constructive Alternatives', *supra* note 11, at 155.

192 For a contrary view, see Knop, *Diversity*, *supra* note 143, at 55.

193 See for example the Congres of Berlin. See Simpson, 'The Diffusion of Sovereignty', *supra* note 117, at 270.

194 C. Chaumont, 'Le droit des peuples à témoigner d'eux-mêmes' in 2 *Annuaire du Tiers Monde* (1976) at 27, referred to by Knop, *Diversity*, *supra* note 143, at 56.

195 See Friendly Relations Declaration, Principle V, para. 6, *supra* note 137. See also Charpentier, 'Autodétermination', *supra* note 97, at 120 and Bedjaoui, 'Article 73', *supra* note 13, at 1080.

196 T. Franck, R. Higgins, A. Pellet, M. Shaw, C. Tomuschat, 'L'intégrité territoriale du Québec dans l'hypothèse de l'accession à la souveraineté', in Commission d'étude des questions afférentes à l'accession du Québec à la Souveraineté, *Les attributs d'un Québec souverain, Exposés et etudes* (1992), vol. I, translated as 'The Territorial Integrity of Québec in the Event of the Attainment of Sovereignty' in A. F. Bayefsky (ed.), *Self-Determination in International Law: Québec and Lessons Learned* (Kluwer Law International: The Hague, 2000) at 283.

197 See for example Cassese, *Self-Determination*, *supra* note 34, at 191.

198 Franck, Higgins, Pellet, Shaw, Tomuschat, 'Québec', *supra* note 196, at 282. See also Knop, *Diversity*, *supra* note 143, at 75.

use of force for territorial gain.[199] Withdrawal of foreign troops realizes their right.[200] In other words, 'Aggression should not bear fruit. Occupation and annexation of part of a territory should not lead to the creation of a new people'.[201] 'Outside the colonial context, the primary subjects of external self-determination are the whole people of each State', prototypes of *demoi*.[202] It follows that under international law – aside some exceptional circumstances (*confer infra*) – only peoples in a political sense hold the right to exercise self-determination externally. What is the rationale for this restriction? Why have *ethnoi* within states no international right to external self-determination?

'In general terms, self-determination is about groups or individuals being free from domination by others, though it does not imply freedom from all constraints'.[203] E. Kant wrote: 'freedom … is the sole and original right that belongs to every human being by virtue of his humanity, insofar as it is compatible with the freedom of everyone else'.[204] Replacing some words, it may read: self-determination is the sole and original right that belongs to every people by virtue of its peoplehood, insofar as it is compatible with the self-determination of every other people. Equal freedom or equal self-determination demands legal restrictions.

Peoples are not 'physical realities'.[205] 'There are no authentic nations'.[206] 'The fact is that, whenever in the course of history a people has become aware of being a people, all definitions have proved superfluous'.[207] Peoples are constructed through political and ideological struggle and, moreover, 'are conceptualised in conflicting

---

[199] Article 2 (4) of the UN Charter, *supra* note 3. See Alfredsson, 'Different Forms', *supra* note 119, at 61.

[200] Cassese, *Self-Determination*, *supra* note 34, at 130 and 147-150.

[201] Alfredsson, 'Different Forms', *supra* note 119, at 61.

[202] J. Crawford, 'The Right of Self-Determination in International Law: Its Development and Future' in Alston (ed.), *People's rights*, *supra* note 188, at 63-64. See also Myntti, 'Indigenous Peoples', *supra* note 188, at 108 and Quane, 'Kosovo', *supra* note 187, at 220.

[203] Thornberry, 'Indigenous Peoples', *supra* note 95, at 49.

[204] See A. Ingram, 'Rights and the Dignity of Humanity' in L. Hancock and C. O'Brien, *Rewriting rights in Europe* (Ashgate: Aldershot, 2000) at 4. The quotation has been slightly restructured. See also article 4 of La Déclaration des droits de l'homme et du citoyen de 1789: 'La liberté consiste à pouvoir faire tout ce qui ne nuit pas à autrui. Ainsi, l'exercice des droits naturels de chaque homme n'a de bornes que celles qui assurent aux autres membres de la société la jouissance de ces mêmes droits. Ces bornes ne peuvent être déterminées que par la loi'.

[205] Charpentier, 'Autodétermination', *supra* note 97, at 122.

[206] Koskenniemi, 'National Self-Determination', *supra* note 146, at 269. See also E. Kamenka, 'Human Rights: Peoples' Rights' in Crawford (ed.), *The Rights of Peoples*, *supra* note 1, at 133: 'Nations and peoples, like genetic populations, are recent, contingent and have been formed and reformed constantly throughout history. They do not form a natural kind'.

[207] Cristescu, *Self-Determination*, *supra* note 100, at 40.

and overlapping ways'.[208] Therefore, self-determination of one people can only be compatible with that of any other people, if it is something different from an entitlement, 'to state-formation or nothing at all', i.e. if it transcends the 'absolutist' or 'binary' nature of self-determination.[209] 'All-or-nothing patriots',[210] are in fact selfish and morally condemnable. Self-determination should not equal selfishness. *Ethnoi* must accept a 'relativist' understanding of self-determination.[211] The right to external self-determination must be limited if it is to respect the freedom of all humans.

In his human rights' approach to self-determination, R. McCorquodale shares the idea that self-determination cannot be an, 'absolute right without any limitations'.[212] There must be limitations to protect the rights of others and the general interests of society.[213] In particular, the principles of territorial integrity and *uti possidetis* constitute legitimate constraints on 'the high levels of psychic and social energy'[214] which self-determination is able to generate.[215]

If this fails to convince the reader, the gruesome picture of the exercise of external self-determination by all peoples may help. 'Just as the concept of individual human liberty carried to its logical extreme would mean anarchy, so the principle of self-determination given unrestricted application could result in chaos'.[216] A right to external self-determination for all peoples – especially *ethnoi* - would constitute, 'continual fuel for strife',[217] a 'phrase … loaded with dynamite',[218]

---

[208] Koskenniemi has called this the 'onion-problem' of nationalism. See Koskenniemi, 'National Self-Determination', *supra* note 146, at 260 and p. 269. See also Makkonen, *Identity*, *supra* note 143, at 33-34 and S. J. Anaya, 'Self-Determination as a Collective Human Right Under Contemporary International Law', in Aikio and Scheinin (eds), *Operationalising*, *supra* note 95, at 5.

[209] See Makkonen, *Identity*, *supra* note 143, at 68. This has been called the 'end-state' approach in Kingsbury, 'Reconstructing Self-Determination', *supra* note 173, at 22. See also Cobban, *The Nation State*, *supra* note 145, at 144.

[210] E. J. Cárdenas, M. F. Cañás, 'The Limits of Self-Determination' in Danspeckgruber (ed.), *Self-Determination of Peoples*, *supra* note 97, at 107.

[211] Makkonen, *Identity*, *supra* note 143, at 68.

[212] McCorquodale, 'A Human Rights Approach', *supra* note 179, at 875. See also H. Hannum, 'A Principled Reponse to Ethnic Self-Determination Claims', in Alfredsson and Stavropoulou (eds), *Justice Pending*, *supra* note 168, at 263.

[213] McCorquodale, 'A Human Rights Approach', *supra* note 179, at 876 and 878.

[214] P. Allot, 'Self-Determination – Absolute Right or Social Poetry?' in Tomuschat (ed.), *Modern Law of Self-Determination*, *supra* note 119, at 177.

[215] McCorquodale, 'A Human Rights Approach', *supra* note 179, at 879-882.

[216] E. Roosevelt, *The Universal Validity of Man's Right to Self-Determination*, 27 *Dept. St. Bul.* (8 December 1958) at 919, quoted in Cassese, *Self-determination*, *supra* note 34, at 318.

[217] Falk, 'Self-Determination', *supra* note 97, at 31.

'an opened box of Pandora',[219] a 'Frankenstein's monster'.[220] External self-determination would blow the world to pieces in a 'downward disintegrative spiral',[221] 'matréshka-wise',[222] and '*ad infinitum*'.[223] The result would be 'anarchy',[224] 'utter chaos',[225] 'fratricidal struggles',[226] 'racism', 'xenophobia', 'segregation', 'exploitation' and 'ethnic cleansing'.[227] In more diplomatic language: 'peace, security and economic well-being for all would become ever more difficult to achieve'.[228] Hence, union - not unity - is the destiny of all peoples. The international right to exercise self-determination externally is – aside exceptional circumstances - rightly confined to all *demoi* existing when the current world order was founded.

*Ethnoi* - ordinarily understood to be 'peoples' - hold no right to exercise self-determination externally, but secessionism is not prohibited under international law.[229] 'The breaking away of a nation or an ethnic group is neither authorized nor prohibited by the legal rules; it is simply regarded as a fact of life, outside the realm of law'.[230] Would a general ban on external self-determination be the kiss of death of world's *ethnoi*? No. 'Strong national cultures can survive even without their own state, as demonstrated by the Catalans, Basques, Scots, Welsh, Tamils (in India), Quebecois, Tibetans, [Flemish] and many indigenous peoples, so long – and this is an important caveat – as the human rights of their members are protected'.[231]

---

218 R. Lansing, Secretary of State under President W. Wilson, quoted in Cassese, *Self-determination*, *supra* note 34, at 22.

219 Charpentier, 'Autodétermination', *supra* note 97, at 120.

220 E. Plischke, quoted in Cassese, *Self-Determination*, *supra* note 34, at 340. See also Thornberry, 'Indigenous Peoples', *supra* note 95, at 54.

221 Falk, 'Self-Determination', *supra* note 97, at 35.

222 Skurbaty, *As if Peoples Mattered*, *supra* note 106, at 195. See also Crawford, 'Self-Determination in International Law', *supra* note 202, at 13.

223 R. Higgins, quoted in Makkonen, *Identity*, *supra* note 143, at 74.

224 The International Commission of Rapporteurs dealing with the 1921 Aaland Islanders' claim for secession from Finland, quoted in Henrard, *Devising an Adequate System*, *supra* note 166, at 301.

225 Cárdenas and Cañás, 'Limits of Self-Determination', *supra* note 210, at 102.

226 *Frontier dispute* (*Burkina Faso v. Republic of Mali*), ICJ Reports (1986) 554, at 565, para. 20.

227 Eide, 'Constructive Alternatives', *supra* note 11, at 140.

228 B. Boutros-Ghali, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping*, Report of the Secretary-General of the UN, UN Doc. A/47/277-S/24111 (17 June 1992), para. 17.

229 Cassese, *Self-determination*, *supra* note 34, at 340. See also Franck, Higgins, Pellet, Shaw, Tomuschat, 'Québec', *supra* note 196, at 284.

230 Cassese, *Self-Determination*, *supra* note 34, at 340.

231 Hannum, 'A Principled Reponse', *supra* note 212, at 265-266.

## Right-holders of internal self-determination

As stated above, the distinction between external and internal self-determination has gained legal weight. The right-holders of internal self-determination are, however, not uncontroversial. The 'least controversial' beneficiary of the internal aspect of self-determination is 'the entire population of existing States'.[232] According to A. Cassese, a customary rule of international law is '*in statu nascendi*' in this regard.[233] It is already treaty law under Article 1 of the ICCPR.[234] This is evidenced by the Human Rights Committee's request to, 'describe the constitutional and political processes which in practice allow the exercise of [the right to self-determination]'[235] and by the reports submitted by states in accordance with this request.[236] Both the Friendly Relations Declaration and the 1993 Vienna Declaration support the view that state populations enjoy internal self-determination. They stipulate that a state only conducts itself in compliance with the principle of self-determination when its government represents the 'whole people belonging to the territory'.[237] Finally, the OSCE Helsinki Final Act and the African Charter provide some legal weight to the emerging customary rule.[238]

Thus, *demoi* generally hold a right to exercise self-determination internally. As to *ethnoi* the situation is far less clear. A. Cassese has demonstrated that racial groups have a right to internal self-determination under customary law. It is based on state practice regarding Southern Rhodesia and South Africa in combination with the Friendly Relations Declaration, stating that governments must represent the, 'whole people … without distinction as to race, creed or colour'. [239] As regards minorities, scholars diverge in opinion. K. Henrard summarizes: there are, 'those who make a radical distinction between minorities and peoples, those who do not exclude a possible overlap between both concepts and finally those who take a more centralist position as they emphasize that the minority should take part in the exercise of the "people" in globo'. But she concludes: 'overall, there seems to be a growing

[232] Raič, *Statehood*, *supra* note 177, at 244.

[233] Cassese, *Self-Determination*, *supra* note 34, at 103 and 306.

[234] Cassese, *Self-Determination*, *supra* note 34, at 102. As of 2 May 2003, there are 149 State Parties to the ICCPR.

[235] ICCPR General Comment 12, para. 4.

[236] See *supra* note 187 regarding state practice.

[237] See Friendly Relations Declaration, Principle V, para. 7, *supra* note 137 and Chapter I (2) Vienna Declaration, *supra* note 140

[238] Raič, *Statehood*, *supra* note 177, at 246-247.

[239] Cassese, *Self-Determination*, *supra* note 34, at 108-121 and 129.

acceptance that minorities (should) benefit in some way and to some extent from a right to self-determination'. [240]

Indigenous peoples will be dealt with below. It is nevertheless possible to draw a general conclusion regarding *ethnoi*. In theory *ethnoi* could enjoy internal self-determination, since it would not affect the territorial integrity of the state. There is however no such customary international law. This is for instance borne out by the international community's reaction regarding Kosovo. In Security Council Resolution 1244, favouring 'substantial autonomy' for the Kosovo population, all references to 'self-determination' have been carefully avoided.[241] Autonomy in itself does not imply recognition of a right to internal self-determination.[242] Nevertheless, there are several developments, especially in jurisprudence, which point to an emerging customary rule recognizing a right to internal self-determination for all *ethnoi*.[243] For example, the Supreme Court of Canada has held that: 'It is clear that "a people" may include only a portion of the population of an existing state', and, 'reference to "people" does not necessarily mean the entirety of a state's population'. Other jurisprudence, state practice and doctrine go in the same direction, but elaborating on this is beyond the scope of this article.[244]

In sum, international law recognizes a right to internal self-determination to almost all *demoi*. *Ethnoi*, ordinarily understood to be 'peoples', do not have such a right under customary international law - with the exception of racial groups. There is no logical reason for this state of affairs. A trend is visible towards recognizing a right to internal self-determination to all peoples in instruments, state practice, jurisprudence and doctrine.

---

[240] K. Henrard, *Devising an Adequate System*, *supra* note 166, at 292.

[241] See SC Res. 1244, 10 June 1999.

[242] Quane, 'Kosovo', *supra* note 187, at 222. This contention is based on the fact that States in their reports to the Human Rights Committee tend to refer to autonomy under article 27, but not under article 1 of the ICCPR.

[243] See for example *Reference re Secession of Quebec*, S.C.R., vol.2, 1998, para. 113 and 124. See also Opinion no. 2 of the Arbitration Commission set up in 1991 by the EC Peace Conference on Yugoslavia, 31 *International Legal Materials* (1992), at 1497-1499, stating in para. 3: 'Article 1 of the two 1966 International Covenants on human rights establishes that the principle of the right to self-determination serves to safeguard human rights. By virtue of that right every individual may choose to belong to whatever ethnic, religious or language community he wishes'. Further see also the *Katangese Peoples*' case and the *Tatarstan* case, *supra* note 186.

[244] See Raič, *Statehood*, *supra* note 177, at 247-264 and 288. According to this author, a customary right to internal self-determination for all *ethnoi* having a 'distinct individuality', meaning those having a 'self' distinct from all other 'selves inhabiting the globe', already exists.

## A Potential Consensus Regarding Self-Determination

'Self-determination should be concerned primarily with people rather than territory'.[245] Self-determination, as a legal principle, has been (ab)used to promote the good cause of decolonization.[246] Now that the process of decolonization comes to an end, self-determination can recover its true nature.[247] The core of self-determination has been positively defined as follows:[248]

- the idea that 'human beings, individually and as groups, are equally entitled to be in control of their own destinies'[249]
- a principle 'entitling the people to choose its political allegiance to influence the political order under which it lives'[250]
- 'the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives'[251]
- 'the right of popular participation in the government of the State as an entity'[252]
- 'the right of a people organized in an established territory to determine its collective political destiny in a democratic fashion'[253]
- the right of every people 'to participate in the definition of its political, economic, social, or cultural future'[254]
- 'the "need to pay regard to the freely expressed will of peoples" each time the fate of peoples is at issue'.[255]

It is abundantly clear that self-determination is primarily about 'method' or 'process' and not about 'outcome'.[256] In essence, self-determination is about democracy, not

---

[245] Hannum, 'A Principled Reponse', *supra* note 212, at 267.

[246] One author has argued that there was never a right to self-determination for colonial peoples, but only an international obligation to decolonize. See Charpentier, 'Autodétermination', *supra* note 97, at 124.

[247] 'All trust territories have now exercised their right to self-determination. Except for a few territories – most notably, Western Sahara – all non-self-governing territories have also achieved self-determination', Knop, *Diversity*, *supra* note 143, at 53.

[248] It goes without saying that the following list is not exhaustive of academic opinion.

[249] Anaya, 'Contours of Self-Determination', *supra* note 168, at 8-9.

[250] Halperin and Scheffer, quoted in Cárdenas and Cañás, 'Limits of Self-Determination', *supra* note 210, at 110.

[251] I. Brownlie, 'Rights of Peoples', *supra* note 183, at 5.

[252] A. Eide, quoted in Rosas, 'Internal Self-Determination', *supra* note 180, at 239.

[253] T. Franck, 'The Emerging Right to Democratic Governance', 86 *American Journal of International Law* (1992) at 52.

[254] Franck, Higgins, Pellet, Shaw, Tomuschat, 'Québec', *supra* note 196, at 277.

[255] Cassese, *Self-Determination*, *supra* note 34, at 128 and 319-320. See also *Western Sahara case*, Advisory Opinion, ICJ Reports (1975) 12, at 33.

about independence. 'Self-determination … cannot mean: fragmentation or balkanisation'.[257] Not to be a source of conflict, self-determination cannot primarily be a right to independent statehood.[258] Accordingly, T. Franck contends that self-determination is no longer a principle of exclusion (secession), but has become one of inclusion: the right to participate.[259] Today, the focus has shifted from territory to people, from external to internal self-determination. A. Rosas' observation is paradigmatic: 'At the very end of the day, all elements of self-determination are "internal", in the sense that the popular will must be taken into account'.[260] Moreover, the Supreme Court of Canada has stressed: 'self-determination of a people is normally fulfilled through internal self-determination'.[261]

This shift has concrete implications. Clearly, in a world with less than 200 states and more than 5000 *ethnoi*, in a world where, 'only 4% of all the people live within boundaries coinciding with the extension of their ethnic groups',[262] self-determination should lead to 'pluralist democracy'[263] or 'consociational democracy'.[264] Such democracies are built on the principle of executive power-sharing and recognize some self-administration for groups.[265] Self-determination, procedural in nature, clarifies options and opportunities for each group.[266]

Is there consequently a danger of self-determination becoming 'all things to all men'?[267] Yes, but as Z. Skurbaty contends: 'I see absolutely no reasons to be

---

[256] G. Nettheim, '"Peoples" and "Populations": Indigenous Peoples and the Rights of Peoples' in Crawford (ed.), *The Rights of Peoples*, *supra* note 1, at 119 referring to M. Pomerance, B. Kingsbury, *Claims by Non-State Groups in International Law*, 25 *Cornell International Law Journal* (1992) at 504. Cassese, *Self-Determination*, *supra* note 34, at 320. Thornberry, 'Indigenous Peoples', *supra* note 95, at 51, E.-I. A. Daes, 'The Spirit and the Letter of the Right to Self-Determination of Indigenous Peoples: Reflections on the Making of the United Nations Draft Declaration' in Aikio and Scheinin (eds), *Operationalising*, *supra* note 95, at 79 and Skurbaty, *As if Peoples Mattered*, *supra* note 106, at 261.

[257] Cárdenas and Cañás, 'Limits of Self-Determination', *supra* note 210, at 105.

[258] Cassese, *Self-Determination*, *supra* note 34, at 350.

[259] T. Franck, 'The Emerging Right', *supra* note 253, at 59.

[260] Rosas, 'Internal Self-Determination', *supra* note 180, at 250.

[261] *Reference re Secession of Quebec*, S.C.R., vol.2, 1998, para. 126.

[262] Makkonen, *Identity*, *supra* note 143, at 4. See also Eide, '*Constructive Alternatives*', *supra* note 11, at 166-167.

[263] D. Beetham, *Democracy and Human Rights* (Polity Press: Cambridge, 1999) at 113-114. See also Cassese, *Self-determination*, *supra* note 34, at 306.

[264] A. Lijphart, 'Majority Rule Versus Democracy in Deeply Divided Societies', 4 *Politicon* (1977), at 2, referred to by Eide, 'Constructive Alternatives', *supra* note 11, at 165.

[265] Eide, 'Constructive Alternatives', *supra* note 11, at 166. See also K. Henrard, *Devising an Adequate System*, *supra* note 166, at 313-314.

[266] Skurbaty, *As if Peoples Mattered*, *supra* note 106, at 261.

[267] R. Higgins, *Problems and Process: International Law and How we Use It* (Oxford University Press, 1994).

apprehensive about the implications of such an assumption'.[268] Indeed, isn't human liberty, as guaranteed by Article 1 of the Universal Declaration of Human Rights (UDHR), also all things to all men? Proclaiming such a right has not prevented human beings from acting morally or in accordance with the law. Why would it be different in respect of the right to self-determination?

Being all things to all men, self-determination might even include a right to secede, but solely in 'self-defence'. Already under the League of Nations the Commission of Rapporteurs in the *Åland Islands* case took the view that exceptionally a right to 'separation' of the minority from the state might arise.[269] Such a right would also find support in the Friendly Relations Declaration and in the third preambular paragraph of the UDHR referring to the, 'recourse, as a last resort, to rebellion against tyranny and oppression'.[270] A right to secession is still disputed, however. Opinio juris is considerable, but state practice does not reflect this.[271] Nevertheless, the right may emerge some day, for it is in line with the potential consensus outlined above. Moreover, 'blatant subjugation of groups' is undoubtedly a concern of the international community.[272] Furthermore, territorial integrity, 'cannot be an end in itself'.[273] Hence, 'when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession'.[274]

What becomes apparent is the 'remedial' nature of self-determination. Scholars have spoken of 'remedial secession'[275] and according to S. J. Anaya any form of self-determination should be 'remedial'.[276] The legitimacy of a particular claim to self-determination would flow from that claim's appropriateness to remedy a particular lack of self-determination.[277] Similarly, according to F. L. Kirgis, the legitimacy of a degree of self-determination is inversely related to the existing degree of representative government.[278] The more representative a government is, the lower

---

[268] Skurbaty, *As if Peoples Mattered*, *supra* note 106, at 215.

[269] See Cassese, *Self-Determination*, *supra* note 34, at 31.

[270] Alfredsson, 'Self-Determination and Indigenous Peoples', *supra* note 119 at 49.

[271] See Hannum, 'A Principled Reponse', *supra* note 212, at 264-265, Quane, 'Kosovo', *supra* note 187, at 226-227.

[272] Cárdenas and Cañás, 'Limits of Self-Determination', *supra* note 210, at 102.

[273] Simpson, 'The Diffusion of Sovereignty', *supra* note 117, at 283.

[274] *Reference re Secession of Quebec*, S.C.R., vol.2, 1998, para. 134 and para. 138.

[275] Amongst others see Crawford, 'Self-Determination in International Law', *supra* note 202, at 56-57.

[276] Anaya, 'Self-Determination as a Collective Human Right', *supra* note 208, at 12-14.

[277] Anaya, 'Contours of Self-Determination', *supra* note 168, at 12.

[278] F. L. Kirgis Jr., 'The Degrees of Self-Determination in the United Nations Era', 88 *American Journal of International Law* (1994) at 308-310.

the degree of self-determination, which can be claimed. Thus, self-determination is not anything to any man.

Unfortunately, this reasoning is circular: a claim to self-determination is legitimate if there is an equivalent lack of self-determination. Self-determination is legitimate if it is lacking. As J. Salmon has written: 'The real difficulty of the matter is to define how a people exercises its internal right to self-determination. If sovereignty resides in the people, how does that people voice its will? How is democracy achieved? These are by no means easy questions to answer'.[279] Indeed, almost a decade later H. Hannum writes: 'Even the most ardent world federalists or human rights advocates are not ready to dictate the appropriate form of government for each of the world's nearly 200 independent states'.[280] The author goes on to assert that, 'the challenge is to identify the level at which needs are best addressed and to locate powers accordingly (perhaps along the lines of the EU concept of 'subsidiarity')'.[281] The most daring attempt so far to answer these questions and challenges has probably been the 'Lund Recommendations on the Effective Participation of National Minorities in Public Life' elaborated under the auspices of the OSCE High Commissioner on National Minorities and under the Chairmanship of the Director of the Raoul Wallenberg Institute, Professor Gudmundur Alfredsson. In these recommendations, there are lists of functions generally or successfully exercised by the central or local authorities.[282] This is definitely not the end of the matter. Self-determination remains vague, but difficulties related to the implementation of human rights do not detract from the legitimacy of the underlying rights.[283]

Self-determination can become a real human right: universal in scope and concerned with people instead of territory. For a while, indeed, the term, '"peoples" has been stripped of its ordinary meaning and reconstructed as something quite different', self-determination and simultaneously the word 'peoples' are recovering their true nature.[284] Self-determination may no longer be a 'cruel deception'.[285] The function of international lawyers, 'should be to make sense of existing normative language, corresponding to widely-regarded claims of right, and not to retreat into a

---

[279] J. Salmon, 'Internal Aspects of the Right to Self-Determination: Towards a democratic legitimacy principle?' in C. Tomuschat (ed.), *Modern Law of Self-Determination*, *supra* note 119, at 280.

[280] Hannum, 'A Principled Reponse', *supra* note 212, at 266.

[281] *Ibid.*, at 271.

[282] See Chapter III on self-governance. The functions of central authorities include: 'defence, foreign affairs, immigration and customs, macroeconomic policy, and monetary affairs'.

[283] Hannum, 'A Principled Reponse', *supra* note 212, at 267.

[284] B. Kingsbury, 'Non-State Groups', *supra* note 256, at 499.

[285] Crawford, 'Self-Determination in International Law', *supra* note 202, at 64.

self-denying legalism'.[286] 'Therefore, the legal edifice should be re-arranged. It should be possible to call a people, in the ethnic sense, a people, in the legal sense, without having to fear that such recognition entails devastating consequences'.[287]

## Indigenous Peoples' Rights

### Self-Determination

Two decades ago, in 1983, Special Rapporteur José Martinez Cobo wrote in a study of the problem of discrimination against indigenous populations: 'self-determination, in its many forms, must be recognized as the basic precondition for the enjoyment by indigenous peoples of their fundamental rights'.[288] Has this 'basic precondition' been met? Do indigenous peoples enjoy a right to self-determination? Are they peoples under international law? Indigenous peoples are clearly *ethnoi*. 'They have their own specific languages, laws, values, and traditions; their own long histories as distinct societies and nations; and a unique economic, religious, and spiritual relationship with the territories in which they have so long lived'.[289] Being *ethnoi*, they are, though potentially, not yet 'peoples' in international law (*confer supra*). A closer look is nevertheless required, since indigenous peoples are a special category of *ethnoi*. They have enjoyed specific international attention.

In ILO Convention No. 169 on indigenous peoples, they have been explicitly defined as 'peoples'.[290] This was however qualified by the third paragraph of Article 1 stating that: 'the use of the term "peoples" in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law'. It follows that under the treaty no right to self-determination has been granted implicitly. Indigenous peoples have, however, been accorded such a right in the current UN Draft Declaration on the Rights of Indigenous Peoples. Article 3 provides that: 'indigenous peoples have a right of self-determination. By virtue of that right they freely determine their political status and

---

[286] *Ibid.*, at 64.

[287] C. Tomuschat, 'Self-Determination in a Post-Colonial World', *supra* note 169, at 16.

[288] See Musgrave, *Self-Determination*, *supra* note 162, at 175.

[289] E.-I. A. Daes, 'Some Considerations on the Right of Indigenous Peoples to Self-Determination', in 3 *Transnational Law & Contemporary Problems* (1993) at 6, reproduced in S. J. Anaya, *International Law and Indigenous Peoples* (Ashgate: Aldershot, 2003) at 367.

[290] See Article 1 Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, adopted on 27 June 1989 by the General Conference of the International Labour Organization at its seventy-sixth session.

freely pursue their economic, social and cultural development'.[291] The language is identical to the one used in common Article 1 of the ICCPR and the ICESCR, preceded by 'indigenous'. According to T. Moses the language refers not only to political self-determination, but also to 'hunting, fishing, and trapping'.[292] 'I think of the land, of the water, the trees, and the animals. I think of the land we have lost … the land stolen of our people. I think of hunger and people destroying the land'.[293] Undoubtedly, economic, social and cultural self-determination are an essential part of self-determination, but it is subordinate to political self-determination.[294] Political self-determination is a prerequisite for economic, social and cultural self-determination.[295] So, what kind of political self-determination does the Declaration envisage?

Generally, self-determination in Article 3 of the Draft Declaration has been understood to mean primarily internal self-determination.[296] The right to internal self-determination would constitute the principal legal distinction between indigenous peoples and minorities, according to E.-I. A. Daes.[297] This interpretation of self-determination is in accordance with the potential consensus regarding self-determination. However, the Draft Declaration is still being debated in the UN Working Group. At present, indigenous peoples probably do not enjoy a right to self-determination under international law.

## Autonomy

As pointed out earlier, in everyday life, autonomy can mean the same as self-determination. Legally, however, the term differs in content. The content of autonomy is, 'still vague and imprecise',[298] though attempts have been made to

---

[291] Article 3 of the Draft Declaration on the Rights of Indigenous Peoples, UN doc. E/CN.4/Sub.2/1994/2/Add.1 (1994).

[292] T. Moses, 'The Right of Self-Determination and its Significance to the Survival of Indigenous Peoples' in Aikio and Scheinin (eds), *Operationalising*, *supra* note 95, at 162.

[293] *Ibid.*

[294] Alfredsson, 'Access to International Monitoring Procedures', *supra* note 184, at 206.

[295] *Ibid.*, at 205 and Alfredsson, 'Different forms', *supra* note 119, at 73.

[296] See Alfredsson, 'Self-Determination and Indigenous Peoples', *supra* note 119, at 42 referring to E.-I. A. Daes, A. G. Kouevi, 'The Right to Self-Determination of Indigenous Peoples: Natural or Granted? An African Perspective' in Aikio and Scheinin (eds), *Operationalising*, *supra* note 95, at 151, Crawford, 'Self-Determination in International Law', *supra* note 202, at 25. See also Explanatory note on the Draft Declaration, reproduced in part in Myntti, 'Indigenous Peoples', *supra* note 188, at 88.

[297] E.-I. A. Daes, 'Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples' in Commission on Human Rights, *Prevention of Discrimination against and the protection of Minorities*, UN doc. E/CN.4/Sub.2/2000/10, at 9.

[298] Cassese, *Self-Determination*, *supra* note 34, at 355.

render it more clear and precise.[299] There is still no commonly agreed definition of autonomy in international law. Generally though, autonomy, 'has been and can be referred to as self-government, self-management, home rule … The label should not matter as long as a central government agrees to power-sharing and leaves local matters in the hands of local representatives'.[300] Furthermore, autonomy is generally defined as either territorial or non-territorial (i.e. cultural, personal or functional).[301]

Autonomy has been considered, 'the best means of upholding the necessary balance among different communities or minorities in a pluralistic society'.[302] It is, 'probably the most effective means of protecting the dignity and identity of diverse groups within states'.[303] Therefore, one scholar has called it, 'the "queen" of human rights protection mechanisms'.[304] Nevertheless, the existence of a general group right to autonomy is disputed under current international law.[305]

The legal situation of indigenous peoples is nuanced. Those who live in states that have ratified the ILO Convention No. 169 enjoy some form of non-territorial autonomy.[306] Territorial autonomy, on the other hand, is still not a right of indigenous peoples under international law.[307] It is nonetheless expected that both forms of autonomy will become a right of these peoples in the near future, for Article 31 of the Draft Declaration on the Rights of Indigenous Peoples provides:

> [I]ndigenous peoples … have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, environment and entry by

---

[299] See the 'Lund Recommendations on the Effective Participation of National Minorities in Public Life' available at <www.osce.org/documents/hcnm/1999/09/2698_en.pdf>, September 1999, see also H.-J. Heintze, 'On the Legal Understanding of Autonomy' in Suksi (ed.), *Autonomy*, *supra* note 121, at 7-32.

[300] Alfredsson, 'Self-Determination and Indigenous Peoples', *supra* note 119, at 52 and 'Different Forms', *supra* note 119, at 72.

[301] Heintze, 'Legal Understanding of Autonomy', *supra* note 299, at 18-24.

[302] Cárdenas and Cañás, 'Limits of Self-Determination', *supra* note 210, at 110.

[303] Alfredsson, 'Self-Determination and Indigenous Peoples', *supra* note 119, at 52.

[304] Heintze, 'Legal Understanding of Autonomy', *supra* note 299, at 10, quoting M. Brems.

[305] See Myntti, 'Indigenous Peoples', *supra* note 188, at 118, Heintze, 'Legal Understanding of Autonomy', *supra* note 299, at 13-14 and G. Gilbert, 'Autonomy and Minority Groups: A Right in International Law?', 35 *Cornell International Law Journal* (2002) 307-353.

[306] See Myntti, 'Indigenous Peoples', *supra* note 188, at 118-122.

[307] *Ibid.*, at 129.

> non-members, as well as ways and means for financing these autonomous functions.[308]

This provision is endorsed by the 'Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-government', adopted by the UN Meeting of Experts in Nuuk, Greenland in 1991.[309] It is also supported by Article XV of the draft declaration on the rights of indigenous peoples adopted by the Inter-American Commission on Human Rights in 1997.[310] Nonetheless, there does not currently seem to be a right to autonomy under international law.

## Self-Government

As evidenced by the preceding sections, the emergence of a right to self-determination or a right to autonomy or both for indigenous peoples may be likely. But how likely will these rights surface in international law? And does it matter in the context of the 'Belgian thesis'? R. Falk has written: 'it is too late to put the genie of self-determination back in the colonialist bottle'.[311] Moreover, as was said in the context of the Draft Declaration on the Rights of Indigenous Peoples: 'the right of self-determination is the heart and the soul of the declaration'.[312] The symbolic value of 'self-determination' prompts many to believe that the language is now unavoidable. Indigenous peoples will get a right of self-determination.

The likelihood of this happening has, however, been contested by many others, in the light of the continued aversion and opposition by governments. The reference to self-determination in Article 3 of the Draft Declaration does not clearly exclude external self-determination. Therefore, governments fear the reappearance of the ghost of decolonization. This fear is understandable, though unfounded in the light of the clear consensus that has emerged against external self-determination for sub-state groups under international law. Nevertheless, many diplomats and scholars have urged the parties to abandon the discourse of self-determination.[313] It is believed that autonomy may have a better chance of being recognized if presented under its proper name instead of under the 'self-determination umbrella'.[314]

---

[308] Draft Declaration on the Rights of Indigenous Peoples, Article 31, *supra* note 291.

[309] See UN doc. E/CN.4/1992/42.

[310] See Myntti, 'Indigenous Peoples', *supra* note 188, at 112-113.

[311] Falk, 'Self-Determination', *supra* note 97, at 38.

[312] See quotation in Kingsbury, 'Reconstructing Self-Determination', *supra* note 173, at 19.

[313] Falk, 'Self-Determination', *supra* note 97, at 38 and Alfredsson, 'Self-Determination and Indigenous Peoples', *supra* note 119, at 53-54 and 'Different forms', *supra* note 119, at 75-76.

[314] Alfredsson, 'Different forms', *supra* note 119, at 70.

Does the outcome of this controversy matter for a possible revival of the legal conclusions of the 'Belgian thesis' on Article 73? No. 'What's in a name'? 'Self-determination' in the Draft Declaration denotes internal self-determination or self-government. 'Autonomy', in legal-political vocabulary, equally means self-government.[315] Moreover, Article 31 of the Draft Declaration explicitly mentions the right to 'self-government'. It is fair to say that self-government, understood as autonomy, will sooner or later be recognized as a right of indigenous peoples. This is what matters.

# A Revival of the Legal Conclusions of the 'Belgian Thesis'?

## Are the Foundations of Our Current World Order Arbitrary and Unjust?

The 'Belgian thesis' has been used to de-legitimize the foundations of our current world order, i.e. the generally recognized patchwork of states. It would have supported a right to external self-determination for all indigenous peoples, i.e. amongst other things a right to form an independent state. In reality, the 'Belgian thesis' is not supportive of such a discourse. Moreover, the foundations of the current world order are, whilst arbitrary, not unjust. Finally, this discussion has become superfluous.

Belgium was not interested to endorse state formation by indigenous peoples. On the contrary, it sought to preserve the fundamental world order of the mid-twentieth century. It tried to maintain the established colonial order. Therefore, Belgium understood self-determination to mean autonomy, not independence. Possibly, however, it was part of the Belgian strategy to be misunderstood. Wild tales about Belgium's desire to grant independence to indigenous peoples were never corrected. Nevertheless, in retrospect, it is clear that Belgium did propose autonomy for indigenous peoples. Reshaping the foundations of the world order was not an objective of the 'Belgian thesis'.

It is true that internationally recognized borders are arbitrary. But this is caused by history. The borders of European states are equally arbitrary. Nobody is to blame for it and in reality it is only an illusion, for there is no inherent or authentic world

[315] See Heintze, 'Legal Understanding of Autonomy', *supra* note 299, at 8.

order. It was maybe arbitrary to limit external self-determination to all internationally recognized territories of the mid-twentieth century. This was, however, largely just: all *demoi* enjoyed the same right, whilst all *ethnoi* were refused such a right. A qualification might be necessary with regard to 'indigenous peoples with treaties' and indigenous peoples, initially listed under Article 73, but subsequently unlawfully removed from it.[316] Arguably, they were living in internationally recognized territories and should have been considered as *demoi*. Their fight for independence might be justified. Their demand for external self-determination might have greater chances of succeeding than similar demands by other indigenous peoples.[317]

To a large extent, however, the debate on the foundations of our current world order has become superfluous. Most indigenous peoples do no longer aspire to become independent entities.[318] There is 'for the time being a convergence between indigenous peoples and state decision-makers'.[319] This attempt to find common ground is also evidenced in doctrinal writings. E.-I. A. Daes, for instance, writes: 'Once an independent State has been established and recognized, its constituent peoples [also indigenous peoples] must express their aspirations through the national political system and not through the creation of new States, unless the national political system becomes so exclusive and non-democratic that it no longer can be said to represent the whole of the population'.[320] In any case, the 'Belgian thesis' cannot be used to support the opposite view and should no longer be invoked to subvert the foundations of our current world order.

## A New Lease of Life for Article 73

Some authors have consigned Article 73 of the UN Charter to the realm of history.[321] Firstly, it stopped operating with the establishment of the so-called 'Committee of 24'.[322] Secondly, once decolonization achieved, the text is supposed

316 Cf. Alaska and Hawaii.

317 See G. Alfredsson, 'Indigenous Populations, Treaties with', in *Encyclopedia of Public International Law*, vol. 8, at 951 *et seq*.

318 See Daes, 'Some Considerations', *supra* note 289, at 9-10. See also Kingsbury, 'Reconstructing Self-Determination', *supra* note 173, at 24, Falk, 'Self-Determination', *supra* note 97, at 61, Cárdenas and Cañás, 'Limits of Self-Determination', *supra* note 210, at 113-114 and T. Moses, 'Renewal of the Nation' in Alfredsson and Stavropoulou (eds), *Justice Pending*, *supra* note 168, at 63.

319 Kingsbury, 'Reconstructing Self-Determination', *supra* note 173, at 27.

320 Daes, 'Some Considerations', *supra* note 289, at 7.

321 Doehring, 'Self-Determination', *supra* note 11, at 51, Bedjaoui, 'Article 73', *supra* note 13, at 1081.

322 This Committee was established by a Resolution adopted on the 27th of November 1961. It was entrusted with the task of looking after the implementation of GA Res. 1514. See Bedjaoui, *ibid*.

to become obsolete. This diagnosis is, however, linked up with the current legal understanding of the terms 'non-self-governing territories' and 'self-government'. If interpreted more broadly, as advanced by the 'Belgian thesis', new life can be breath into Article 73. It is submitted that the wording of Article 73 could be interpreted in accordance with its ordinary meaning.

Practically, Article 73 can be interpreted more widely, for the way it was drafted allows development without formal amendment.[323] When practically possible, legal provisions have to be 'effective and useful' and interpreted accordingly; it is a basic principle of legal interpretation.[324] Moreover, an interpretation, which is evolutionary and dynamic, is justified in the case of the Charter, since the text has remained formally almost unchanged for more than half a century.[325] Like a state constitution, the Charter is primarily subject to objective interpretation.[326] This means that interpretation of the Charter has to take into account developments subsequent to the Charter's inception and changing circumstances, rather than strictly follow the subjective aim of the Charter's authors. In this regard, practice of UN members and organs is particularly relevant. Since the Charter's inception and its application to colonies and protectorates, a lot has changed. Issues concerning colonies and protectorates have almost become redundant. Issues concerning indigenous peoples have become an essential part of the UN agenda. In 1982, the UN Economic and Social Council established the UN Working Group on Indigenous Populations, open to all indigenous peoples. Moreover, in 2000, ECOSOC established the Permanent Forum on Indigenous Issues. Furthermore, in 2001, the UN Commission on Human Rights appointed a Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people. Finally, the Draft Declaration on the Rights of Indigenous Peoples – in particular Article 31 – may be adopted in a near or distant future. All these developments define an organizational purpose for the UN: the promotion and protection of the fundamental rights of indigenous peoples. In the light of the foregoing Article 73 could legally be interpreted more widely.

'Self-government' can recover its original sense. As 'self-determination', it might no longer denote independence whatever the circumstances, but might essentially mean autonomy or internal self-determination. A slightly different interpretation of 'self-government' is not inspired by paternalistic or racist motives,

---

[323] Toussaint, 'The Colonial Controversy', *supra* note 22, at 171.

[324] A. Cassese, 'Old Concepts and New Developments', *supra* note 176, at 151, See also Ress, 'Interpretation', *supra* note 157, at 15.

[325] Ress, 'Interpretation', *supra* note 157, at 15.

[326] Doehring, 'Self-Determination', *supra* note 11, at 48-49.

as was seemingly the case in the 'Belgian thesis', but by considerations of peace and security as was explained under the section on external self-determination. A less radical understanding of 'self-government' allows 'non-self-governing territories' to be interpreted more broadly too in accordance with its ordinary meaning, for states no longer have to fear the devastating consequences of such a broad interpretation. Thus, 'non-self-governing territories' may mean all territories 'whose peoples have not yet attained a full measure of self-government'. 'Non-self-governing territories' could not be restricted to colonies and protectorates and could encapsulate indigenous peoples as advanced by the 'Belgian thesis', albeit not for the same reason. Territories inhabited by indigenous peoples could be considered as 'non-self-governing territories', not because these peoples are, 'insufficiently developed to be able to govern themselves', but because they usually lack autonomous government vis-à-vis the State to which they belong. Most indigenous peoples have not yet attained a full measure of self-government. They are still unable, 'to live and develop freely as distinct groups in their original homelands'.[327]

A wider interpretation of Article 73, in line with the conclusions – autonomy and indigenous peoples - reached by the 'Belgian thesis', allows indigenous peoples to become the primary beneficiaries of Article 73. Even though in many countries across the globe, legislative and administrative measures have been taken to recognize indigenous peoples' rights with regard to land, culture, and other matters, these initiatives have lacked adequate implementation, also due to insufficient pressure from the international community.[328] States should be under a duty[329] to develop self-government and should be under international supervision in this regard.[330] Article 73 addresses both issues.

Article 73, interpreted more broadly, in accordance with the conclusions of the 'Belgian thesis', provides a legal basis for the establishment of international supervision of an indigenous peoples' right to self-government. Article 40 of the Draft Declaration stipulates that, 'the organs and specialized agencies of the United Nations system … shall contribute to the full realization of the provisions of this Declaration'. Once the Draft Declaration is adopted, the Secretary General of the UN could request all Members of the UN harbouring indigenous peoples to report on the development of self-government.

---

[327] Anaya, 'Contours of Self-Determination', *supra* note 168, at 12.

[328] *Ibid.*, at 8

[329] Kouevi, 'Self-Determination of Indigenous Peoples', *supra* note 296, at 151 and Daes, 'Some Considerations', *supra* note 289, at 9.

[330] Cassese, *Self-Determination*, *supra* note 34, at 359 and C. Tomuschat, 'Self-Determination in a Post-Colonial World', *supra* note 169, at 18.

## Conclusion

Two general conclusions have been drawn in the preceding chapter. They are not reiterated as such here. Instead they are incorporated in a response to the questions which I undertook to answer in the introduction. Those queries are: being colonialists, were the Belgians neglecting their interests by maintaining that all states with indigenous peoples under their authority were obliged to develop self-government? Or have they been misunderstood? How did it happen and what did they really say? Is it still valuable today?

The Belgians were not neglecting their interests. They acted consciously and cunningly, though on the ground of a naïve premise. They argued for self-government for all indigenous peoples and listed many in a document covering the entire planet. They believed political decolonization could be avoided, for all anti-colonial members of the UN would realize that an offensive aimed at the colonial powers might have repercussions on their own countries. Obviously Belgium's rationale was to maintain its overseas possession. Yet this was naïve, in so far as decolonization was a historical movement with an irreversible momentum.

So the Belgians were in fact insincere in their promotion of self-government? No, not necessarily. To believe they were, is to rely on the common understanding of the 'Belgian thesis' as promoting 'self-government' in the sense of 'independence', instead of 'autonomy'. This misunderstanding probably came to exist and managed to survive, because Belgium had no interest in correcting it. Nevertheless, Belgium argued for autonomy, not independence. It so being, Belgium might have been sincere, albeit having a hidden agenda too. In any case - whether Belgium sincerely supported autonomy or not - it surely is a fallacy to state that it wanted to expand decolonization or independence to all indigenous peoples. The 'Belgian thesis' as normally presented is a myth. It needs to be punctured.

Now the real 'Belgian thesis' – autonomy for indigenous peoples - can be recovered. But is it still valuable today? Yes. In the light of the shifting focus from territories to peoples and all developments in the UN with regard to indigenous peoples since the Charter's inception and considering the coming recognition of indigenous peoples' right to self-government, new life could be breathed into Article 73 of the UN Charter. A wider interpretation of that Article in accordance with the conclusions of the 'Belgian thesis' might impose a duty on all members of the UN to develop self-government for indigenous peoples. Moreover, it could also be the basis for a reporting mechanism under the auspices of the Secretary General. The legal opportunity may exist. In the end, 'law proposes, but politics disposes'.

# Constructing Non-Compliance Systems into International Environmental Agreements – A Rise of Enforcement Doctrine with Credible Sanctions Needed?

Tuula Kolari*

## Introduction

The importance of international agreements is increasingly visible in the modern globalizing world. Cooperative arrangements between states and international agreements are needed, especially when mitigating a growing number of challenging, large-scale environmental problems. Presently, more than 200 international treaties are controlling dozens of issues of environmental harm.[1]

In most international treaty regimes the compliance rate is relatively high. However, after a qualitative analysis, it can be argued that the reason for this is not necessarily the goodwill of the states but rather the nature of the given commitments. International obligations always tend to be more or less compromises, the aim at the drafting phase of the agreement having been to make the compliance of states as likely as possible. On the other hand, agreements have a tendency to inevitably remain incomplete. High transaction costs, the special characteristics of environmental problems and sometimes simply the unwillingness of states to agree on the suggested terms result in the fact that agreements cannot be

* Lic.Sc. (Admin.), University of Joensuu.

[1] Literature usually speaks about some 200 currently existing international environmental treaties. Ecolex, an information centre for environmental law, lists more than 480 multilateral treaties relating to environmental conservation whereas the ENTRI (Environmental Treaties and Resource Indicators) database contains information for 425 multilateral treaties. The notion 'international environmental treaty' is evidently difficult to define.

endlessly modified to cover all possible states of the world and to satisfy every party involved.[2] For this reason, compliance with agreements cannot be perfect either.

Louis Henkin has made the famous statement: '[A]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.'[3] Generally, agreements are created with the parties' intention to commit to the commonly agreed obligations and to reach the objectives of the agreements as fully and as promptly as possible. The 1969 Vienna Convention on the Law of Treaties codified into binding international law the principle of *pacta sunt servanda*, according to which 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'[4] In principle, the rules set out in the Vienna Convention apply to treaties concluded after 1980, when the Convention came into force. However, many of the rules are widely regarded as having history as customary principles.[5] On the whole, shortcomings in compliance with international treaties understandably undermine the efforts to solve wide-ranging environmental problems, erode the credibility of international cooperation and lead to inefficiencies in the action of the parties.

Ensuring compliance with existing agreements is at least equally important as negotiating new commitments. Rightly, the international environmental cooperation efforts have lately been experiencing a 'move to implementation', which seeks to direct attention toward making existing treaties more attractive to state compliance. The main points for success may be distinguished as being: i) supervision of state

[2] On the practical impossibility of perfect contracts, see e.g. Robert Cooter and Thomas Ulen, *Law & Economics* (3rd edn, Addison-Wesley Publishing: Reading, 2000) 206.

[3] Louis Henkin, *How Nations Behave*, (2nd edn, Columbia University Press: New York, 1979) 47. Otherwise the legal system would be a 'massive delusion'. Louis Henkin, *International Law: Politics and Values* (Martinus Nijhoff, 1995) 47.

[4] Vienna Convention on the Law of Treaties, Vienna, 22 May 1969, in force 27 January 1980, 1155 *United Nations Treaty series* 331, Art. 26. The good faith requirement also implies that states may not invoke provisions of their domestic laws as an excuse for a failure to perform any international treaty obligation. See Art. 27 of the Convention. In a strict sense, fulfilling obligations in good faith requires not only that states implement what a rule prescribes but also that they refrain from acts that could make the object and purpose of such a rule empty before the entry into force of the treaty. See Art. 18 of the Vienna Convention.

[5] See e.g. Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2000) 10 and the International Court of Justice (ICJ) judgment in the 1997 *Gabcíkovo-Nagymaros* case where the Court referred to its own previous judgments and stated that it had, on several occasions, held that 'some of the rules laid down in the Vienna Convention might be considered as a codification of existing customary law' (*Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Reports (1997) 7, at para. 46) and the Vienna Convention was applicable (for the part of those rules 'which are declaratory of customary law') to the treaty under dispute made in 1977 between Hungary and Slovakia (para. 99).

action, ii) promotion of compliance with all possible means, and iii) the use of efficient mechanisms to react to violations (to enforce obligations) when needed.

International environmental agreements form an interesting and challenging theme for research on treaty compliance. The issue is all the time topical and its dynamics are connected to a variety of legal, political, scientific and economic factors. An understanding of the characteristics of international environmental problems and treaties is necessary for an understanding of the compliance issues therein. The nature of global environmental problems sets its own limits to the joint regulatory efforts. States are tempted to counter-productive free-riding behaviour and collective action problems. Furthermore, the heterogeneity of states makes international treaty negotiations painstaking; yet countries are also highly interdependent, which leads to difficulties as well.

Not surprisingly, the outcome of international treaty negotiations is usually a less ambitious compromise, advancing according to the smallest common denominator between the participating states. State sovereignty is a remarkable hindrance to the realization of wide international environmental regulatory cooperation. It would, therefore, be advisable if international agreements were formulated so that accession to and compliance with them would be in the interests of states since treaty arrangements are always based on voluntarism. In other words, the resulted agreements should be self-enforcing[6], for the fact is a state needs not enter into a treaty that does not conform to its interests. Moreover, general treaty law does not allow the imposition of an obligation upon states to join a treaty arrangement nor to give binding decisions in a treaty regime upon third parties.[7]

In this article, I seek to explore the issue of compliance-promotion with international environmental treaties with a view to finding suggestion about the

---

[6] A term first introduced in Scott Barrett, 'The Problem of Global Environmental Protection', 6 *Oxford Review of Economic Policy* (1990). In a strict sense, a self-enforcing agreement does not need forceful enforcement simply because fulfilling its terms is in accordance with the interest of the parties, and hence no violations should occur. Consequently, parties to international agreements must themselves be willing to enforce the treaties if they are to have any effect.

[7] See Vienna Convention Art. 35. However, arguments can be presented for a state's general duty to cooperate as an element of sovereignty: state sovereignty not only means independence, it also means responsibility to cooperate. See generally Franz Xaver Perrez, *Cooperative Sovereignty. From Independence to Interdependence in the Structure of International Environmental Law* (Kluwer Law International: The Hague, London and Boston, 2000); Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (Lakimiesliiton Kustannus/ Finnish Lawyers' Publishing Company, Helsinki, 1989). Issue-specifically, Rose & Crane refer to a decision by the ICJ (*The Fisheries Jurisdiction* case (*United Kingdom of Great Britain and Northern Ireland* v. *Iceland*), ICJ Reports (1973) which recognized there to be a general obligation for states to cooperate in fisheries conservation on the high seas. A duty established this way appears vague, however. Gregory Rose and Saundra Crane, 'The Evolution of International Whaling Law', in Philippe Sands (ed.), *Greening International Law* (New Press: New York, 1994) 159-181 at 162.

direction the compliance systems (to be) built into these agreements should take. The article seeks to make a contribution to the at all times topical environmental treaty compliance debate and to suggest ways for creating as a whole more effective – regardless of whether effectiveness is being defined from a problem-solving, legal, economic, normative or political approach, for example[8] – mechanisms for dealing with compliance issues therein. The analysis is then used in mapping out guidelines for the ideal approach, structure and function of an effective compliance system of an international environmental treaty.

# Two Approaches to Ensuring Compliance with International Environmental Agreements

## The Management Doctrine: Non-Compliance as a Problem Waiting for a 'Friendly' Solution

It can fairly be said that most countries join international environmental agreements with an intention to comply with them as this simply serves their interests. Therefore, it is expected that once countries join an agreement, they will also comply with the obligations laid down therein. The reality may often be different, as states are not always willing to or capable of acting the way a ratified environmental treaty would require.

The international community basically has two kinds of means to react to the non-compliant behaviour of states: diplomatic and coercive. The international regimes literature conventionally speaks about management and enforcement doctrines respectively.[9] The former refers to 'amicable' diplomatic procedures,

[8] The classification in Oran R. Young and Marc A. Levy, 'The Effectiveness of International Environmental Regimes', in Oran R. Young (ed.), *The Effectiveness of International Environmental Regimes. Causal Connections and Behavioral Mechanisms* (MIT Press: Cambridge, 1999) 1-32 at 4-6. Young has examined general regime effectiveness from a wider perspective, see Oran R. Young, *International Governance. Protecting the Environment in a Stateless Society* (Cornell University Press: Ithaca and London, 1994) 143-152.

[9] The concepts have appeared in writings influenced by legal, economic as well as by international relations thinking. For a slightly different modelling (division into 'sunshine methods', positive incentives and coercive measures), see Harold K. Jacobson and Edith Brown Weiss, 'Assessing the Record and Designing Strategies to Engage Countries', in Edith Brown Weiss and Harold K. Jacobson (eds), *Engaging Countries. Strengthening Compliance with International Environmental Accords* (MIT Press: Cambridge, 1998) 511-554. It should be noted that the doctrines cannot always be clearly separated from one another.

discussions and problem-solving in a cooperative atmosphere, with an aim to bring the non-compliance party back to the cooperative track. In contrast, the enforcement doctrine is more accusatory in nature, even emphasizing differences and disagreements, and it is prepared to use forceful measures as the last resort in the attempts to have the treaty obligations fully enforced. Together, these mechanisms of sticks and carrots form a non-compliance response system for a treaty.[10] That system is crucial in determining whether the concluded agreement shall be implemented and complied with among states and, thus, whether the desired behavioural changes and set environmental objectives, in particular, are attained. Overall, the two schools of thought on compliance represent different viewpoints as to how the international systems works, what the possibilities to control state behaviour by virtue of international law are and what tools are available for this purpose, plus which of them should be eventually used to handle compliance problems arising under international agreements.[11]

Firstly, the mechanisms adopted under the management approach to compliance include different reporting obligations. A reporting requirement is generally a conflict-avoiding, open and transparent means to examine and guarantee the extent to which states are committed to their obligations. Secondly, a treaty regime may establish procedures for compliance monitoring. On-site monitoring is rather rare under current international environmental agreements, mainly due to technical and state sovereignty reasons, but it is still included e.g. in the International Whaling Convention.[12]

Thirdly, states may be subject to positive measures such as technical and scientific assistance. Such belong to the repertoire of e.g. the Montreal Ozone Protocol[13], which grants states technical assistance in cases where lack of resources

[10] Mitchell differentiates among three parts of any compliance system. First, a primary rule system consists of 'the actors, rules and processes related to the behavior that is the substantive target of the regime'. Second, a compliance information system is composed of 'the actors, rules and processes that collect, analyze, and disseminate information on instances of violations and compliance'. Lastly, a non-compliance response system consists of 'the actors, rules and processes governing the formal and informal responses – the inducements and sanctions – employed to induce those in noncompliance to comply'. See Ronald B. Mitchell, 'Regime Design Matters: International Oil Pollution and Treaty Compliance', 48 *International Organization* (1994) 425-458 at 430.

[11] Kal Raustiala and David G. Victor, 'Conclusions', in David G. Victor, Kal Raustiala and Eugene B. Skolnikoff (eds), *The Implementation and Effectiveness of International Environmental Commitments. Theory and Practice* (MIT Press: Cambridge, 1998) 659-707 at 681.

[12] International Convention for the Regulation of Whaling, Washington D.C., 2 December 1946, in force 1 July 1948, 161 *United Nations Treaty Series* 72.

[13] Protocol on Substances that Deplete the Ozone Layer, Montreal, 16 September 1987, in force 1 January 1989, 26 *International Legal Materials* (1987) 154.

is obviously the principal reason for treaty-violating conduct.[14] Pure financial incentives are also often available. Positive assisting measures are invariably welcomed by needy states but they cause dependency and shortly become very expensive. Finally, in the field of dispute resolution the management doctrine offers treaty (re)-interpretation, negotiations and involvement of third parties in roles of a mediator, provider of good services or that of a conciliator.

In general, the underlying idea of the management doctrine can be said to conform with the conventional research results that states tend to comply with agreements they have explicitly committed to, and breaches occur because of lack of resources rather than lack of will.[15] Accordingly, it is thought that treaty violations can be kept on a tolerable level by employing different positive incentives and continuous dialogue between treaty parties and institutions, international organizations and civil society. It is generally contended that when a certain level of openness and transparency has been attained, the diplomatic ties between states, pressure from non-governmental organizations and the awareness of public are likely to keep states complying with treaties. The doctrine is characterized by flexibility and efforts to assist countries to create a capacity to comply with their international commitments.

## The Enforcement Doctrine: Non-Compliance as a Crime Calling for Punishment

The management approach for inducing treaty compliance has been clearly dominant within international regimes. And surely, offering of incentives and cooperative problem-solving does not pose threats to treasured state relations. Furthermore, it has appeared generally effective. Nonetheless, positive measures are not always enough to bring back into compliance a country that lacks the political

[14] *Ibid*. Art. 10. Moreover, e.g. the Biodiversity Convention (Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 21 *International Legal Materials* (1992) 822) promotes the transfer of technology to enable developing countries to benefit from the exploitation of their biological resources. See Art. 19.

[15] See e.g. Victor, Raustiala and Skolnikoff, *The Implementation and Effectiveness*, *supra* note 11; Brown Weiss and Jacobson, *Engaging Countries*, *supra* note 9. Chayes, Chayes and Mitchell, based on an earlier and more detailed enquiry into compliance with treaties in international regulatory regimes, come to the conclusion that it is highly erroneous to believe that most compliance problems are caused by wilful violations. See Abram Chayes, Antonia Handler Chayes and Ronald B. Mitchell, 'Managing Compliance: A Comparative Perspective', in Brown Weiss and Jacobson, *Engaging Countries*, *supra* note 9, 39-62; also Abram Chayes and Antonia Handler Chayes, 'On Compliance' 47 *International Organization* (1993), 175-205. The Chayes conclude that non-compliance is deviant rather than expected behaviour, endemic rather than deliberate, *ibid*. at 204.

will to cooperate. In these circumstances, diplomatic means can be presumed to have some effect only when they are backed up by stricter, enforcement-type mechanisms that can be activated once the softer measures have failed in their mission.

The enforcement-oriented viewpoint highlights adversarial dispute settlement mechanisms and sanctions within environmental treaties. It is based on the, in certain circles, widely held view that a state's decision to comply with an international agreement is always a result of strategic calculations of the expected costs and benefits of the required way of action.[16] Raising the costs by forceful enforcement appears, therefore, as an appropriate reply to a treaty violation. The approach clearly builds on the traditional realist models of state behaviour. On the other hand, enforcement-oriented non-compliance mechanisms may be criticized for too visibly underlining the conflictory nature of the given implementation problems and, thus, raising the threshold for states to react to treaty violations that may have occurred.

The possible means to deal with non-compliance under the enforcement approach include the possibility to withhold certain treaty privileges. The Montreal Protocol provides an excellent example: as a consequence from non-compliance, a party may lose its access to technology transfer or to the Protocol's financial mechanism, as well as the right to produce, consume, or trade in the controlled ozone depleting substances.[17] Moreover, a non-compliance system of a treaty may not only provide for suspension of a treaty provision but for the suspension or termination of the treaty vis-à-vis the non-complying state. The suspension must be in accordance with the applicable rules of international law concerning the suspension and operation of a treaty (Vienna Convention on the Law of Treaties, Article 60).

Imposition of economic and trade sanctions may also come into question as an enforcement mechanism, although their compatibility with the rules of the World

---

[16] See e.g., Scott Barrett, 'Problem of Global Environmental Protection', *supra* note 6; Ronald B. Mitchell, 'Compliance Theory: an Overview', in James Cameron, Jacob Werksman and Peter Roderick (eds), *Improving Compliance with International Environmental Law* (Earthscan: London, 1996) 3-28; Detlef Sprinz and Tapani Vaahtoranta, 'The Interest-Based Explanation of International Environmental Policy', 48 *International Organization* (1994) 77–105.

[17] See Art. 8 of the Protocol and Report of the Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, UN Doc., UNEP/OzL.Pro.4/15 (1992), annex IV 'Non-Compliance Procedure' and annex V 'Indicative list of measures that might be taken by a meeting of parties in respect of non-compliance with the Protocol' at 44-46. Under the Kyoto Protocol (Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 10 December 1997, 36 *International Legal Materials* (1998) 22), a party's right to participate in the cooperative mechanisms – JI, CDM and Emissions Trading – may be suspended as a result from non-compliance. See Decision of the Conference of the Parties: Procedures and mechanisms relating to compliance under the Kyoto Protocol, UN Doc., FCCC/CP/2001/13/Add.3, Decision 24/CP.7 (2002).

Trade Organization (WTO) can be questioned. The Montreal Protocol is probably the most notable international environmental treaty containing provisions on the possibility to apply trade sanctions against states in non-compliance with the treaty rules: a country may lose any or all of its trading privileges under the Protocol as a result from non-compliance.[18] Under the CITES Convention[19], decisions of the parties and the Standing Committee have been used to recommend, in principle in a non-binding way but very effectively in practice, the suspension of trade with a specific non-compliant state on certain species covered by the treaty.[20] Finally under the enforcement approach, dispute resolution may be given to arbitration or judicial settlement in an international court of justice.

# Constructing Non-Compliance Mechanisms into International Environmental Agreements

## The Choice of Approach

### The Background

An agreement should be constructed in such a way as to bring under control the environmental problem the treaty arrangement was originally designed for. To achieve this objective, there necessarily needs to be mechanisms that make states perceive compliance with the agreement as worthwhile. Whether incentive-based or sanctioning-oriented procedures are effective in attaining this is the sum of many factors, such as the prevailing economic and technological situation in a country and the global as well as local political and resource-oriented conflicts of interest.

Mainly because cooperation between states has arguably been rather shallow within international agreements and compliance rates have been fairly high so far[21],

[18] See Report of the Fourth Meeting of the Parties, *supra* note 17.

[19] Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington, D.C., 3 March 1973, in force 1 July 1975, 993 *United Nations Treaty Series* 243.

[20] Based on Art. XI, XII and XIII of the Convention.

[21] The claim of the so-far shallowness of cooperation within international environmental agreements may be defended by arguments such as despite the large number of treaties and environmental obligations in various fields, the establishment of cooperation has quite invariably been a result of long-drawn consensus-seeking and compromises. Admittedly, there are treaties whose obligations are truly ambitious and under which the parties have really been committed to reaching the objectives of the

it has been difficult to assess what strategy would work best when responding to the problem of treaty non-compliance in different situations. The main determinant in the choice of means of response is whether the major factor behind a treaty violation is seen to be wilfulness or unintentional misperceptions and lack of resources.

It can be assumed that the effectiveness of softer reaction means will diminish as states increasingly face genuine difficulties in complying with treaty rules. Sanctions are crucial within agreements under which free-riding is possible and could carry significant rewards. However, the distinction between sanctions and other means of ensuring compliance is not always clear. For instance, the fact that a treaty body reacts to a strikingly substandard national report by making it public with all its flaws can equally well factually function in the way of a sanction – providing the country in question cares for its image and reputation in international circles.[22]

In developing compliance regimes, the fact that the mechanisms are mutually supportive in serving the aim of enhancing implementation of and compliance with international environmental commitments should be taken into account. Non-compliance avoidance mechanisms that prevail during the pre-breach phase, and actual non-compliance mechanisms both serve the overarching aims of achieving meaningful cooperation and of avoiding environmental harm.

## Which Route to Pick?

In an ideal situation, proceedings actualizing after a treaty breach could be selected from a long continuum.[23] This would enable the special features and individual circumstances of each case of non-compliance to be taken into account as comprehensively as possible. There are various reasons for non-compliance with international agreements and, moreover, complying with or neglecting treaty obligations often involves differences of degree and variation with time, which both require a system that has to provide different responses to a variety of compliance problems.

---

regime to be established. However, there are also a large number of treaties with rather lax or currently inadequate obligations or with reservations and 'godfather clauses' that undermine the effectiveness of the regimes.

[22] Under the CITES Convention, for instance, a continuous failure to submit annual reports to the secretariat can lead to the suspension of legitimate trade on the Convention species with the party in question. See Decision 11.37 (2001). Consequently, detailed lists of parties with problems in submitting reports have been issued.

[23] See e.g. the Kyoto Protocol and the structure of its compliance system. See *infra* notes 33-34.

The starting point should be to use different 'soft' means to seek solution concepts with which to improve the effectiveness of an environmental agreement, for both individual state parties and the treaty system as a whole. The means may vary from increasing the transparency of the treaty and assisting participating countries financially and technologically, to arranging multilateral negotiations and granting participants more time to fulfil treaty obligations. If these prove unsuccessful, i.e. the treaty-violating behaviour continues, – and it can be stated with considerable certainty that it is wilful action in question – other parties to the regime may employ harder measures and, thus, make a shift to using various forms of sanction measures and legally binding dispute settlement procedures. They are meant to deal with non-compliance that is not occurring due to insufficient resources or misunderstandings but is a result of more or less wilful neglects and breaches.

Overall, there should always be a possibility to use sanctions when treaty-violating behaviour is severe and continuous. When the content of the original obligation is clear, the road for negotiation has reached its end and, after time has been given to return to compliance and no major change in a state's behaviour has taken place, the imposition of some kind of sanction seems to be in order. In applying subsequent sanctions, it is important to make the level of sanction sensitive to the level of non-compliance: a situation should never arise where a party sees that the punishment it receives will not be reduced even if it marginally improves its behaviour.[24]

The Montreal Ozone Protocol provides a good example of a treaty in which the non-compliance response system has been carefully crafted and which combines management and enforcement approaches in a balanced way. Under the Protocol, a special Implementation Committee always first examines the suspected breach and then seeks, in a friendly atmosphere, to find a solution that would satisfy the parties involved. Only after this route has come to a dead end, there is the possibility to apply stricter means for restoring respect for the agreement.[25] This process illustrates the approach according to which emerged disagreements are subject to a period of rapprochement before they are allowed to evolve into graver judicial disputes. As the Montreal Protocol is quite easy to manage, the successful mechanisms and lessons learnt cannot be as such directly transferred to other, more challenging and different types of treaty regimes as for example the Kyoto Protocol.

---

[24] Tim Hargrave, Ned Helme, Suzi Kerr and Tim Denne, 'Defining Kyoto Protocol Non-Compliance Procedures and Mechanisms', The Leiden International Emissions Trading Papers (1999), <www.ccap.org/pdf/ leiden_compliance.pdf> (visited 10 February 2004) 21.

[25] See Report of the Fourth Meeting of the Parties, *supra* note 17.

The non-compliance procedure of the Montreal Protocol has proved to be effective not only in theory but also in practice, not least due to the powerful incentives and disincentives that it has access to. The case of non-compliance by Russia[26] can be viewed as an illustration of a successful approach to compliance problems: a combination of carrot (financial assistance) and stick (financial conditionality and the threat of trade restrictions) was used with success. Overall, the Implementation Committee of the Montreal Protocol has applied a pragmatic, cooperative approach, which improves the ability of the process to influence the behaviour of non-compliant parties.[27] A long-term iterative approach allows one to find an efficient way to treat each occurred case of non-compliance.

A means to react to the (possibility of) neglect of obligations should first work to *induce* states toward treaty-compliance, to provide different solution concepts and incentives. As a rule, actual enforcement measures should only be undertaken when the breach is continuous or in some way particularly reproachful. It is evident that a significant and persistent violation of an environmental agreement tends to weaken the credibility and reliability of the treaty and to lead to negative political, economic and environmental consequences. However, it is strongly advisable to favour softer measures for promoting compliance, especially when the treaty is still in its early stages, so that the threat of serious sanctions would not deter potential signatories from the treaty regime.[28]

## Competition between Enforcement and Management mechanisms?

The two approaches to compliance with international treaties are sometimes regarded to be in competition with one another, both in theory and practice. Tallberg has stated that enforcement and management mechanisms are most effective when combined. He argues:

> In real-life international cooperation, the two strategies are complementary and mutually reinforcing, not two discrete alternatives. Compliance systems that offer

[26] See Report of the Seventh Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, UN Doc., UNEP/OzL.Pro.7/12 (1995), Decisions VII/18, VII/19.

[27] See e.g. David G. Victor, The Operation and Effectiveness of the Montreal Protocol's Non-compliance Procedure, in Victor, Raustiala and Skolnikoff, *The Implementation and Effectiveness of International Environmental Commitments*, *supra* note 11, at 165.

[28] Edith Brown Weiss, 'National Compliance with International Environmental Agreements, Remarks and Discussion in the Proceedings of the 91st Annual Meeting of the American Society of International Law, Theme Plenary Session: Implementation, Compliance and Effectiveness' (American Society of International Law: Washington D.C., 1997) 56-59, 62-73 at 64. Brown Weiss argues that it is good that states can examine and consider beforehand their ability to comply with the agreement, but a sharp focus on compliance may also make states overcautious and thus excessively limit the number of states that commits to the agreement. *Ibid.*

> both forms of instruments tend to be particularly effective in securing rule conformance, whereas systems that only rely on one of the strategies often suffer in identifiable ways. By the same token, compliance systems that develop this complementarity over time demonstrate an enhanced capacity to handle non-compliance.[29]

Clearly, the doctrines are not mutually exclusive. Rather, the differentiation is reflection of the various reasons for non-compliance by states with their international obligations, not an implication of two competing approaches of which only one is right and comprehensively appropriate. The legal relationship between measures taken under the two approaches is not conflictory, either. Both kinds of proceedings can be invoked within the same dispute, even simultaneously; for instance, on-going political processes are no bar for the jurisdiction of the ICJ.[30] A non-compliance case may be handled in a parallel manner by both the legal and the political organs the treaty gives competence to. Martti Koskenniemi has dealt with this question in relation to the Montreal Protocol, its Implementation Committee and the possibility of parallel procedures conducted before the ICJ or an arbitral panel. He argues that in some cases the proceedings of the Committee should be suspended while the court decides the case.[31] Some conflict between the systems may arise, but international law does not have an unambiguous answer to give.[32]

The Kyoto Protocol provides a recent example of the way the international community believes compliance with a multilateral environmental agreement can be ensured. As a result of long negotiations, parties adopted a two-way-approach to solving possible compliance problems. The purpose of the facilitative branch is to assist and support parties in implementing their commitments[33]; the institution is

---

[29] Jonas Tallberg, 'Paths to Compliance: Enforcement, Management, and the European Union', 56 *International Organization* (2002) 609-643 at 609. Tallberg challenges in his study the conception of exclusiveness between management and enforcement doctrines in promoting compliance with legal norms. He bases his argumentation on the case of the European Union (EU) and on comparison with other international regimes.

[30] Martti Koskenniemi, 'Breach of Treaty or Non-Compliance? Reflection on the Enforcement of the Montreal protocol', 3 *Yearbook of International Environmental Law* (Graham & Trotman: London, 1992) 123-162 note 202 at 158.

[31] *Ibid.* at 158.

[32] For discussion, see e.g. M. A. Fitzmaurice and C. Redgwell, 'Environmental Non-Compliance Procedures and International Law', XXXI *Netherlands Yearbook of International Law* (T.M.C Asser Press: The Hague, 2000) 35-65. On the possibility that conflict cannot be eliminated, see Koskenniemi, 'Breach of Treaty or Non-Compliance?', *supra* note 30, at 155.

[33] Consequences of non-compliance applied by the facilitative branch include 1) Provision of advice and facilitation of assistance to individual Parties; 2) Facilitation of financial and technical assistance to any Party concerned, included technology transfer and capacity building from sources other than those established under the Convention and the Protocol for the developing countries; 3) the same

evidently based on the management-oriented approach to non-compliance. In contrast, the enforcement branch shall make formal declarations of detected non-compliance and decisions concerning the consequences of treaty violations. The means of reaction differ clearly from those available for the facilitative branch.[34]

It is illustrative that the parties to the Framework Convention on Climate Change[35] and Kyoto Protocol recognized that a regime comprised only of managerial 'carrots' would be insufficient to collectively induce states to reduce emissions as required. The decision to create the described two-branch non-compliance system can be regarded as a remarkable achievement: the arrangement is clearly more demanding and detailed than the similar systems in earlier international environmental agreements. Furthermore, the compliance system is clearly connected with the Kyoto mechanisms and fulfilling of the treaty's reporting obligations. The Protocol itself states: 'The objective of these procedures and mechanisms is to *facilitate, promote and enforce* compliance with the commitments under the Protocol.'[36] The emphasis seems to be, also according to this formulation, on preventive means, but the system retaining also the enforcement option.

Taken together, an ideal non-compliance system incorporates elements of both the management and the enforcement approaches, not as alternatives but rather as a menu of possible responses to different possible types of non-compliance. In an ideal situation, the existence of sanctions increases the efficiency and effectiveness of other means to induce compliance while stepping in themselves only as a last option.

## Characteristics of an Ideal Sanction

### A 'Correct' Expected Value Needed

It is impossible to present a generally applicable model for an ideal sanction of an international environmental agreement. On the whole, prevention of treaty breaches is a strongly advisable approach because repairing resulted negative consequences

facilitative operations for countries with economies in transition; and 4) recommendations to the party concerned. See Decision of the Conference of the Parties, *supra* note 24, section XIV.

34 The consequences may be: 1) discounting the tonnes ('Deduction from the Party's assigned amount for the second commitment period of a number of tonnes equal to 1.3 times the amount in tonnes of excess emissions'); 2) a party has to prepare a compliance plan (a detailed plan defining how the state will meet its target for the subsequent commitment period); and 3) suspension of the eligibility to make transfers under emissions trading. See *ibid.*, section XV.

35 United Nations Framework Convention on Climate Change, New York, 9 May 1992, 31 *International Legal Materials* (1992) 849.

36 *Ibid.* section I (emphasis added).

afterwards will, as a rule, become more costly – both in monetary and environmental terms.[37]

Firstly, a sanction must be constructed so as to be of appropriate magnitude. The punishment following a breach must not be too harsh since there lays the obvious danger that states evade overly strict sanction clauses and, as a result, prefer to stay outside whole treaty arrangements. Nevertheless, a sanction should be of such a size that the costs it brings outweigh the benefits derived from treaty violation – the effects of discount factors included. Optimal deterrence would require the expected sanction to equal the full social cost of the act of non-compliance. However, consideration of the appropriate magnitude of sanctions gains a new dimension when the issue of fairness is added to the analysis: very high punishment is easily seen as unfair. Fairness is an important concept for non-compliance mechanisms of international agreements, since a sanction that is perceived as unreasonable can have far-reaching implications for the whole treaty regime and farther. An unfair system cannot gain legitimacy in the eyes of its targets, a fact that may, in the worst case, lead to the collapse of the whole legal arrangement.[38]

It would seem logical that an effective sanction mechanism consists of the highest possible sanction and a relatively small probability of imposition. This allows for the maintenance of a reasonable deterrence effect while enforcement costs remain moderate. This kind of sanction would become, however, extremely costly to impose (unless an assumption could be made that the clause would never be invoked, i.e. the deterrence effect would be perfect) and secondly, the price for possible interpretation errors would become very high.[39]

A sanction should be construed in a sufficiently simple manner. This would allow actors to calculate expected consequences for different policy options and to make rational choices of action accordingly. It is important that sanctions, and the situations in which they will be undertaken, are well understood in advance, since

---

[37] Glen Wiser, and Donald M. Goldberg, Restoring the Balance. 'Using Remedial Measures to Avoid and Cure Non-Compliance Under the Kyoto Protocol'. A Paper Prepared for The World Wildlife Fund (2000), <www.ciel.org/Publications/restoringbalance.pdf> (visited 10 February 2004) 27.

[38] See A. Mitchell Polinsky and Steven Shavell, 'The Fairness of Sanctions: Some Implications for Optimal Enforcement Policy', 2 *American Law and Economics Review* (2000) 223-237 at 231, 237. Overall, the degree to which actors concern themselves about fairness in sanctions should be reflected in the probability and magnitude of the punishment.

[39] See e.g. Avinash K. Dixit and Barry J. Nalebuff, *Thinking Strategically. The Competitive Edge in Business, Politics and Everyday Life* (W.W. Norton: New York and London, 1991) 105-106. Yet there are many other factors influencing the magnitude of a sanction policy, especially in the area of international law and international politics, where coercion cannot be widely applied due to the well-known issues of state sovereignty and lack of central enforcement authority.

only that will ensure their ultimate effectiveness. Very complex sanction structures also understandably increase associated administrative and transaction costs and cause delays in actual execution. In addition, the predictability and transparency of a sanction will suffer because of the complicated structure, and along with this the relevant deterrence effect and feel of fairness of the arrangement will also be diminished.

Another crucial feature of a sanction is credibility. The threat of punishment will have an effect only if the target has strong reasons to believe the threat will be carried out when circumstances come to so require. The likelihood with which a sanction is imposed forms, with the size of the countermeasure, the expected value of the sanction. It is that value against which actors as 'rational maximizers of self-interest' weigh their incentives to violate an agreement.

It has consequently been argued that credibility is a central problem in the organization of cooperation regarding sanctions.[40] Generally, building and maintaining sufficient deterrence is not easy in international regimes. Moreover, rather paradoxically, deterrence capability can also render sanctions to work against themselves: since their anticipation alone is enough to bring about compliance, a threat to impose them every time beforehand is not credible.[41] Moreover, the structure of many global environmental problems is likely to make credible sanctions less effective. This is because other parties suffer only marginally from one country's non-compliance and, therefore, only small punishment is credible. However, the rewards from 'cheating' may be large and, thereby, pose strong incentives to defect. The conclusion is that credible punishment may not be sufficient to deter non-compliance.[42]

## Rules of Proportionality

International law requires sanctions to be in a proportionate relation with the breach as implied by the principle of proportionality.[43] Any punishment to deter non-compliance must 'fit the crime'. A punishment should reflect the gravity of the act of non-compliance; aspects of the treaty violation, such as the type (substantive or

[40] Lisa L. Martin, 'Credibility, Costs, and Institutions: Cooperation on Economic Sanctions', 45 *World Politics* (1993) 406-432 at 407.

[41] Jonathan Eaton and Maxim Engers, 'Sanctions', 100 *The Journal of Political Economy* (1992) 899-928 at 902.

[42] Scott Barrett, Free-Rider Deterrence in a Global Warming Convention, in OECD, *Convention on Climate Change. Economic Aspects of Negotiations* (OECD, 1992) 73-97 at 77.

[43] See e.g. Wiser and Goldberg, Restoring the Balance, *supra* note 37, at 60. Also the International Law Commission's Draft Articles on State Responsibility take note of the requirement of proportionality: in the words of the ILC, countermeasures must not be out of proportion of the degree of gravity of the internationally wrongful act and the effects thereof on the injured state. Draft Art. 51.

procedural[44]), the question of fault and the overall severity of the act or omission should be considered before a decision regarding the consequences is made. Similar requirements are mentioned e.g. regarding the compliance system of the Kyoto Protocol, where it is stated that the cause, type, degree and frequency of the non-compliance of a party should be taken into account when determining consequences.[45]

Accordingly, the characteristics of each case of treaty violation should be taken into account when imposing a sanction. In this light, it appears that an automatically determined punishment is not desirable but proportionality would demand more ad hoc type of mechanisms. Generally, mechanisms to react to treaty breaches should be constructed so that there was a balance between a treaty body's case-by-case consideration and provisions that activate automatically. Notwithstanding that the practice of treating every violation separately increases the (felt) fairness of the procedure and allows the parties to modify their response to the specific circumstances and needs of the non-complying party, it also brings uncertainty and delays to the functions of the non-compliance system. Readily-tailored procedures for dealing with compliance problems bring, for their part, desired legitimacy, deterrence effect and certainty into a treaty arrangement. On the other hand, they can, when given a strong emphasis and when there is a lot at stake, especially economically, even drive states away from the treaty regime – or prohibit others from joining.[46]

In the design of sanctioning mechanisms, some flexibility should be allowed so that countries could be clearly forgiven for their treaty violations in extreme circumstances. If the exceptions to compliance rules are allowed only in extraordinary circumstances, they will not damage the credibility of the overall system. Article 62 of the Vienna Convention on the Law of Treaties addresses the 'fundamental change of circumstances'. Accordingly, a fundamental change of circumstances which has occurred with regard to those conditions existing at the

---

[44] Goldberg et al. suggest, with reference to the climate change regime, that on a conceptual level, the compliance system directed toward procedural non-compliance should rely on persuasion, in the form of carrots and sticks, to induce compliance. Substantive noncompliance should, by contrast, invoke a strict liability approach of 'making the climate whole'. See Donald M. Goldberg, Glenn Wider, Stephen J. Porter and Nuno Lacasta, *Building a Compliance Regime under the Kyoto Protocol* (CIEL/EuroNatura, 1998) 23, <www.ciel.org/Publications/buildingacomplianceregimeunderKP.pdf> (visited 10 February 2004). The approach is clearly visible in the compliance system of the Kyoto Protocol.

[45] See Decision of the Conference of the Parties, section XV.

[46] Jacob Werksman, 'Compliance and the Kyoto Protocol: Building a Backbone into a "Flexible" Regime', 9 *Yearbook of International Environmental Law* (1998) 48–101 at 99. Werksman also notes that efforts to pre-define categories of non-compliance and to associate these categories with specific non-compliance responses have, thus far, failed under the Montreal Protocol. See *ibid.* at 72.

time of the conclusion of a treaty, and which was not foreseen by the parties, may be invoked as grounds for terminating the treaty or withdrawing from it if i) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; *and* ii) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty. However, a fundamental change of circumstances -clause may not be invoked if 'the change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty'.[47] The clause has not been in effective use within international environmental agreements but one can imagine situations where fundamental change of circumstances could be invoked in environmental contexts. For instance, the extinction of a protected species could force a state to resort to the clause.

The ideal duration of a sanction is a sensitive question. It is often thought the longer, the better because longer duration increases the cost the punishment imposes on the target. However, one could also argue that the longer sanctions are in force, the weaker their effect becomes. This is because the target may adjust to the existence of the countermeasure with time and the passage of time may even harden the resolve of the target. A frequent use of sanctions may also reduce their credibility over time.[48]

The final lifting of sanctions should be planned. Every sanctions regime should have a 'sunset clause', a maximum time for application should be established.[49] Sanctions should never be permanent.[50] The imposition decision should stipulate the conditions under which sanctions shall be lifted and, thus, present a reasonable exit strategy for treaty parties. In general, sanctions may be lifted either because the behaviour that led to their imposition has changed as desired, or because they have demonstrably failed to bring the change about. The International Law Commission has stated: 'Reprisals are intended to make the breaching party live up to its obligations, nothing more. Reprisals need to be terminated, therefore, once this

---

[47] Art. 61(2).

[48] Jaleh Dashti-Gibson, Patricia Davis and Benjamin Radcliff, 'On the Determinants of the Success of Economic Sanctions: An Empirical Analysis', 41 *American Journal of Political Science* (1997) 608-618 at 610, 616.

[49] The Stanley Foundation, *US Sanction Policy: Balancing Principles and Interests. Report of the Thirty-Eighth Strategy for Peace, US Foreign Policy Conference* (The Stanley Foundation: Muscatine, 1997) 16.

[50] It may be argued that a sunset clause makes a sanction too calculatable so that the target can simply count on the possibility that if it endures the counter-measure for long enough, the sanction shall be lifted and nothing in the state's behaviour needs to be changed. However, this can be largely avoided if the sanction measure is carefully designed and implemented to begin with. Furthermore, in a situation where a sunset clause has been calculatedly taken advantage of, the original sanction was obviously ineffective and needs to be replaced by other means.

objective is achieved and must not cause irreversible damage.'[51] It is also possible that the sanction measure is terminated gradually. Under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), a trade ban may be withdrawn in parts according to the occurred changes in the behaviour of the target country.[52]

If kept in place for too long, sanctions can have untoward implications, such as potentially serious social, economic and political effects. Therefore, there should be constant monitoring of the impacts of the sanction on the target state. Accurate information is needed in order to determine how long the sanction should stay in force, if it can be exchanged to a lighter one or if other kinds of measures are needed. To begin with, it is of vital importance that verification of treaty breaches, i.e. observation and identification of violations, is conducted reliably and on equal grounds. Self-monitoring is many a time doomed to fail because such a practice will provoke extensive opportunistic behaviour by rogue states. Hence, there is a need for internationally organized monitoring for state activities related to environmental treaty obligations.[53] The experience of Montreal Protocol's linkage between the Implementation Committee and a Technical and Scientific Advisory Panel suggests that a linkage to expertise can be valuable.[54]

## Joint Decision-Making and Imposition: Way to Legitimacy

Sanctions imposed under an international agreement should be decided multilaterally. Delbrück has argued that the most important feature of lawmaking treaties is that they are directed toward a common goal of all parties and that, therefore, implementation of the treaty obligations is owed by each party to all the other parties.[55] According to Delbrück, this, in turn, means that a violation of one of the treaty obligations by one party in respect of another party constitutes a violation of the obligation vis-à-vis all the other parties to the treaty, irrespective of whether these other parties themselves directly suffered injuries from the violation. Therefore, all other states parties to the treaty are entitled to sanction the non-

[51] The ILC Draft Articles on State Responsibility, Art. 47 para. 3.

[52] See e.g. the case of United Arab Emirates, Notification to Parties No. 2002/049.

[53] See e.g. Timothy Swanson and Sam Johnston, *Global Environmental Problems and International Environmental Agreements. The Economics of International Institution Building* (Edward Elgar Publication: Cheltenham, 1999) at 164.

[54] David Downes and Braden Penhoet, 'Effective Dispute Resolution. A Review of Options For Dispute Resolution Mechanisms and Procedures', a Paper for WWF & CIEL BW99-8 (1999), <www.ciel.org/Publications/ effectivedisputeresolution.pdf> (visited 10 February 2004) 31.

[55] Jost Delbrück, 'Prospects for a "World (Internal) Law?": Legal Developments in a Changing International System', *9 Indiana Journal of Global Legal Studies* (2002) 401-431 at 416.

compliant state. This 'intra-treaty *erga omnes*-effect', concludes Delbrück, represents 'a fundamental shift of the international law of treaties toward an objective character of international law'.[56]

The idea behind Delbrück's argument is worth support. It is also being realized to a certain extent under current international environmental agreements since non-compliance by one party may be punished by others even if they had not experienced any direct and concrete harm from the occurred treaty breach. A different matter is, whether the reason for this kind of practice is intra-treaty *erga omnes* effect as suggested by Delbrück or mere fears that overlooked non-compliance gives rise to collective disrespect for treaty obligations and, thereby, may lead the whole treaty regime into decline. In any case the shift observed by Delbrück is clearly taking international law of treaties away from traditional liability regimes and towards international law based on reciprocity and obligations directed towards all parties at all times.

Jointly imposed sanctions are to be preferred rather than punishment measures placed unilaterally by an individual country.[57] Adoption by a credible multilateral organization provides important legitimacy for the application of sanctions, and collective action reflects a consensus on the applicable norm.[58] In general, adoption of countermeasures outside organizational frameworks places them on unstable ground. As Doxey remarks: 'The absence of structure means intense diplomatic bargaining with a variety of policy priorities jostling for precedence and the result may be more akin to multiple unilateralism than a genuine multilateral effort.'[59]

Therefore, it is important that the imposition of international sanctions takes place in an organized manner and involves the whole treaty coalition e.g. through a specific enforcement body. Unilateralism should, in general, be avoided to the greatest extent possible and coordinated practice favoured in order to prevent chaos and anarchism in the international sanction policy. Collective decision-making may also allow for a proper assessment of the overall situation and ensure sanctions are not resorted to for political reasons. Moreover, from an economic point of view, the greater number of parties imposing a sanction, the less will be the cost for each individual sender – for the same or greater total deterrent. A multilateral sanction

---

[56] *Ibid.*

[57] However, Martin argues that the process of organizing multilateral sanctions typically occurs under conditions of significant asymmetry of interests among potential sanctioners, which is apt to give rise to coordination problems between the leading sender and the others that try to free-ride. See Martin, 'Credibility, Costs, and Institutions', *supra* note 40, at 408.

[58] The Stanley Foundation, US Sanction Policy, *supra* note 49, at 13.

[59] Margaret P. Doxey, *International Sanctions in Contemporary Perspective* (2nd edn, Palgrave Macmillan: Basingstoke, 1996) at 54.

clause may be hard to create, but once in place it may be relatively inexpensive to enforce.[60]

A multilaterally decided sanction is generally more easily accepted and regarded as legitimate than a unilateral measure. Franck has argued that in a community organized around rules, compliance is secured – to whatever degree it is – at least in part by perception of a rule as legitimate by those to whom it is addressed.[61] Consequently, a state's failure to comply with a legitimate rule usually arouses the concern of other states, even of those not directly affected by the breach. The failure is often seen by other states as an indirect threat to their interests: by undermining the legitimacy of a rule of which they approve and on which they rely, and by weakening the fabric of the community's rule system as a whole.[62]

The core of legitimacy is that the addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.[63] The principle of due process, familiar from domestic administrative law, can also be applied to international administrative and legal processes. In the case of sanction measures, it means that the targeted parties must feel that they have been given adequate opportunity to clarify their situation throughout the non-compliance process. When imposing a sanction, the subjected state should be notified of the suspected or identified violation and be given a proper chance for explanation and defence. The incident should undergo a thorough and unbiased examination and receive a fair and equal treatment at every stage of the process, preferably according to predetermined guidelines.

Taken together, there should be a graduated series of responses to problems of non-compliance. Both the intent and capacity of countries to comply may change. This suggests the measures needed to maintain compliance by individual treaty parties may also change.[64] De Jonge Oudraat has examined the question: 'Which tactics are likely to be most effective: a swift and crushing blow, or a gradual tightening of the screws'.[65] She finds two schools of thought dominating the debate on sanction tactics. One theory holds that sanctions are most effective when they are imposed immediately and comprehensively. This view is defended by arguments

---

[60] Richard A. Posner and Eric B. Rasmusen, 'Creating and Enforcing Norms, with Special Reference to Sanctions', 19 *International Review of Law and Economics* (1999) 369-382 at 380.

[61] Thomas M. Franck, 'Legitimacy in the International System', 82 *American Journal of International Law* (1988) 705-759 at 706.

[62] Thomas M. Franck, *The Power of Legitimacy among Nations* (Oxford University Press, 1990) at 150–151.

[63] *Ibid.* at 24.

[64] Brown Weiss, 'National Compliance with International Environmental Agreements', *supra* note 28, at 59.

[65] Chantal de Jonge Oudraat, 'Making Economic Sanctions Work', 42 *Survival* (2000) 105-128 at 118.

stating that sanctions should be imposed early in a crisis since gradual imposition gives the target time to adjust. The other school of thought asserts that sanctions are most effective when imposed gradually and incrementally. It is argued that comprehensive sanctions are the economic equivalent of wars of attrition, which will almost inevitably cause actors to move behind the regime. The political and economic characteristics of a target are fundamentally the keys to determining which approach to choose.[66] In environmental contexts, the gradual imposition approach would appear more advisable since it gains more easily the needed legitimacy and the prospect would not equally drive away states from the treaty regime.

Sanctions should be constructed in such a way as to allow for prompt, predictable and firm response, when states commit breaches of their international environmental obligations. An ideal sanction should be able to consider and effectively respond to the special features of the treaty and the environmental problem it is targeted to mitigate, the characteristics and situation of the non-compliant party as well as the international realm and its laws and politics.

# Concluding Remarks

## The Future Outlook of Non-Compliance Systems

It is clear that in order to be efficient an agreement must state the consequences of its terms being breached. One cannot presume that the parties to a treaty would invariably behave in an altruistic manner once the rules of the game have been agreed to. Therefore, agreements should be constructed in such a way that they promote compliance and make breaches simply unworthy. This can be accomplished by making the detection and verification of violations as well as responses to them more likely, credible and effective.

Despite the development of globalization, state sovereignty will continue to set limits on the quality and deepness of international cooperative efforts. It has been argued there is no doubt that the process of globalization is transforming traditional conceptions and constructions of sovereignty.[67] However, globalization transforms, not dissolves or erodes, the way in which sovereignty is produced.[68] Nevertheless,

---

[66] *Ibid.* at 118.

[67] See e.g. Kanishka Jayasuriya, 'Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance', 6 *Global Legal Studies Journal* (1999) 425-455 at 425, 453.

[68] *Ibid.* Cf. Benedict Kingsbury, 'Sovereignty and Inequality', 9 *European Journal of International Law* (1998) 599-625, where it is argued that globalization is placing the traditional system of sovereignty under strain but for the time being it is 'continuing to creak along'. *Ibid.* at 616.

new international commitments are treated with suspicion. States may agree about the need to take joint efforts for the global environment but the factual consensus does not necessarily reflect to reality. This is because states look at the picture from a wider than merely environmental viewpoint: state sovereignty cannot be allowed to be restricted except for weighty reasons; the need to protect the global environment cannot be viewed in isolation but must be considered in the broader context of international cooperation and the associated threat to state sovereignty as a whole.[69] States may fear that entering deeper collaboration in one field will soon bring pressure to open up to international regulation in other policy areas as well.

The fact that global environmental issues and their solution concepts pose threats to traditional notions of state sovereignty should be recognized and accounted for when establishing international regulatory regimes. A transition to more stringent obligations, on the one hand, and to more enforcement-oriented means of responses to non-compliance, on the other hand, would be best conducted carefully and in a gradual process. Only this way can sovereign nation states be encouraged to participate. Furthermore, states should be encouraged to view cooperation as an element of the very notion of sovereignty: sovereignty not only denotes independence, it also means responsibility to cooperate.[70]

It looks as if the drafting of compliance response systems is seen increasingly important within international environmental agreements. With the Kyoto Protocol, for instance, negotiations on the formulation of compliance provisions were rather long and complicated.[71] Furthermore, the fact that Japan and Russia made it clear that an acceptable result on the treaty text on compliance was a precondition for their ratification of the Protocol[72] illustrates how much weight states put on the requirement of a treaty to provide proper measures to be taken against non-compliant parties. More complication can be expected if and when future international agreements become more ambitious for their targets and, thus, the demand for more enforcement-oriented non-compliance mechanisms increases. Fitzmaurice & Redgwell point out how long it took to negotiate a compliance response system into the Kyoto Protocol and argue that this indicates that the

---

[69] Andrew Hurrell and Benedict Kingsbury, 'The International Politics of the Environment: An Introduction', in Andrew Hurrell and Benedict Kingsbury (eds), *The International Politics of the Environment* (Clarendon Press: Oxford, 1992) 1-47 at 8.

[70] See *supra* note 7.

[71] Agreement was reached four years after the signature of the Protocol. The same process took five years with the Montreal Ozone Protocol but that treaty was more pioneering than the Kyoto Protocol in this respect. Within the latter, the parties made numerous submissions as to the precise contents of the non-compliance system to be created and the negotiations were intense.

[72] See e.g. 'Kyoto Protocol Finally Gets the Green Light', 1100 *Environment Daily* (2001).

transition from a facilitative to a more enforcement-oriented approach to compliance will not be an easy one.[73] This is what can be expected.

On the other hand, it has become customary in recent years to put-off the design of any compliance procedure until after the treaty itself is established, rather than to regard compliance control as an integral part of negotiating new commitments.[74] This may be regarded as a demonstration of the attitude still held in some spheres that the main effort in international treaty negotiations should be to create a general framework and the specific obligations for cooperation, and that the compliance provisions are clearly secondary in state preferences. A second, and better explanation would be that compliance issues present an important yet difficult question for the negotiating parties. Consequently, creation of a detailed non-compliance system is preferred to be left for future. More generally, the fact that there is even need for treaty-specific mechanisms to respond to non-compliance can be thought to reflect a recognition of the failure of general international law and traditional dispute settlement mechanisms to provide efficient and effective means of deterring and providing reparation for non-compliance.[75]

## A Rise of Enforcement Doctrine Needed?

Situations vary when a management or an enforcement -oriented approach is a more apt and effective response to a treaty violation. Any compliance system should be a combination of different type of means, mechanisms designed to fit specific situations on the basis of taking into account the nature of the environmental problem, the structure of the legal obligation, the actual capacities of the concerned countries, and other relevant circumstances.

The resultant compliance system of an international environmental agreement should incorporate means of both management and enforcement doctrines. The system should be flexible so as to be capable of responding to different types of compliance problems states may face. At the same time, however, the existence of perverse incentives should be minimized and the damaging free-riding behaviour deterred, which may require in some cases rather strict sanctions or at least a

---

[73] Fitzmaurice and Redgwell, 'Environmental Non-Compliance Procedures and International Law', *supra* note 32, at 64.

[74] David G. Victor, 'Enforcing International Law: Implications for an Effective Global Warming Regime', 10 *Duke Environmental Law and Policy Forum* (1999) 147-184 at 163-164.

[75] See e.g. Martti Koskenniemi, 'Peaceful Settlement of Environmental Disputes', 60 *Nordic Journal of International Law* (1991) 73-92 at 80. Also Werksman, 'Building a Backbone Regime', *supra* note 46, at 63. Unless an international treaty provides otherwise, non-compliance with its terms will be governed by the rules set out in the Vienna Convention on the Law of Treaties. Although not all states are parties to the Convention, much of it is considered to be customary international law, and thus binding upon all states, see *supra* note 5.

credible threat of them. In the midst of all this, effort should be seen to avoid fragmentation of compliance procedures. Brack has argued that a fragmented system bears a danger e.g. in the form of an increased likelihood of countries 'shopping around' for the forum in which they are most likely to be successful.[76] For this reason, it is important that the root cause of each case of non-compliance is identified and non-compliance procedures are constructed so as to address those causes.

It is important to keep in mind that the mere existence of non-compliance response mechanisms does not guarantee compliance with a treaty. There is, on the one hand, the degree of a country's commitment to the environmental agreement, and, on the other hand, the relative political and economic power of the state, which would allow it to act according to its own interests and regardless of international norms. The worst-case scenario is that formal dispute settlement systems, in particular, will be left with a role to function only as a symbolic threat against treaty violators.[77]

Most current international environmental agreements emphasize dispute avoidance rather than dispute settlement. Sanctions have, so far, been a very rarely used instrument. The logic behind traditional enforcement doctrine indicates that as environmental agreements become more demanding for the participating states, wilful violations will increase in number respectively. In other words, when the implementation of international agreements becomes more challenging and costly for states, and action required by treaties would mean real and considerable change in current behaviour and bring significant costs, the incentives for wilful breaches will inevitably grow.

Development seems to call for a considerable increase in more binding and rigid measures to be made available to react to treaty non-compliance; enforcement strategies that raise the cost of non-compliance appear to become necessary. It can be assumed that in these conditions the need for stronger sanctions will also apparently increase.[78] One should not, however, look down upon more informal mechanisms, either, or formal mechanisms and their ability to mobilize stronger

---

[76] Duncan Brack, 'International Environmental Disputes. International Forums for Non-Compliance and Dispute Settlement in Environment-Related Cases' (2001), <www.riia.org/pdf/research/sdp/envdisputes.pdf> (visited 10 February 2004) 3.

[77] Jacob Werksman, 'Designing a Compliance System for the UN Framework Convention on Climate Change', in James Cameron, Jacob Werksman and Peter Roderick (eds), *Improving Compliance with International Environmental Law, supra* note 16, at 103.

[78] See also Jacob Werksman, 'Responding to Non-Compliance Under the Climate Change Regime', an OECD Information Paper (1999), <www.iisd.ca/climate-d/epoc9921.pdf> (visited 10 February 2004) 12.

informal powers. It has been argued that the non-compliance systems of the CITES and Montreal Protocol have had significant effects on countries' behaviour mainly because the existence of formal systems has given rise to strong informal powers.[79]

There have already been signs that compliance is coming under increasing pressure within international regimes. Attacks on the scientific consensus about the ozone depletion, the development of the black market and the suspicions of cheating have indicated this within the ozone regime, for instance.[80] Globalization poses its own challenges for international environmental regulatory cooperation, yet also offers states a new, inspiring environment and toolbox for a joint effort towards mitigating international environmental problems.[81] Deepening integration between states is to be expected, within which international commitments are likely to develop into a direction that shall require extensive political, legal and concrete behavioural changes in the way states treat the environment. Matters that were previously domestic are now becoming global. Sands has suggested that this development has already led to a situation where the challenge is not the insufficiency of the rules, but rather that there may be too many, that they are frequently vague and open-ended, and that rules addressing different subject matters may frequently be in conflict with each other.[82]

The environmental problems of the future will not be benign ones.[83] The world will most likely be facing environmental threats that are growing in the number and the extent of their effects. With this scenario, it can be assumed that establishment of international environmental regulatory cooperation will face growing challenges. States have a lot at stake in treaty negotiations and at the same time the treaty obligations should be formulated fairly stringently for that is what the state of the environment will require. Treaty negotiations will be increasingly

---

[79] Victor, 'Enforcing International Law', *supra* note 74, footnote 56 at 164.

[80] Edward A Parson and Owen Greene, 'The Complex Chemistry of the International Ozone Agreements', 37 *Environment* (1995) 16-20, 35-43 at 36, 38, 41.

[81] Perrez claims that with growing global interdependencies, the individual state interests become increasingly parallel and gain homogeneity. This will lead to the emergence of a general interest and the international order for protecting it. See Perrez, *Cooperative Sovereignty*, *supra* note 7, at 140.

[82] Philippe Sands, 'Turtles and Torturers: The Transformation of International Law', 33 *International Law & Politics* (2001) 527-559 at 549.

[83] The term 'a benign problem' is used, e.g., by Ulfstein, by which he refers to the characteristics of the ozone depletion: the prevailing scientific consensus, mitigation measures not having major economic or political repercussions, the problem having negative effects on all states there, thus, being no losers or winners in the game and the strong public opinion of concern on the effects of the depleted ozone layer. These factors are claimed to be, for a great part, behind the success of the ozone regime. See Geir Ulfstein, 'The Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol', in The Nordic Council of Ministers, *Second Publication from a Nordic Project on the Effectiveness of Multilateral Environmental Agreements*, Nord 1996:18 (Nordic Council of Ministers: Copenhagen, 1996) 105-116 at 114.

painstaking and the lowest common denominator may be found on a lower and lower level – or alternatively agreements will have to be constructed to include very complicated provisions, escape clauses and differing responsibilities for states if a global-level treaty regime is still desired.

All in all, mechanisms to ensure compliance are at least of equal importance as the careful formulation of the obligations of treaties. The commonly presented fact is that without effectual sticks and carrots states will act for the objectives of an environmental agreement only to the extent that is in line with their direct self-interests. It is important that a state always possesses both the motivation and the capacity to comply with a given treaty.[84]

Innovative and efficient measures to address non-compliance become all the more important when international treaty arrangements evolve and develop increasing demands for states.[85] The most successful environmental agreements so far, i.e. ones that have not fallen very far from their objectives, such as the Montreal Protocol, have used a mix of formal and informal, soft and hard means to react to compliance problems. Those experiences should be studied and analyzed, and applicable successful methods used in new treaty arrangements with appropriate adjustments.

Overall, the weight in current and future international environmental agreements should continue to be on incentive-based methods and procedures that underscore cooperation, while maintaining the threat of a credible sanction to be applied when a treaty violation proves to be significant and persistent and the result of insufficient political will. This kind of approach may be the best means to prevent and deal with breaches of international environmental treaties.

At the end, it should be recognized that one may design ideal compliance systems and potent mechanisms, but all the effort risks becoming useless if states lack political will and commitment to honour the obligations laid down in international environmental agreements. Political will is needed at all stages of the

---

[84] A conclusion from the study in Brown Weiss and Jacobson, *Engaging Countries*, *supra* note 9.

[85] Of innovative ideas, as examples may be mentioned the Susskind's suggestion of the posting of bonds and Stone's idea of 'guardians', legal representatives for the natural environment. See Lawrence E. Susskind, *Environmental Diplomacy. Negotiating More Effective Global Agreements* (Oxford University Press, 1994) at 117–119 and Christopher Stone, 'Defending the Global Commons', in Sands, *Greening International Law*, *supra* note 7, 35–49 at 40-41.

process: in the creation of treaties, in their implementation at the national level as well as in the application of measures for restoring compliance when despite all effort a party has let its commitment lapse. Carefully designed and above all *legitimate* means for ensuring compliance with international environmental agreements will be in a key role in achieving this.

# International Online Dispute Resolution – Caveats to Privatizing Justice

Tapio Puurunen*

## Introduction

The development of electronic commerce and the emergence of consumers on the global electronic market place have challenged the adequacy of the norms applicable to international business-to-consumer transactions. While legislators and courts throughout the globe have sought to minimize the potential for disputes through norms that pursue the virtues of legal certainty and predictability, businesses and consumers still remain perplexed.[1]

Businesses and consumers have had to operate in an international business environment where fraud, dishonesty, delivery problems, defective goods and services, misuse of personal information are regrettably frequent phenomena.[2] Many of the problems are more likely to occur online than off-line: online credit card transactions, for example, are 15-20 times more probably disputed and charged back than face-to-face transactions.[3] Nevertheless, the international legal order does not

* Researcher, Institute of International Economic Law, University of Helsinki, Finland.

[1] The author has examined some of these issues in 'The Legislative Jurisdiction of States over Transactions in International Electronic Commerce', 18 *John Marshall Journal of Computer & Information Law* (2000) 689; 'The Judicial Jurisdiction of States over International Business-to-Consumer Electronic Commerce from the Perspective of Legal Certainty', 8 *UC Davis Journal of International Law & Policy* (2002) 133; and 'Choice of Law in European Union Business-to-Consumer Electronic Commerce – A Trail out of a Political Impasse', 789 *Zeitschrift für Europäisches Privatrecht* (4/2003).

[2] For a survey on the problems consumers face, see Consumers International, 'Should I Buy? Shopping online 2001: An International Comparative Study of Electronic Commerce', <www.consumersinternational.org/publications/searchdocument.asp?PubID=33&regionid=135&langid=1> (visited 23 April 2003).

[3] Figures provided by Visa International, <www.visaeu.com/microsite/verified/-guaranteed_payment.html> (visited 22 April 2003).

provide businesses and consumers with effective redress avenues. Even if pertinent norms were stretched to give systematically jurisdiction to, for example, the consumer's home court that applied the forum's consumer protection norms, and foreign courts recognized and enforced its decision, the disproportion between costs and the quantum of the claim would still limit access to justice significantly, especially with respect to low-value consumer transactions.

An obvious way to promote access to justice for e-commerce disputants would be to reform the institutions that generally administer justice and develop the law – the judicial system. However, notwithstanding the merits of such reforms, there are limits to what they may viably produce. From an economic point of view, for example, it is doubtful whether establishing very low claims procedures or granting legal aid to all cross-border e-commerce litigants would be a wise allocation of state resources. Indeed, even in higher quantum claims, the time, resources and efforts required often make courts unattractive for litigants.

Rather, governments as well as international and national organisations have begun to explore how Alternative Dispute Resolution (ADR) and Online Dispute Resolution (ODR) mechanisms could strengthen confidence in the new commercial environment. Former U.S. Commerce Secretary William Daley's calls for cheap and effective remedies[4] have been echoed in the EC Electronic Commerce Directive.[5] EU institutions have established a comprehensive research and regulative programme for ADR in business-to-consumer e-commerce.[6] Other bodies, such as the OECD and the Trans-Atlantic Business Dialogue – a US-EU corporate-state alliance – have also joined the choir. And indeed, recent years have witnesses a mushrooming field of various kinds of private, public and joint business/government on-line ADR ventures.[7]

---

[4] U.S. Department of State International Information Programs, 'Remarks by U.S. Commerce Secretary William Daley, American Chamber of Commerce/American Club, Lisbon, Portugal, June 1 2000', <http://usinfo.state.gov/topical/global/ecom/00060101.htm> (visited 22 April 2003).

[5] Parliament and Council Directive 2000/31, OJ 2000 L 178/1, Art. 17. The Directive entered into force on 17 July 2000 and Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with it by 17 January 2002.

[6] For a detailed description, see Commission Green Paper on Alternative Dispute Resolution in Civil and Commercial Law, COM(2002) 196 final. See also Communication from the Commission on 'widening consumer access to alternative dispute resolution', COM(2001) 161 final. See also Commission Recommendation 98/2257, OJ 1998 L 115/31; Commission Recommendation 2001/310, OJ 2001 L 109/56.

[7] See, for example, International Chamber of Commerce et al., 'A Global Action Plan for Electronic Business' (3rd edn, 2002), <www.iccwbo.org/home/electronic_commerce/word_documents/-3rd%20Edition%20Global%20Action%20Plan.pdf> (visited 22 April 2003); Ethan Katsh and Janet Rifkin, *Online Dispute Resolution* (Jossey-Bass: San Francisco, 2001) 169-170.

The present paper will first define ODR and set out the various types of online dispute resolution systems. It will then question whether current ODR ventures – designed ideally to offer cheap, speedy, flexible, informal and fair dispute resolution services that are not tied to the burdens of geography – have generally managed to promote consumer confidence by satisfying major concerns of privatized justice critics with respect to procedural and substantive law. Having reached a generally negative conclusion, the paper offers a line of reforms based on a number of promising initiatives on regional structuring.

# Definition and Types of On-line Dispute Resolution Mechanisms

## Definition

There is no universally accepted abstract or theoretical definition for either ADR[8] or ODR. In a pragmatic sense, ADR may be understood as those procedures short of court litigation parties use to resolve their disputes, generally through the intercession and assistance of a third neutral party.[9] However, the precise contours of the definition vary. A broad definition, for example, could embrace all techniques and procedures that fall short of trial in public courts[10], while more restrictive definitions could exclude all forms of adjudication (including arbitration) and processes not involving a third party (including negotiation).[11] ADR is indeed placed in a continuum, with adjudicative processes (court litigation and arbitration) on the one end and consensual processes (negotiation and mediation) on the other end, and a range of mixed procedures in between. The present paper treats ADR as an alternative to public adjudication[12] and seeks to show the dangers that privatized and internationalized consumer e-commerce dispute resolution carries without touching on the merits of any definition.

---

[8] Michael Freeman, 'Introduction' in Michael Freeman (ed), *Alternative Dispute Resolution* (Dartmouth: Aldershot, 1995) xi.

[9] Henry Brown and Arthur Marriott, *ADR Principles and Practice* (2nd edn, Sweet and Maxwell: London, 1999) at 12.

[10] Jay E. Grenig, *Alternative Dispute Resolution with Forms* (2nd edn, West Publishing Co.: St. Paul, MN, 1997 and 2000) at 2.

[11] See Brown and Marriott, *ADR Principles and Practice, supra* note 9, at 12.

[12] For a similar analytical framework, see Judith Resnick, 'Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication', 10 *Ohio State Journal on Dispute Resolution* (1995) 211.

The acronym ODR refers to ADR systems that use computer-mediated communication (e.g. e-mail, chat rooms, videoconferencing, Internet telephony) to resolve off-line or online generated disputes.[13] On one definition, ODR includes neither human-mediated tools, such as mail or courier services (dispute resolution) nor more traditional e-commerce tools, such as the telephone and the fax (e-commerce dispute resolution).[14] The present paper employs a less strict definition that concentrates on the nature and function of ODR while still emphasising the novel possibilities the Internet offers. Accordingly, it will suffice that the substantial part of communication takes place online: the less online activity is involved, the less justification there is to classify it as ODR.

## Types of Online Dispute Resolution and Prevention Services

Since the mid and late 1990's, businesses, academic institutions, Internet operators and national and international organisations have established private and state-sponsored ODR services to provide businesses and consumers with a variety of dispute resolution tools. Currently the ODR industry is in a state of flux with new providers entering the market and others terminating or temporarily suspending their services. In an August 2001 survey, Consumers International found 26 operational ODR bodies available for consumers and three that were about to launch their services.[15] Extending the time of research, varying the criteria, and performing the survey at a different time would no doubt result in a different figure.

Online consumer services may, however, be viewed from a larger perspective that comprises rather uncoordinated international processes that promote the prevention of disputes, provide dispute information and assistance services, and services to resolve actual disputes. An 'actual dispute' does not arise until one party

---

[13] See also Llewellyn Joseph Gibbons, Robin M. Kennedy and Jon Michael Gibbs, 'Cyber-mediation: Computer-mediated Communications Medium Massaging the Message', 32 *New Mexico Law Review* (2002) 27, at 40 ('When ADR takes place using computer-mediated communication in the online environment, it is often referred to as online dispute resolution (ODR)').

[14] In its August 2000 international survey Consumers International defined ODR bodies for purposes of its study by three criteria: available online, available to consumers in disputes with merchants over sales transactions and available regardless of the location of the parties. Consumers International, 'Disputes in Cyberspace, Online dispute resolution for consumers in cross-border disputes – an international survey' (2000), <http://cinternational.eval.poptel.org.uk/document_store/Doc35.pdf> (visited 22 April 2003).

[15] Consumers International, 'Disputes in Cyberspace 2001 – Update of Online Dispute Resolution for Consumers in Cross-border Disputes', <www.consumersinternational.org/document_store/Doc517.pdf> (visited 22 April 2003). For the criteria employed, see *ibid.*

asserts a claim that is disputed by the other.[16] Therefore, the first type and parts of the second type are not, strictly speaking, dispute resolution services. Nevertheless, they have a vital role in enhancing consumers' legal security and have a direct impact on ODR. In fact, the Internet has actually provided new tools to protect consumers and globalized traditional tools; their impact goes beyond e-commerce to off-line disputes, thus enhancing consumers' overall protection and access to justice.

Both governments and businesses have grasped the idea that, at least in theory, consumers make better choices and disputes may be prevented if they are given more information, such as blacklists of unreliable merchants and tips on what to look for on web sites.[17] Different codes of conduct may decrease the likelihood of disputes if they meet the consumer's needs. So-called trustmarks granted to merchants may also convey to consumers a sense of confidence that merchants abide by certain third party guidelines or principles, guide consumers to such merchants and in fact promote compliance with such common norms.[18]

However, two issues gnaw the positive effects of dispute prevention services. First, the image of the active and resourceful e-consumer that these services seem to build is yet a distant aspiration. Trying to reach the consumer through different media imposes information providers a challenging task in moulding the consumer more in the direction of a quasi-lawyer. There are limits to what consumers can and should be required to understand and perform, and governments and consumer protection organisations have a major task in getting pertinent information to the consumer in a digestible form. Second, an increasing number of different entities are engaged in the dispute prevention venture, and consumers may become more confused than confident about their reliability.

Dispute information and assistance services are the second step in an effort to reduce the number of actual disputes. The services do not form an exclusive category but operate both before an actual dispute has erupted and after, when they may perform a dispute resolution function. In fact, when applied to e-commerce, 'dispute resolution' has been defined broadly to cover internal and external

---

[16] David Foskett, *The Law and Practice of Compromise* (4th edn, Sweet and Maxwell: London, 1996) at 5 (cited in Brown and Marriott, *ADR Principles and Practice, supra* note 9, at 2).

[17] On 24 April 2001, thirteen countries unveiled 'econsumer.gov', a joint effort to gather and share cross-border e-commerce complaints. In addition, the project provides a variety of online shopping tips, e-commerce materials and a wide array of information on, for example, current suits brought against businesses. See <www.econsumer.gov> (visited 22 April 2003).

[18] For private ventures see BBBOnline Reliability Seal Program, <www.bbbonline.com> (US and Canada); for private ventures supported by public finance, see EURO-LABEL – the European E-commerce Trust Mark, <www.guetezeichen.at/ueber/index_e.html> (Austria, France, Germany, Italy, Spain and Norway); and for public ventures, see Australian E-Commerce Best Practice Model Logo, <www.ecommerce.treasury.gov.au/html/logo.htm> (Australia) (all visited 22 April 2003).

complaint mechanisms.[19] The former include, for example, e-businesses' customer services: feedback or complaint forms that consumers may fill out and send via e-mail. Third parties, e.g. businesses, consumer protection organisations or public authorities, may provide external complaint mechanisms: sites where consumers lodge publicly available complaints, compliments, questions or suggestions to any business. The sites may also seek to educate and inform consumers about dispute resolution through news services and links to legal services.[20]

Governments, consumer organisations and businesses, among others, have intensified the provision of consumer information and assistance on cross-border complaints.[21] The European Commission, for example, has launched the EEJ-Net, a system of national Clearing Houses that co-ordinate and facilitate the processing of foreign consumer and business complaints, but leave dispute resolution to the ADR bodies designated by participating governments.[22] It is complemented by the FIN-Net, an out-of-court complaints network for financial transactions covering the European Economic Area.[23] In addition, the 30 member states of the International Consumer Protection and Enforcement Network have established a public Web site under the rubric of e-consumer.gov through which general information is provided on consumer protection and a restricted government site through which the consumer protection authorities of 17 member states may share information on complaints.[24] These developments are welcome as they incorporate the idea of transparent, international non-profit services that make a true effort towards coordinating national consumer protection procedures.

---

[19] See Louise Ellen Teitz, 'Providing Legal Services for the Middle Class in Cyberspace: the Promise and Challenge of On-line Dispute Resolution', 70 *Fordham Law Review* (2001) 985.

[20] For examples, see PlanetFeedback, <www.planetfeedback.com> and Baddealings, <www.baddealings.com> (visited on 22 April 2003).

[21] See <www.bbbonline.org> (comprised of almost 150 non-profit Better Business Bureaus in North America) and <www.ombudsman.at> (an Austrian service jointly established by the Austrian Consumer Information Organisation and the Austrian Institute for Applied Telecommunication receiving financial assistance from the European Commission) (visited 22 April 2003).

[22] Council Resolution on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes, OJ 2000 C 155/1.

[23] See European Commission, 'Financial services: Commission launches out-of-court Complaints Network to improve consumer confidence', <http://europa.eu.int/comm/internal_market/-en/finances/consumer/adr.htm> (visited 22 April 2003).

[24] See econsumer.gov, <www.econsumer.gov> and International Consumer Protection and Enforcement Network, <www.imsnricc.org> (visited 22 April 2003). The service is, however, primarily an enforcement sentinel accessible to national enforcement and regulatory agencies investigating suspect companies and individuals, uncovering new scams, and spotting trends in fraud. Accordingly, consumers and businesses should not necessarily expect that their claim be taken on.

Businesses and consumers may be offered pre-arranged and virtually automatic services, such as escrow services where neutral third parties hold the purchase price until the goods or services are delivered.[25] An insurance or chargeback service provider may step into the shoes of the purchaser by paying-off or not debiting her. These solutions are, however, only developed for certain geographical areas (chargeback services are not available for all credit cards, countries have imposed restrictions on their availability, escrow services are available only in States that have adopted the institution of trust or similar legal devices)[26], certain online environments (Internet portals or clients of access providers) or types of disputes (escrow services are of no aid to post-delivery disputes).

Dispute resolution services are built in a variety of ways. Their jurisdiction may be limited: the body may serve particular online environments, such as Internet shopping malls[27] or auction sites, subscribers to trust marks, or users of certain payment methods. Alternatively, the body may offer a stand-alone service to the world at large on virtually any dispute – thus not targeting its expertise based on any geographical or sectoral criteria. Their services may be limited: ODR ventures provide a variety of combinations of traditional ADR services online, such as negotiation, mediation (conciliation)[28] and arbitration. However, several sites provide a full house of services often employed according to the escalation of the dispute. With respect to mediation and arbitration, the processes and types of cases considered vary among service providers – e.g. the level of automation they employ, the number of third parties, selection criteria and the binding nature of arbitration awards.

More strikingly, ODR providers have also established new tools. Negotiation services may be automated: disputants using Blind-Bidding services enter their offers of sums for monetary claims and a computerized service then seeks to find a compromise sum without disclosing a party's offer to the other.[29] The services may also provide online negotiation services, such as virtual negotiation rooms,[30] and

---

[25] See, for example, escrow.com, <www.escrow.com> (visited 22 April 2003).

[26] States have imposed legal limitations and conditions on its availability. See, for example, 15 USC 1666 and 1666i; 12 Code of Regulations §§ 226.12(c) and 226.13 (US).

[27] See, for example, America Online's Certified Merchant Program, <http://shophelp.aol.com/shoppinghelp/promise/guarantee.adp> (visited 22 April 2003).

[28] Conciliation and mediation are often used interchangeably and there is no universally accepted definition for each. Conciliation may refer to those procedures where the third party proposes a solution to the dispute, whereas mediation does not. See Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (2nd edn, Sweet and Maxwell: London, 1991) 26.

[29] For examples, see <www.settlementonline.com> and <www.cybersettle.com> (visited 22 April 2003).

[30] For a text-based demo of the operations of a conference room, see <www.resolutionforum.com/s_demo.html> (visited 22 April 2003).

online tools that help parties evaluate their dispute, identify potential solutions and aid in drafting an agreement.[31]

Businesses and consumers are thus presented with a variety of support structures, methods and possibilities to avoid and resolve disputes. Nevertheless, their number, variety, new features and lack of international coordination and information are prone to cause confusion especially among the typical consumer who will have a hard time evaluating the different services and selecting the most viable and trustworthy.

## Current Online Dispute Resolution Mechanisms – Benefits and Pitfalls

### The Task

To understand ODR properly, one needs to go beyond its technical features to its functions and objectives. Since the 1960-70's, the access to justice and ADR movements[32] have been tackling with the perceived deficiencies of the traditional litigation model: its costs, complexity especially in cross-border disputes that involve difficult jurisdiction and choice of law questions, increased work load, its inappropriateness for all types of cases and the nature of its products. A functional definitional approach of ADR used, for example, by Edward Brunet, addressed these defects and identified a number of ADR's unitary characteristics: proceedings are speedy, low-cost, informal, minimal and private, emphasize party or client direction, de-emphasize attorney representation and judicial involvement, and involve creative norm production that avoids 'substantive law'.[33]

---

[31] See, for example, <www.onlineresolution.com> (visited 22 April 2003). A prime example of the sophistication of a world-wide online dispute resolution service is offered by the World Intellectual Property Organisation's (WIPO) mediation and arbitration, and especially its domain name dispute resolution services. However, the service does not deal with the typical business-to-consumer disputes covered by the present article.

[32] See, for example, Mauro Cappelletti (ed), *The Florence Access-to-Justice Project* (Sijthoff and Nodrdhoff & Giuffrè: Alphen aan den Rijn & Milan, 1978-1979) Vols. I-IV; Mauro Cappelletti (ed), *Access to Justice and the Welfare State* (Sijthoff: Alphen aan den Rijn and Firenze, 1981). See also Klaus Viitanen, 'Vaihtoehtoisista riidanratkaisumenetelmistä' [On Alternative Dispute Resolution Devices], 28 *Oikeus* (1999) 216.

[33] Edward Brunet, 'Questioning the Quality of Alternative Dispute Resolution', 62 *Tulane Law Review* (1987) 1, at 11-14.

E-commerce has internationalized consumer commerce considerably, aggravated access to justice problems and challenged the effectiveness of even the most sophisticated, high quality and normally available national dispute resolution and justice mechanisms. It is not denied that properly constructed ODR mechanisms may alleviate consumer and business concerns, increase confidence and provide redress in a number of cases. Indeed, in addition to the advantages of ADR, the online environment seeks to offer reduced communication and dispute resolution costs, speedy communication, absence of a need to change location for dispute resolution purposes and new innovative communication and dispute resolution tools. Nevertheless, the privatization of justice and the delegation of its administration to private informal national or international dispute resolution bodies must not neglect a range of basic legal guarantees that the public court system generally seeks to uphold. Due to the economic, psychological and social power imbalances between businesses and consumers, many States are unlikely to tolerate ODR systems that promise consumers fair, inexpensive and timely solutions to consumer grievances without any public accountability, transparent guarantees or control that the promise will be honoured.

The present section seeks to examine these concerns by examining four different ODR services in light of a number of principles, adherence to which is essential for the interests of consumers. Apart from very general norms requiring States to 'encourage' ODR bodies to provide 'adequate procedural guarantees for the parties concerned'[34], there are yet no unequivocally binding international norms addressing ODR services. Rather, States as well as national, international and supranational institutions have adopted a variety of soft-law instruments. The 1999 OECD Guidelines for Consumer Protection in the Context of Electronic Commerce urge that consumers be provided 'meaningful access to fair and timely alternative dispute resolution and redress without undue cost or burden' through self-regulatory and other policies and procedures, including ADR mechanisms.[35] The European Commission has issued a number of principles in two recommendations, i.e. independence/impartiality, transparency, effectiveness, liberty, legality, fairness and the adversarial principle, the extent of their applicability depending on the service in question. Many of them are shared by, for example, the Global Business Dialogue on Electronic Commerce (GBDe)[36] and the Consumer

---

[34] See Directive 2000/31, *supra* note 5, at article 17(2).

[35] OECD, 'Recommendation of the OECD Council Concerning Guidelines for Consumer Protection in the Context of Electronic Commerce', <www.oecd.org/pdf/M00000000/M00000363.pdf> (visited 22 April 2003).

[36] Commission Recommendation 98/2257 and 2001/310, *supra* note 6. See Global Business Dialogue on Electronic Commerce (GBD), 'ADR in Context of E-commerce', <www.consumerconfidence.gbde.org/adrtokyo2001.pdf> (visited 22 April 2003). See also Australian

Due Process Protocol of the American Arbitration Association's National Consumer Advisory Committee.[37]

These developments have understandably provoked academic attention, as well.[38] Apart from legal scholars, the need for procedural justice in ADR may also be grounded on the works of scholars in social sciences[39] and philosophy[40]. In fact, even in a pragmatic sense, there must be certain principles that make an ODR system workable and attractive: can the system deliver an acceptably justified, impartial decision if one of the parties is not heard? Will consumers use the system and consider that they have been equally treated if the sole decision-maker is affiliated with and financially dependent on the respondent?

Finally, the principles may also be grounded on international human rights norms. However, an examination of their applicability is beyond the scope of the present paper as at least two controversial questions need to be answered: whether such obligations may be imposed beyond States, the normal duty-holders and whether they apply to ADR/ODR.[41]

## Four Services

The first ODR service examined is selected mainly for its wide geographical coverage, variety of services offered and its potential of becoming one of the main global services. OnlineConfidence was created by a group of European Chambers of Commerce with the support of the European Commission and has now, through international co-operation, been extended to cover disputes arising between Europe

Department of the Treasury, 'Building Consumer Sovereignty in Electronic Commerce: A Best Practice Model for Business', <www.ecommerce.treasury.gov.au/publications/BuildingConsumer SovereigntyInElectronicCommerceABestPracticeModelForBusiness/context.htm> (visited 22 April 2003).

37 National Consumer Disputes Advisory Committee, 'Consumer Due Process Protocol', <www.adr.org> (visited 22 April 2003).

38 See, for example, Veijo Heiskanen, 'Dispute Resolution in International Electronic Commerce', 16 *Journal of International Arbitration* (1999) 29, at 41; Lucille M. Ponte, 'Boosting Consumer Confidence in E-business: Recommendations for Establishing Fair and Effective Dispute Resolution Programs for B2C Online Transactions', 12 *Albany Law Journal of Science & Technology* (2002) 441, at 450-51.

39 See, for example, Tom R. Tyler, 'Citizen Discontent with Legal Procedures: a Social Science Perspective on Civil Procedure Reform', 45 *American Journal of Comparative Law* (1997) 871.

40 Michael D. Bayles, *Procedural Justice – Allocating to Individuals* (Kluwer: Dordrecht, 1990).

41 For further discussion, see Robert Briner and Fabian von Schlabrendorff, 'Article 6 of the European Convention on Human Rights and its Bearing upon International Arbitration', in Robert Briner et al (eds), *Law of International Business and Dispute Settlement in the 21st Century* (Heymanns: Köln, 2001) 89.

and the US, Europe and Asia and US and Asia.[42] It offers ODR procedures for both business-to-consumer and business-to-business disputes concerning online purchases.[43] OnlineConfidence offers two types of online services – direct negotiation and evaluation – to any disputing parties and to buyers against businesses that have subscribed to its trustmark. In case negotiations fail, buyers may resort to evaluation, where a neutral third party, appointed by the organisation or the parties jointly from a list of neutrals, will suggest a solution to the dispute. Although the service occurs entirely online, local Chambers of Commerce play an important role in assisting the parties and advertising the service in their local area.

The second service, Word&Bond is a private English company that, unlike OnlineConfidence, offers 'i-arbitration' to business-to-consumer disputes worldwide.[44] It is the first privately owned dispute resolution provider to become part of the EEJ-network and thus exhibits the problems and benefits of fitting a private ODR body into a regional consumer protection structure. Moreover, it shows how a service that pledges to honour arbitral law and practice provides arbitration to cross-border business-to-consumer e-commerce disputes. Claims may be brought against traders so consenting or against those holding the Word&Bond Standard that are bound to honour the arbitrator's decision. The service processes disputes arising out of the provision of goods and services, but not those concerning injury, illness or death or the consequences of any of these.[45]

The third service is iCourthouse, offered by a California-based private corporation.[46] The service advertises itself as the Internet's courthouse where cases may be taken to trial before an online jury. The service handles a wide variety of disputes: both criminal cases (e.g. battery, gross bodily harm, burglary) and civil cases (e.g. custody, employment and contractual disputes). Anyone may register as a juror and pick a case to decide. Jurors may ask questions and cross-examine the parties, review their trial books and finally give verdicts with comments. These characteristics warrant its inclusion as an example of innovative and peculiar entrepreneurship, albeit limited in effectiveness.

Fourth, there is Square Trade,[47] a private American ODR service anchored, among other market places, into the well-known Internet auction site eBay. It handles both consumer-to-consumer and business-to-consumer disputes arising over online transactions and offers negotiation and mediation services to several

---

[42] See <www.onlineconfidence.org/About-Us/Organisati/index.htm> (visited 22 April 2003).

[43] See <www.onlineconfidence.org/To-Resolve/ODR-Rules/index.htm> (visited 23 April 2003).

[44] See <www.wordandbond.com> (visited 20 February 2003).

[45] *Ibid.*

[46] See <www.icourthouse.com> (visited 23 April 2003).

[47] See <www.squaretrade.com> (visited 23 April 2003).

market places and arbitration services to two of them. It is a prime example of how a high-volume ODR service employing a Seal Program, ethical standards and standards of practice operates in an online market place.

## Benefits and Pitfalls

### Proceedings are Speedy but Generally Too Expensive

According to a first principle, ODR services should impose reasonable time limits and be free or impose only reasonable costs.[48] ICourthouse identifies itself as a greatly streamlined version of the court system in the real world, where cases move at Internet speed and which is 'always in session'.[49] The rather populist expression bases itself on the Internet's unique features and the use of facilitative Internet applications. The Internet transmits data virtually instantly throughout the globe with negligible costs, is available 24 hours a day, seven days a week, and does not require parties to be concurrently present in one place. In effect, ODR services aim to take considerably less time than traditional ADR, not to speak of transnational litigation.[50] Proceedings in the four services take normally from 1 to 45 days. Speedy processes seem desirable if parties have sufficient time to prepare their statement and to enjoy other essential procedural rights.

While fees and the quality and professionalism of services vary considerably, costs are generally lower than those in traditional ADR or transnational litigation.[51] Resolving a dispute and being a juror at iCourthouse is free,[52] so are Square Trade's

---

[48] See Commission Recommendation 98/2257, *supra* note 6, at 34 (free of charges or of moderate costs, only short periods elapse between the referral of a matter and the decision); Consumer Due Process Protocol, *supra* note 37, Principle 6 (reasonable cost) and Principle 8 (reasonable time limits).

[49] See <www.icourthouse.com> (visited 23 April 2003).

[50] According to a study prepared in 1995 by Professor Gessner, University of Bremen, for the EC Commission, the average duration of a civil law suit in the Community is almost 2 years at the defendant's residence and 2,5 years at the plaintiff's residence. European Consumer Law Group, 'Jurisdiction and Applicable Law in Cross-border Consumer Complaints - Socio-legal Remarks on an Ongoing Dilemma Concerning Effective Legal Protection for Consumer-citizens in the European Union', ECLG/157/98 - 29/04/98, Annex II, on file with the author, soon available at <http://europa.eu.int/comm/consumers>.

[51] See *ibid*., finding that the total cost of taking cross-border consumer action with a value of 2000 ECU varies, depending on the combination of Member States, from 980 ECU to 6600 ECU and amounts to 2489 ECU at the defendants residence on average. The costs are 3-11% lower in the plaintiff's residence.

[52] See also <www.squaretrade.com> (visited 23 April 2003). At SquareTrade, a seal program to which traders may subscribe for US$ 7,50 per month, automated negotiation services are free and mediation services cost US$ 20 for the filing party.

negotiation services. Square Trade's mediation and Word&Bond's arbitration services cost from US$ 20 to € 60 for claims up to US$ or € 1000, and € 130-250 for claims above € 1,000 or US$ 40 + 5,00% up to a maximum of US$ 2500. In addition, Word&Bond's arbitrator may, at her discretion, reimburse the filing fees to the claimant. OnlineConfidence has not yet announced its cost schedule.

Although the fee schedules of the (three) services show an increasing recognition of consumer needs, a recent study by Consumers International – that included iCourthouse and Square Trade – found that ODR services are generally disproportionately expensive for typical consumer disputes.[53] In fact, automated services presuppose the willingness to compromise and often consumers have no reason to compromise, for example, where they have never received the product or service.[54] Furthermore, parties are normally required to bear their own costs of preparing and submitting their case, such as obtaining expert witness or statements and resorting to legal advice.[55] While typical consumer complaints normally involve relatively simple issues compared to business-to-business disputes, costs will still be a bar to a substantial number of low-value complaints.

## Confidential and not Transparent

Confidentiality has been one of the cornerstones of business-to-business ADR: it avoids parties being adversely affected by publicity, encourages candour and a full exploration of the issues. With secure sites and distributed physical presence, ODR may enhance it. ICourthouse prohibits the use of proper names, or identifying information such as addresses. OnlineConfidence's and, it seems, Square Trade's proceedings are confidential unless otherwise agreed. Word&Bond's proceedings are strictly confidential and may not be disclosed to any stranger to the proceedings unless necessary for the enforcement of the award. If confidentiality is seen as a benefit, ODR systems generally preserve it.[56]

---

[53] Consumers International 2001 Survey, *supra* note 15, at 9.

[54] Complaints submitted by consumers worldwide to econsumer.gov's sentinel from April 2001 to June 2002 reveal that 30% of complainants never received the merchandise or service, <www.econsumer.gov> (visited 23 April 2003).

[55] See, for example, Word&Bond i-arbitration Rules, article 11, <www.wordandbond.com> (visited 20 February 2003).

[56] See <www.vmag.org> (visited 23 April 2003) that maintains an online public depository of arbitration decisions. In spite of having functioned since 1999, the depository notifies of only one future entry to it, Tierney v. Email America; WIPO domain name dispute resolution service, <www.arbiter.wipo.int> (visited 23 April 2003) publishes all decisions online. Of the 29 sites examined by Consumers International, only five published their result in full or in part. Consumers International 2001 Survey, *supra* note 15, at 8.

One of the strongest objections to the confidentiality of consumer ODR services derives from their lack of transparency and legal predictability. The objections focus on the transparency of the process with respect to the parties and to all outsiders who crave for information on the process and its outcome, e.g. consumers, consumer organisations and States. In fact, ODR providers do not generally fully observe the information disclosure obligations contained in several instruments.[57] This in especially true of their impartiality and independence[58] as they have seldom given assurance of their independence and impartiality by publicising their names, affiliations and qualifications or sources of funding – nor have they provided appropriate control mechanisms to ascertain and redress partial outcomes.[59] The four cases illustrate a variety of approaches. Contrary to traditional procedural requirements, iCourthouse disputants may assign an unlimited number of jurors to hear their case. It may well be that the jurors do not mirror the values of the jurisdiction where the contract has its closest contacts or even any contact as they can pick the cases they want to decide world wide. In spite of their general disclosure obligations, neither Square Trade's Ethical Standards and Standards of Practice nor Word&Bond's rules of procedure dictate how much information the parties are given on the identity and affiliations of the arbitrator or who selects the list of third parties, although in practice, Word&Bond's i-Arbitrator sends a declaration of independence and a brief CV to the parties.

OnlineConfidence shows a commendable approach. Evaluators must pass strict criteria as to competence and impartiality and a list of evaluators with details of each will be apparently soon accessible on OnlineConfidence's Web site. The Case Officer or the parties jointly appoint a sole evaluator from OnlineConfidence's list and parties have the right to reject her if there are justifiable doubts as to impartiality and independence. The service also addresses a question neglected by others: the need to have an input from both the industry and consumer organisations. A Listing Board, comprised of industry and consumer organisation representatives in equal proportion, drafts the list of evaluators. If an evaluator is

---

[57] Commission Recommendation 98/2257, *supra* note 6, at 33, Consumer Due Process Protocol, *supra* note 37, Principles 2 and 13.

[58] Commission Recommendation 98/2257, *supra* note 6, at 33, Commission Recommendation 2001/310, *supra* note 6, at 59; Consumer Due process Protocol, *supra* note 37, Principle 3; Global Business Dialogue Guidelines, *supra* note 36, at 9. See UNCITRAL Arbitration Rules (1976), article 10, GA Res. 31/98, <www.uncitral.org>; Rules of Arbitration of the International Chamber of Commerce, article 11(1), <www.iccwbo.org/court/english/arbitration/rules.asp>; American Arbitration Association International Arbitration Rules, article 7, <www.adr.org> (all visited 23 April 2003)

[59] Consumers International 2001 Survey, *supra* note 15, at 9-10.

appointed from outside the list, a representative of each must confirm the proposed evaluator. Nevertheless, either by not disclosing or giving only a general statement on the sources of their funding, the four services do not, in this respect, seem to seek to solicit consumer confidence on their impartiality.

ODR bodies have also neglected the liberty principle requiring that consumers be given pre-dispute information on the binding nature of the process and that pre-dispute ADR agreements that in fact bar recourse to courts are not enforceable.[60] It is part of the wider principle of fairness that requires, among others, that parties be given information on the right of withdrawal and use of other bodies, on the voluntary character of the proceedings, and that a court ruling might be more favourable.[61] No ODR body examined by the Consumers International Survey gave any information on the enforcement of the liberty principle: whether it would refuse to process a dispute to which the consumer had given her consent before the dispute had arisen and which the consumer does not want the body to process.[62] Neither OnlineConfidence[63] nor Word&Bond spell out the contents of the principle in their procedural rules. The latter may, however, have fulfilled the principle's requirements: the service applies only to cases filed by purchasers, who must declare that they consent to the proceedings and that they are entitled, under their home country laws, to make the claim.

States and organisations safeguarding parties' interests need information on the process and its outcome. The Finnish Consumer Protection Act[64], for example, entrusts several public authorities with the responsibility of supervising that businesses abide by the law. Consumer law thus contains a public law element that

---

60 See Commission 1998 Recommendation, *supra* note 6, at 33; Consumer Protection Act (20 Jan. 1978/38) Ch. 12, Article 1d (Finland); Consumer Arbitration Agreements Act 1988 s. 1(1) (England, Wales and Northern Ireland). See Council Directive 93/13, OJ 1993 L 95/29, Annex, Article 1(q) (terms may be regarded as unfair that have the object or effect of 'excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions'). For the strikingly different US approach, see Jean R. Sternlight, 'Is the U.S. out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World', 56 *University of Miami Law Review* (2002) 831; Ponte, 'Boosting Consumer Confidence', *supra* note 38, at 450-51; *Carnival Cruise Lines v. Shute*, 499 US 585 (1991); *ProCD, Inc. v. Zeidenberg*, 86 F 3d 1447 (7th Cir. 1996) and discussion below accompanying footnotes 109-111. The Consumer Due Process Protocol, *supra* note 37, Principle 11, does not take a position on the appropriateness of pre-dispute binding arbitration agreements, but imposes disclosure requirements and prohibits such clauses if they exclude recourse to small claims courts.

61 See Commission Recommendation 2001/310, *supra* note 6, at 60.

62 Consumers International 2001 Survey, *supra* note 15, at 12 fn. 9.

63 OnlineConfidence merely states that if the advice is not acceptable or the case is not resolved through OnlineConfidence, the case may be taken to the courts.

64 Consumer Protection Act (20 Jan. 1978/38).

many states find unacceptable to privatize entirely and hide from public scrutiny. To this effect, the European Commission has recommended that information on the performance of the procedure be made publicly available, including the number and types of complaints received and their outcome; the time taken to resolve complaints; any systematic problems arising from complaints; and the compliance record, if known, of agreed solutions.[65] The Consumers International survey found that most ODR services provide inadequate information on their results.[66] Neither of the two US services have given meaningful information or statistics on the types of cases decided, on outcomes and reasons, while Word&Bond will publish on its website, the number and types of complaints received and outcomes, together with information on the compliance record of agreed outcomes and OnlineConfidence will probably also follow the European Commission's recommendations.

## Emphasis on Minimalism, Informality and Client Direction Requires Proper Safeguards

As ADR, effective ODR is normally minimalist and informal. The claim is that judicial proceedings are formalised and highly structured, and their outcome is curtailed by prior decisional criteria and narrow, predefined legal remedies. ODR is accommodative, co-operational and facilitates communication. Minimalism and informality promote more creative and satisfactory results for the parties. Even the most court-like ODR services use procedures that are minimalist and constructed in comprehensible, colloquial language.[67]

Effective ODR emphasizes party or client direction and de-emphasizes attorney representation and judicial involvement. ODR is consensual, implying that parties are willing to participate actively in the process and seek a solution to their dispute. Negotiation and mediation, in particular, give parties substantial control over the process and its outcome. Lawyers, who may take considerable time to develop the case fully with legal research and argument and then settle the case below the real expectations of their client,[68] may make the process less civilized and dilute its responsiveness. Most ADR mechanisms have lacked judicial involvement,

---

[65] Commission Recommendation 2001/310, *supra* note 6, principle B(5). The Consumer Due Process Protocol, *supra* note 37, contains no such provision.

[66] Consumers International 2001 Survey, *supra* note 15, at 10.

[67] Once proceedings are commenced at iCourthouse, both parties make their opening statements, give their evidence and make their closing arguments. Jurors will thereafter make questions and render their verdict, <www.icourthouse.com> (visited 23 April 2003).

[68] Julie McFarlane, 'The Mediation Alternative', in Julie Macfarlane (ed), *Rethinking Disputes: The Mediation Alternative* (Cavendish Publishing: Guildford and King's Lynn, 1997) 1, at 6.

and the image of the decision-maker is more accommodating and conversational,[69] bringing comfort to the consensual process. Umpires and lawyers belong to the rights-based rhetoric of an adversarial, rigid, formal and overwhelmingly uncomfortable process, which the average consumer fears. Simplified ODR processes, especially those suited for low-quantum claims, are normally tailored to a form that does not necessitate parties to resort to legal representation, but do not exclude it either. ODR has also unique characteristics that promote party direction: consumers may be less intimidated to express their views online against a more powerful opponent, have more time to research or consult third parties than in face-to-face dispute resolution and may not be confronted with the prejudices and biases that appear in face-to-face situations.[70]

In business-to-consumer dispute resolution minimalism, informality and client direction retain their appeal only if the bodies make a serious effort towards ensuring that consumers understand the process from its inception, are able to fulfil the procedure's requirements, and make their decisions being fully aware of the facts and consequences. An ODR service will need proficient officials to ensure the proper implementation of the parties' rights. Nevertheless, there are limits to how much a body should cater for the weaker party: at some point questions of impartiality become increasingly pertinent. An impartial process requires that arbitrators or mediators do provide information to the parties but not legal advice. Even the parties' freedom to organize the arbitral proceedings as they like, emphasising the active role of the body[71] or choosing an inquisitorial-like procedure[72], probably reduce the inequality of bargaining power but do not level it. In fact, arbitral-type proceedings may show to be more apt in levelling the inequality than mediation where the third party's role is more restricted.[73]

In line with the four services examined, the Consumers International survey found that most, if not all, ODR service providers surveyed satisfied the adversarial or due process principles[74]: hearing-type services gave parties an opportunity to be heard and to respond to each other, and mediation services gave them equal

---

[69] See Resnick, 'Many Doors?', *supra* note 12, at 247.

[70] For further information, see Colin Rule, *Online Dispute Resolution for Business* (Jossey-Bass: San Francisco, 2002) at 62-71.

[71] See Commission Recommendation 98/2257, *supra* note 6, at 32.

[72] Brown and Marriott, *ADR Principles and Practice*, *supra* note 9, at 53. See also Detlev F. Vagts, 'Dispute-Resolution Mechanisms in International Business', 203 *Recueil des cours* (1987) 17, at 68

[73] See BEUC, 'Alternative Dispute Resolution – BEUC's Position on the Commission's Green Paper' (2002), <www.beuc.org> (visited 23 April 2003).

[74] Commission Recommendation 98/2257, *supra* note 6, at 34; Consumer Due Process Protocol, *supra* note 37, Principle 12.

procedural rights.[75] ODR services may nevertheless fail to offer parties a fair opportunity to present one's case: most ODR bodies, including iCourthouse, provide their services only in English. The other three services examined are better tailored and refer to the language used by the parties for the purchase or any other language agreed upon; a few other languages than English; the languages of the major trading nations; and at Word&Bond buyers may even request that the process is conducted in their own language. Still, ODR services have limitations: competence in a language needed for purchasing purposes is remarkably lower than for dispute resolution purposes; a trader may not agree to dispute in a more exotic language that is not of a major trading nation, e.g. in Finnish; and even all the services examined display their Web sites only in English. Services that are part of a network and utilize the national entities' linguistic services (Onlineconfidence and Word&Bond) may go a long way in remedying these defects, provided that those entities have the resources and will to do so.

## Participation and Enforcement

ODR's advantage is that it is based on the common consent of the parties expressed either before or after the eruption of the dispute. However, businesses may be reluctant to give such consent. The nature of the parties (typically a repeat and a one-shot player, at least currently), the vast market area and the parties' impersonal and distant (psychological and physical) relationship may make defendant participation less frequent. For example, Cybertribunal.com, a Canadian site, had to close because in over half of the 500 cases the defendant never responded to email requests for information.[76] Indeed, the dearth of cases submitted to certain ODR services have shown that those in a superior economic power are unlikely to surrender their autonomy to a third party.[77]

The most serious test of the effectiveness of ODR decisions or agreements is whether they are recognized and enforced. National ADR bodies have produced a variety of agreements, e.g. conciliation minutes or mediation minutes that can be implemented if made enforceable through the approval of a judge or a duly

---

[75] Consumers International 2001 Survey, *supra* note 15, at 12.

[76] Rebecca Brannan, Wendi Clifton, and Bill Kelley, 'Will Online Dispute Resolution Change the Practice of Law?', <http://gsulaw.gsu.edu/lawand/papers/fa00/brannan_clifton_kelley/#164> (visited 23 April 2003).

[77] See Henry H. Perritt, 'Dispute Resolution in Cyberspace: Demand for New Forms of ADR', 15 *Ohio State Journal on Dispute Resolution* (2000) 675, at 687 (referring to the Virtual Magistrate project, at <www.vmag.org> (visited 23 April 2003)).

authenticated deed executed before a public official.[78] On the international plane, however, for all cases other than binding arbitral awards, the only recourse is courts. In consumer disputes the costs and complexity of such a process are manifest and defy the whole purpose of ODR. Where binding arbitral awards are concerned, the party may benefit from the New York Convention's recognition and enforcement structure.[79] However, a number of the Convention's form requirements create problems in ODR: whether requirements of notice, written form of the agreement and a 'duly authenticated original award or a duly certified copy thereof' can be fulfilled in electronic form is debatable.[80] While form requirements are gradually updated to fit the electronic environment,[81] the Convention allows States to exclude consumer disputes ('Commercial Reservation').[82] Furthermore, a substantive debate concerns so-called 'a-national' arbitration, i.e. whether the procedural rules applied may be detached from national arbitration law.[83] Arguably, the Convention presupposes that an award is always governed by a national law.[84] Therefore, Word&Bond's awards are in a far better position than iCourthouse's 'verdicts'. The UK is party to the Convention, has not made the commercial reservation and proceedings at Word&Bond are governed by the UK Arbitration Act 1996,[85] whereas iCourthouse can hardly be classified as arbitration, the US has made the reservation and iCourthouse is silent on the applicable procedural law.

ODR services have begun to tackle enforcement problems through self-regulation. OnlineConfidence, Square Trade (and Word&Bond) each employ a trustmark, label or standard, which traders may display on their Web sites. The ODR service may sue traders that do not abide by the rules of the instrument for breach of contract and revoke the licence. A portal may also enforce the decision directly by e.g. revoking a security fee. In addition to trustmarks, complaint sites and

---

[78] Green Paper on Alternative Dispute Resolution in Civil and Commercial Law, COM(2002) 196 final at 31 (noting also that in certain EU Member States the transactions set out in the minutes of an approved ADR session are deemed to be enforceable).

[79] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958, 330 *United Nations Treaty Series* 3, 133 parties and 24 signatories on 10 Mar. 2003.

[80] See Christopher Kuener, 'Legal Obstacles to ADR in European Business-to-Consumer Electronic Commerce', <www.kuner.com/data/pay/adr.html> (visited 23 April 2003).

[81] See Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, § 101 (2001), 15 USCA § 7001 (US); Parliament and Council Directive 1999/93, OJ 2000 L 13/12.

[82] On 10 March 2003, 42 States had made such a reservation.

[83] See Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (Kluwer: Denventer, 1981) at 31; Susan Choi, 'Judicial Enforcement of Arbitration Awards under the ICSID and New York Conventions', 28 *New York University Journal of International Law & Politics* (1996) 175.

[84] van der Berg, *The New York Arbitration Convention*, *supra* note 83, at 55.

[85] The Act is available at <www.legislation.hmso.gov.uk/acts/acts1996/96023j.htm> (visited 23 April 2003).

business rating services also play an important role.[86] Nevertheless, outside such specific schemes, there is so far no comprehensive and effective out-of-court method for consumers to ensure compliance against reluctant businesses.

## Limited Oversight

A substantial part of ODR service providers are private, for-profit ventures. States may attempt to oversee foreign ODR services, but public power is considerably weaker in cross-border e-commerce than within the national sphere. In the online environment an ODR body may have significant assets in one country, but only those of minor importance in others, such as data on foreign servers that can be relocated with negligible costs. States seeking to control extraterritorial activity may in most cases have to content themselves with unilateral and often ineffective action, such as consumer education, national firewalls[87] or informing an international sentinel. In fact, international law on jurisdiction does little to promote a viable structure of oversight of the various ODR services: it fails to provide a workable system of norms dictating how States should balance the benefits a norm gives to interest groups within a State and the adverse effects it has on those outside it.[88] This uncertainty promotes conflict and erects significant barriers for effective action.[89]

In a sense, the structure of the global cross-border ODR market seems attractive for businesses either providing or using ODR services. Although the decision as to which ODR service is employed should be a matter for both businesses and consumers to decide, as repeat players businesses will have the incentive and resources to forum shop. They may decide which ODR mechanism they tie their sites to and it would not seem yet a widespread practice for consumers to either read the ODR forum clause and to contact the business prior to the transaction and insist on another ODR. Nevertheless, it seems that fears of a 'race to the bottom' – businesses selecting ODR services with the lowest level of

[86] See, for example, BizRate.com, <www.bizrate.com> (visited 23 April 2003).

[87] See, for example, 'The Great Firewall of China', *BusinessWeek online*, 23 September 2002, <www.businessweek.com> (visited 23 April 2003).

[88] For an international analysis of the balancing effort, see Tapio Puurunen, 'Legislative Jurisdiction', *supra* note 1. For national applications, see Larry E. Ribstein and Bruce H. Kobayashi, 'State Regulation of Electronic Commerce', 51 *Emory Law Journal* (2002) 1, at 36-37.

[89] For an illustration of a present conflict, see *UEJF and Licra v. Yahoo! Inc. and Yahoo France*, N° RG: 00/05308 Paris County Ct. 20 Nov. 2000, at <www.cdt.org/speech/international/001120yahoofrance.pdf> (visited 23 April 2003) and *Yahoo! Inc. v. La Ligue Contre Racisme et l'Antisémitisme, et al.*, 169 F Supp 2d 1181 (N.D. Cal., 2001). The case is currently on appeal before the US Court of Appeals for the Ninth Circuit.

consumer protection and ODR services adopting such standards to serve them – have not materialized. The majority of ODR services are established in the US and it is doubtful that US consumer protection standards form the global 'bottom'. While empirical evidence would be needed to show to what extent businesses do engage in ODR shopping, the potential is there.

### Conclusion

Current ODR services have generally not been able to transpose adequately the benefits of ADR to the business-to-consumer e-commerce context as they have failed to take into account the special needs of consumers. Services are with some exceptions too expensive to use, not transparent, give no real guarantees that consumers do understand the process, their decisions may not be enforceable and oversight is limited. The absence of safeguards puts the whole ODR community into disrepute, increases prejudices over even those few services that have taken efforts to address consumer concerns and materializes the fears of ODR systems becoming 'one more way for 'repeat players' to replicate their societal advantages, this time on a global level and largely free of public scrutiny'.[90] Nevertheless, especially Word&Bond and OnlineConfidence are promising examples of how ODR providers have concentrated on remedying those defects. As the next section will illustrate, in addition to the absence of unequivocally binding international norms, there is no uniform and clear international method for determining whose national norms apply to ODR services and their decisions, leaving interested parties in substantial uncertainty.

## Uncertainty About the Applicable Law

### Party Autonomy and National Norms

ADR and ODR are often designed to avoid substantive law and to emphasize process, compromise and creative norm production.[91] They aim for a fair solution to the dispute and do not utilize strict and time-consuming procedural rules familiar to litigants.

---

[90] Elizabeth G. Thornburg, 'Fast, Cheap, and Out of Control: Lessons from the ICANN Dispute Resolution Process', 6 *Journal of Small and Emerging Business Law* (2002) 191, at 195.

[91] Brunet, 'Questioning the Quality', *supra* note 33, at 13-14.

The role law takes depends on the type of service employed. Mediation, for example, is less 'hemmed-in' by rules of procedure or substantive law: the conflict is seen as unique and less subject to a general principle, and is neither to be governed by a precedent nor to set one.[92] In fact, mediators do not always have legal training and legal counsel is not always appropriate. In fact, more consensual types of ADR remain largely unregulated,[93] and ODR providers have considerable freedom to craft applicable procedural and substantive rules. Some international rules dictate what norms a mediator or conciliator should adhere to if the parties have decided to resort to a particular national or international framework. The UNCITRAL 1980 Conciliation Rules, for example, refer to principles of objectivity, fairness and justice, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, but declare that the parties may agree to exclude or vary any of the rules at any time.[94]

Law has taken a more prominent role in commercial arbitration: parties have been able to stipulate the applicable law[95], thus avoiding an undesirable national law and increasing legal certainty. They have also been able to mandate the arbitrator(s) to decide as *amiable compositeur* or *ex aequo et bono*,[96] where, within certain limits, the ADR body may disregard strict legal or contractual requirements if an equitable[97] solution to the disputes so requires. If the parties have not chosen a law, the arbitrator or tribunal may, in the broadest formulation, apply such rules of law that it determines to be appropriate.[98] The same liberal approach applies to procedural rules as well: parties may agree on them, or the ODR provider may have 'the widest discretion to discharge its duties allowed under such law(s) or rules of law as [it] may determine to be applicable'.[99] In fact, the Consumers International survey found that

---

92 Leonard L. Riskin, 'Mediation and Lawyers', 43 *Ohio State Law Journal* (1982) 29, at 34.

93 OECD Working Party on Information Security and Privacy, 'Legal Provisions Related to Business-to-Consumer Alternative Dispute Resolution in Relation to Privacy and Consumer Protection' (17 July 2002), <www.olis.oecd.org/olis/2002doc.nsf/linkto/dsti-iccp-reg-cp(2002)1-final> (visited 23 April 2003).

94 G.A. Res. 35/52, 4 December 1981.

95 See, for example, International Chamber of Commerce, Rules of Arbitration, Article 17, <www.iccwbo.org>; American Arbitration Association, International Arbitration Rules, Article 28, <www.adr.org> (both visited 23 April 2003).

96 *Ibid.*

97 'Equity' does not here refer to any system of specific rules and remedies familiar to common law countries, but is a broader concept referring to what is 'fair'. Redfern and Hunter, *Law and Practice, supra* note 28, at 35.

98 See, for example, ICC Rules of Arbitration, *supra* note 95, Article 17(1).

99 Format taken from the London Court of International Arbitration Rules Article 14(2), adopted to take effect for arbitrations commencing on or after 1 January 1998, <www.lciaarbitration.com-/lcia/download/rules.pdf> (visited 23 April 2003).

current ODR services worldwide do not generally address questions of applicable law, probably either because they expect the parties to agree upon the applicable law or because they do not expect to have to rely on a particular law.[100] Neither iCourthouse nor OnlineConfidence's rules make reference to any applicable law. Word&Bond's arbitration rules point to English procedural law but are silent on the method for selecting the applicable substantive law.

The benefits of party autonomy would flourish unfettered where equally capable and resourceful parties operated within a politically unbiased environment and their dispute was resolved by recourse to the law they agreed upon. Arbitrators are, however, faced with several layers in the choice of law process: whether a choice has been made or not, the ODR service provider must often decide on the substantive law applicable to the arbitration agreement; the law applicable to the arbitration proceedings; the substantive law applicable to the merits; and the conflict of laws rules applied to select the law to be used for each of the above. While this scheme involves a multitude of theories and practical applications of rules,[101] the task is complicated even more by a substantial body of more or less conflicting national consumer protection policies, normally channelled through mandatory norms that seek to redress consumers' and businesses' unequal resources.

## Unequal Access to and Power over the Applicable Law

Businesses and consumers have generally unequal access to the applicable law. The consumer's disadvantaged position may force him to settle for a lower amount, the consumer normally does not have the resources to execute a risk analysis of her position in a cross-border transaction, and the consumer may well face financial hardship if she is not compensated fairly timely.[102] Moreover, businesses will normally be aware of the fact that consumers cannot afford to litigate. The gravity of the concerns naturally varies depending on the interest at stake. The repeat player business will often be far more resourceful and may take advantage of a better knowledge of the applicable law and a right conferred by it. Accordingly, scholars have noted that ADR occurs 'in the shadow of the law'.[103] Whereas these arguments are not e-commerce-specific, the novel environment increases the number of cross-

---

[100] Consumers International 2001 Survey, *supra* note 15, at 12.

[101] The present section will not examine all these theories and applications. For an excellent treatment, see Julian D.M. Lew, *Applicable Law in International Commercial Arbitration* (Oceana: New York 1978) 531.

[102] For similar arguments relating to ADR, see Owen Fiss, 'Against Settlement', 93 *Yale Law Journal* (1984) 1073; Carrie Menkel-Meadow, 'Pursuing Settlement in a Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR"', 19 *Florida State University Law Review* (1991) 1.

[103] Robert Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: the Case of Divorce', 88 *Yale Law Journal* (1979) 950, at 968.

border consumer disputes and potentially applicable foreign laws and generally deepens the consumer's distress. This is especially disturbing where the business has a policy of referring disputes to a particular ODR connected with that industry.

In fact, the question of applicable law seems to be of significant importance as the ODR body's decision may be the only effective recourse the consumer has. Although some have thought that an ADR (or ODR) body should base its decision on some law in order to legitimize its decision in the eyes of the consumer and thus prove its impartiality,[104] in a sense, law may play a lesser role in ODR than in ADR. In fact, regulatory measures, court cases and academic discussion in various parts of the world have illustrated the difficulties e-commerce has imposed on traditional jurisdictional and applicable law theories[105] that even larger businesses may find very difficult to grasp.

More importantly, however, legal systems may actually give the stronger party a virtual monopoly over the applicable law by downplaying the liberty principle. In the United States, a wave of scholars[106] have criticized that American courts are increasingly willing to enforce arbitration agreements contained in consumer adhesion contracts, including 'click-wrap' agreements. Indeed, the consumer is in a strait jacket as the defences of coercion, fraud and duress are construed narrowly, the Federal Arbitration Act pre-empts all state legislation attempting to limit the reach of binding arbitration, and courts have severely limited the grounds for appealing an arbitral award.[107] In effect, Internet businesses are given significant power to choose an ODR suitable for their needs and the applicable law, and bind consumers to them through binding contractual arbitration clauses.[108]

---

[104] See Brunet, 'Questioning the Quality', *supra* note 33, at 26-27; Mark E. Budnitz, 'Arbitration of Disputes between Consumers and Financial Institutions: A Serious Threat to Consumer Protection', 10 *Ohio State Journal on Dispute Resolution* (1995) 267, at 321.

[105] See *supra* note 1.

[106] Stephen J. Ware, 'Default Rules from Mandatory Rules: Privatizing Law Through Arbitration', 83 *Minnesota Law Review* (1999) 703; Elizabeth G. Thornburg, 'Going Private: Technology, Due Process, and Internet Dispute Resolution', 34 *UC Davis Law Review* (2000) 151; Philip J. MacConnaughay, 'The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration', 93 *Northwestern University Law Review* (1999) 453.

[107] Thronburg, 'Going Private', *supra* note 106, at 182.

[108] Somewhat similarly, Square Trade's Online Dispute Resolution Use Agreement states that the services will be deemed to have occurred in the State of California, US; parties irrevocably agree that the laws of the State of California govern the agreement and their relationship, without reference to any choice of law rules; disputes must be submitted to mediation prior filing an action against Square Trade; and all actions concerning the agreement or the Services arising from the agreement must be brought in the state or federal courts in San Francisco, California, <www.squaretrade.com> (visited 23 April 2003).

## Mandatory Rules

Mandatory consumer protection rules address national interests that the growing body of codified international commercial rules avoids. The UNCITRAL Conciliation Rules (1980), Arbitration Rules (1976) and Model Law on Electronic Commerce (1996), for example, all give precedence to them.[109] The typically European concept divides mandatory rules into two categories: 'domestic' or 'internal' rules from which parties may derogate by choice of law except in what are for all practical purposes purely domestic cases and 'internationally' mandatory rules which their author State regard so fundamentally important that they override the otherwise applicable law.[110]

Unlike in the United States, where mandatory rules are not generally given a special status and state interests are weighed in the normal course of an *ad hoc* choice of law process that employs *dépeçage*,[111] European arbitrators face a definitional dilemma: should consumer protection rules belong to internationally mandatory rules? Many scholars simply note that the most frequently encountered internationally mandatory rules include norms protecting parties presumed to be in an inferior bargaining position.[112] Others have argued for their exclusion: the concept behind classical bilateral conflict of laws rules is broad enough to include 'weaker party' concerns into the *lex causae*, almost all States have laws protecting the weaker party and minimal protection can be accomplished by the public policy objective in determining the applicable law and in enforcement proceedings.[113] The definitional questions remain without generally accepted answers.

What the arbitrator may and should do with respect to mandatory rules in general has given rise to vigorous debate. In 1986 Pierre Mayer spoke of two opposing trends, the first favourable to the application of mandatory rules, the other

---

[109] UNCITRAL Conciliation Rules (1980), Article 1(3), GA Res. 35/52; UNCITRAL Arbitration Rules (1976), Article 1(2), GA Res. 31/98; UNCITRAL Model Law on Electronic Commerce with Guide to Enactment with additional article 5 bis as adopted in 1998 (1996), footnote **, GA Res. 51/162, available at <www.uncitral.org> (visited 23 April 2003). See also UNIDROIT Principles of International Commercial Contracts (1994), which exclude consumer contracts due to their frequently mandatory character, available at <www.unidroit.org/english/principles/contents.htm> (visited 23 April 2003).

[110] See, for example, the Rome Convention on the Law Applicable to Contractual Obligations, Articles 3(3) and 7, OJ 1998, C 27/34. See Nathalie Voser, 'Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration', 7 *American Review of International Arbitration* (1996) 319, at 327.

[111] Voser, *ibid*, at 327.

[112] Pierre Mayer, 'Mandatory Rules of Law in International Arbitration', 2 *Journal of International Arbitration* (1986) 274, at 275; Daniel Hochstrasser, 'Choice of Law and "Foreign" Mandatory Rules in International Arbitration', 11 *Journal of International Arbitration* (1994) 57, at 68.

[113] Voser, 'Mandatory Rules of Law as a Limitation' *supra* note 110, at 325.

hostile, and both roughly equal in force.[114] Unlike a judge, the arbitrator has no forum and no *lex fori* in the private international law sense: she is neither the guardian of a State's public order nor given the mission to apply its mandatory rules.[115] She receives her mission from the contract, owes allegiance to the parties, and should not apply any other legal framework than that chosen by the parties and any of its mandatory rules.[116] But she also has a duty towards the survival of international arbitration as an institution.[117] Arbitrators do often decide cases that involve mandatory rules outside the otherwise applicable law and precluding them from doing so would divert cases to the courts. A duty to decline to take cases impinging on mandatory consumer protection rules would not work in business-to-consumer ODR and would in fact deprive e-consumers in many cases from the only avenue they have. Moreover, the arbitrator cannot ignore the consequences of her neglect: In Finland, for example, consumers are not bound by an arbitration agreement entered into before the dispute has arisen[118] and Finnish courts are likely to hold that an arbitration agreement has failed to fulfil the formal criteria of validity on grounds of reasonableness where weaker parties are concerned.[119]

The question of which mandatory rules the arbitrator should apply, if at all, impacts ODR bodies in at least three ways: arbitrability, i.e. the validity of the arbitration agreement; the process; and the merits of the case. Each of them is important for levelling the rights of the parties, but each involves a complicated, far from uniform and uncertain search, not only for the *lex contractus* (and mandatory rules part thereof) but also for other possibly applicable mandatory rules. Even though an ODR provider may declare that it cannot exclude mandatory law (consumer protection law), because otherwise the decision would loose any possibility of being enforced and the scheme its credibility in the long term,[120] the international environment does not offer uniform, comprehensive and

---

[114] Mayer, 'Mandatory Rules of Law in International Arbitration', *supra* note 112, at 283.

[115] *Ibid*, at 285-86; Serge Lazareff, 'Mandatory Extraterritorial Application of National Law', 11 *Journal of International Arbitration* (1995) 137, at 138.

[116] Even this point is debatable. Mayer, *supra* note 112, opines that the arbitrator can apply the mandatory laws of the *lex contractus* only if invoked by one of the parties, whereas Lazareff *ibid*, argues that the duty exists irrespective of the parties' submissions.

[117] Mayer, 'Mandatory Rules of Law in International Arbitration', *supra* note 112, at 286.

[118] Consumer Protection Act (20 Jan. 1978/38) Ch. 12 §1d.

[119] See the Finnish Law on Arbitration (Laki välimiesmenettelystä 23.10.1992/967) 3 § and Matti S. Kurkela, *Välimiesmenettelylaki* (Lakimiesliiton kustannus: Helsinki, 1996) at 25.

[120] E-mail received from OnlineConfidence's staff member Vincent Tilman (24 January 2003).

internationally accepted substantive norms, or general procedural and administrative norms that can be considered to bind all ODR services.[121]

## Minimum Protection through Special Conflict Rules

In the European Union mandatory rules are channelled through special conflicts rules in consumer cases. The European Commission has recommended a specific safeguard[122] to ensure that consumers are not deprived of the protection afforded by the mandatory protective rules of the law of the State where the ODR provider is established and those of the Member State in which the consumer is normally resident. The rule operates in the context of a restricted class of distance contract cases that fulfil the conditions of Article 5 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations.[123] In fact, for example in Finland, Sweden and Denmark, the Rome Convention applies irrespective of whether the decision-maker is a court or one of the public ADR bodies.[124]

A Commission working paper has pointed out that the safeguard does not concern the question of applicable law as the body may decide the matter on basis of equity or codes of conduct.[125] The legality principle – as it is termed – only ensures that the protection of mandatory laws is not circumvented where the active third party imposes or suggests a solution (e.g. arbitration), but not when the body merely attempts to bring the parties together to convince them to find a solution by common consent (e.g. mediation).[126]

---

[121] For the application of such principles on the functioning of the Finnish Consumer Complaint Board, see Viitanen, 'Vaihtoehtoisista riidanratkaisumenetelmistä', *supra* note 32, at 223-24.

[122] See Commission Recommendation 98/2257, *supra* note 6, at 34.

[123] OJ 1998 C 27/34. See generally Richard Plender and Michael Wilderspin, *The European Contracts Convention* (Sweet and Maxwell: London, 2001) at 193; Lawrence Collins (ed) *Dicey and Morris on the Conflict of Laws* (13th edn, Sweet and Maxwell: London, 2000) vol. 2, 1285-91

[124] See, for example, Klaus Viitanen, *Lautakuntamenettely kuluttajariitojen ratkaisukeinona* [Public Board as a Way to Settle Consumer Disputes] (Suomalainen lakimiesyhdistys: Helsinki, 2003) at 202.

[125] European Commission, 'EEJ-Net towards a European Extra-Judicial Network for resolving consumer disputes, Discussion paper for the workshop on legal issues', <http://europa.eu.int/comm/-consumers/redress/out_of_court/eej_net/acce_just07_leg_en.htm> (visited 24 April 2003).

[126] See Commission Recommendation 2001/310, *supra* note 6, Article I(1). The safeguard applies to substantive law only. A high level of procedural rules is sought through general requirements concerning independence, transparency etc. examined in the preceding section. For the types of ADR falling under the Recommendation's definition, see European Commission, 'Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Marketplace, Department of Commerce/Federal Trade Commission Invitation to Comment and Public Workshop' 8 (30 May 2000), <www.ftc.gov/bcp/altdisresolution/-comments/postworkshopcomments/europeancommission.pdf> (visited 24 April 2003).

It is rather unfortunate that the Recommendation did not react to concerns raised in academic circles that Article 5 would create problems when applied to e-commerce.[127] Such a debate replicates the juxtaposition of business and consumer interests in choice of law questions debated in the EU.[128] Indeed, the Commission's recent Green Paper on the conversion of the Convention into a Community instrument recognizes that the Convention's provisions are not entirely adequate for e-commerce.[129]

The typical industry argument claims that governments must be confident that consumers' rights are protected but must at the same time avoid action that could adversely affect the growth of global e-commerce: the flexibility ODR has as regards the grounds of decision provides an opportunity to develop high consumer protection standards worldwide.[130] The Commission's working paper suggested that ADR (and ODR) bodies do not have to find out what a foreign law says when there is no indication that the resolution of the dispute may be substantially different if the bodies take account of the foreign law, but merely to base its decision on the information relating to a foreign law collected from other out-of-court bodies in the country of the consumer or from the Clearing House in that country.[131] Furthermore, the principle applies only to a limited number of cases, as in most consumer disputes the issue is one of fact, not law.[132]

Indeed, EC's special legal framework is peculiar with its common consumer policy and a minimum Community consumer protection standard is in the creation. These factors explain why a legality requirement has emerged in the EU (and would presumably be honoured by Word&Bond and OnlineConfidence), but does not imply that it could be easily transplanted onto the global level. It would require a political agreement on the principle, clarification of how the Rome Convention's terms 'a specific invitation addressed to him', 'advertising' or 'taken in that country all the steps necessary on his part for the conclusion of the contract' should be understood in e-commerce, and possibly common consent to build a global network

---

[127] For these problems see Kronke, 'Applicable Law in Torts and Contracts in Cyberspace', in Katharina Boele-Woelki and Catherine Kessedjian (eds), *Internet, Which Court Decides? Which Law Applies?* (Kluwer: The Hague, 1998) 65-87.

[128] See The European Commission, 'Hearing on "Electronic Commerce: Jurisdiction and Applicable Law" Position Papers Submitted to the European Commission', on file with the author; Donatella Marino and David Fontana, 'European Parliament and Council Draft Directive On Electronic Commerce', *Computer and Telecommunications Law Review* (2000) 45.

[129] Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, COM(2002) 654 final.

[130] Global Business Dialogue on Electronic Commerce, *supra* note 36.

[131] See *supra* note 125.

[132] *Ibid.*

of Clearing Houses and a computerized system for ODR services to access the Clearing House. These are not low hurdles, and would not necessarily end the quest for a viable global solution for questions of applicable law.

# Synthesis and Proposals for Reform

## Insufficiency of Information, Education and Self-development

Two factors limit the development of online dispute resolution: consumers are not sufficiently aware of present services and they have little reason to be confident to use them as present services have generally not responded adequately to the caveats to privatized justice. Some large businesses have even complained that among European businesses, there is an acute lack of awareness of the economic benefits of ADR and a basic understanding of such processes.[133] Reforms should therefore focus on both information and confidence building.

As illustrated above, governments and international organisations have been developing information provision services. No doubt regular e-consumers need more than *ex post facto* information on redress mechanisms: a general grasp on what to look for and what to expect before contracting. Governments and consumer protection organisations, among others, may gather and disseminate information on current ODR bodies as well as on normative and policy developments. However, States will have difficulties in keeping track of worldwide developments and will have to engage substantial resources in pro-active information gathering. Therefore, a global and neutral non-profit information, educational and promotional agency should be established as a centre from which national authorities, lawyers, as well as businesses and consumers could gather information via the agency's Web site. The proposal follows the lines of the American Bar Association's recommendations[134] and builds upon already existing international platforms. Although primarily an enforcement tool, econsumer.gov, for example, already contains links to

[133] See CPR Institute for Dispute Resolution, 'Response to the European Commission's Green Paper on Alternative Dispute Resolution in Civil and Commercial Law' (endorsed opinion of Akzo Nobel N.V., British American Tobacco (Holdings) Ltd, Fiat S.p.A., General Electric Company, Johnson & Johnson and Nestlé S.A.), <www.cpradr.org/EUGreenPaperMenu.htm> (visited 24 April 2003).

[134] American Bar Association, 'Addressing Disputes in Electronic Commerce, Final Report and Recommendations of The American Bar Association's Task Force On Electronic Commerce and Alternative Dispute Resolution' (August 2002), <www.abanet.org> (visited 24 April 2003).

participating countries' consumer protection agencies, gives shopping tips, collects complaints and issues charts concerning such complaints.[135]

To alleviate the burden of the international centre, regional centres should be established or existing national and regional bodies be required to assist the international Centre in fulfilling its mandate and also to engage independently in such pro-active work.[136] In fact, suitable bodies exist on the regional level: the European Consumers Centres Network (ECC-network), consisting of 14 Consumer Centres in 12 EU States, gives pro-active information on legislation and case law as well as advice and support to the individual consumer on consumer problems within the internal market.[137]

ODR is still in a nascent stage and the ODR industry is unknown to the general public. The structure of the ODR industry seems far too complicated and incomprehensible to the average consumer. Without clear and easily digestible information on ODR services, it is unrealistic to require consumers and less resourceful businesses to evaluate and compare the available ODR services and to make an informed choice, especially when most ODR services are provided only in English. What is needed is a standardized approach to information provision dictating what information is given and in which format. Nevertheless, a viable global policy requires more than consumer education, activity and self-development.

## International Structuring through Localization

As the survival of the ODR industry is dependent on consumer trust, an optimal compromise must be found between the views of consumer protection entities and the industry. Indeed, the number of overlapping ODR service providers, their different scope, norms and procedures, have brought all but clarity to consumers. The Finnish National Consumer Agency, for example, has decided not to recommend consumers to use private ODR services due to their dubious character and uncertain results.

Recognizing the lack of a viable global normative framework for the ODR industry, the insufficiency of information, consumer education and self-development in levelling the uneven bargaining power, it seems that a localization effort should be pursued to increase consumer confidence. In this sense, localization refers to a range of benefits consumers would enjoy if the process were conducted

---

135 See <www.econsumer.gov> (visited on 24 April 2003).

136 The CPR Institute, *supra* note 133, has made a similar proposal with respect to the EU.

137 See <www.europa.eu.int/comm/consumers/redress/compl/euroguichet/index_en.htm> (visited 24 April 2003).

in their own country. It may operate on the jurisdictional, applicable law and recognition and enforcement levels. The jurisdictional task focuses on the location of the decision-making process – whether requiring that decisions be taken by a body operating in the consumer's State of residence or by some other quasi-localizing criteria, such as nationality of the decision-makers. The applicable law task seeks to protect consumers by conferring certain pro-consumer conflicts rules with respect to the applicable norms. The recognition and enforcement prong determines a system's viability by giving or not giving effect to decisions through localized criteria.

Localization may be justified on all three levels, as efforts at creating delocalized procedures for business-to-consumer dispute resolution have not at least yet gained wide support. First, there have been several proposals for creating an online international or indeed a global body that could resolve e-commerce disputes[138] and in fact, the World Intellectual Property Organization has already operated such a body, albeit with very limited subject-matter jurisdiction.[139] The establishment of new centralized international bodies conferred with exclusive jurisdiction, raises general objections to moving decision-making away from local bodies, their legitimacy, distribution of power, the proportionality of the measures taken, and to their economical viability.[140] Therefore, they do not provide a timely alternative to localization. In fact, if detailed and comprehensive feasibility studies and consumer perception surveys indicated that creating a global body is too much too soon, as is expected, the building of the ODR structure should be attempted regionally. Regional ventures and the experiences gathered would indicate regional demands and problems and the information could be used in possible future negotiations for a global structure.

Second, neither the present international instruments applicable to business-to-consumer e-commerce nor the lex mercatoria have developed sufficiently to provide an inclusive and viable global normative framework that takes into consideration the needs of the weaker party. No global body with such general normative power exists and only suggestions have been made: in one of its earlier reports, for example, the American Bar Association recommended that a Global Online Standards

---

138 See, for example, Heiskanen, 'Dispute Resolution' *supra* note 38, at 38-39.

139 See WIPO Domain Name Dispute Resolution Service, <http://arbiter.wipo.int/domains/index.html> (visited 24 April 2003).

140 International organisations set up for regulating the Internet have been attacked for their lack of democracy in decision-making and representation. For the Internet Corporation for Assigned Names and Numbers (ICANN) generally, see Jonathan Weinberg, 'ICANN and the Problem of Legitimacy', 50 *Duke Law Journal* (2000) 187 and for its dispute resolution policy, see Thornburg, 'Fast, Cheap, and Out of Control', *supra* note 90.

Commission be created – a high profile intergovernmental entity that would issue binding global ODR standards enforced through a trustmark program.[141]

Third, different confidence-building mechanisms, such as trustmark schemes where merchants agree to deposit a certain security fee, have been gaining popularity. They seek to create a system that ensures enforcement without having to resort to outside procedures that are strained by requirements of different locations. Nevertheless, such procedures cover only a fraction of global e-commerce merchants and the overwhelming majority of possible ODR decisions will still have to be given effect through off-line procedures.

## The Jurisdictional Avenue

The jurisdictional prong of localization may be based on the notion that, in general, the nearer decision-making is to the consumer, the more she has confidence in the process. Accordingly, by entering into the supposedly ubiquitous Internet environment and transacting therein, consumers want to have a person to rule on or mediate their dispute who is familiar with the consumer protection standards and ideology of the State with which they are most closely connected to.

Not surprisingly, those in charge of formulating national norms and policies have not adopted a strict pro-consumer stand. This phenomenon is visible first, in international treaties, where conflicts norms have explicitly recognized that in a number of circumstances, the e-commerce consumer is not protected and cannot rely on national processes. The jurisdictional treaties and EC instruments applicable in Europe – the Brussels Regulation, the Brussels and Lugano Conventions – do not claim application to ODR bodies. However, especially Nordic public consumer ADR bodies apply analogously the principles enshrined therein.[142]

Second, it is visible in novel attempts at building regional dispute resolution mechanisms. The EEJ-net directs consumer disputes to a Clearing House established in the supplier's country, which, in turn, directs it to a recognized ADR body operating therein. The European Commission has stressed the fact that ADR schemes are usually based on voluntary agreements made with national enterprises on a national basis, and that it is unusual for an enterprise to be a member of a

[141] ABA Jurisdiction in Cyberspace Report, cited in ABA final Report, *supra* note 134, at 28.

[142] See, for example Lov om behandling av forbrukertvister (Law on the Resolution of Consumer Disputes) (18/1978), Article 8(1), at <www.lovdata.no/all/nl-19780428-018.html> (visited 24 April 2003) (Norway); Lov om Forbrukerklagenævnet (Consolidated Danish Consumer Complaints Board Act) (282/1988), Article 6(1). An English translation thereof is available at <www.fs.dk/index-uk.htm> (visited 24 April 2003) (Denmark). For an analysis of the public Nordic consumer complaint boards, see Viitanen, *Lautakuntamenettely, supra* note 123, at 199-208 (including also an analysis of the international jurisdiction of the Swedish and Finnish bodies for which there are no national laws).

scheme in a State where they are not established.[143] Other factors may be identified as well: the chosen law is normally that of the country of the supplier and an ADR body placed in that country may be most suited to rule thereon, the chances that businesses abide by the decision increases especially as the decisions of consumer ADR bodies are, for the time being, mainly of recommendatory character and businesses may be better influenced in their home State.

If the *actor sequitur forum rei* approach of the EEJ-Net is followed and disputes are channelled to ADR or ODR services that operate in the respondent's home state, consumers and those guarding their interests would have to have great confidence in the working of a decentralized system. A decentralized structure is, of course, not devoid of controversies. Such bodies do not exist in all States for all kinds of disputes nor is it said that all will attain the same standards of conduct. It would also be difficult to ensure that all nodes of the network maintained the same or compatible technology and same processes.

Nevertheless, future prospects of altering the system – or indeed building a global system – to the effect that jurisdiction be given to the ODR bodies of the consumer's State in appropriate cases should be seriously considered. This could be achieved by following the Brussels Regulation's consumer protection provisions, although in a reformed version.[144] The present author has suggested on another occasion that the Community legislature should balance the needs of businesses and consumers by giving an option to e-commerce traders to indicate on their Web site or e-mail messages those countries which their site or message is directed at.[145] The enactment should specify in detail the contents and form the indication – or the targeting clause – should take. This reflects the traditional active/passive dichotomy, albeit manifesting itself differently: the targeting clause would indicate in a non-fictionary manner when consumers are passive and when active. The consumer would see which countries' consumer protection norms the trader is prepared to face. It would not matter where the consumer was physically when the contract was concluded, where goods or services were delivered (physical or virtual addresses) or in which Member State the consumer took all the steps necessary on his part for the conclusion of the contract. Therefore, also mobile consumers would be protected.

Such an approach would provide a clear solution to the jurisdiction of ODR bodies part of a regional or global system – a solution that is also analogous to the jurisdiction of courts. In this sense, jurisdiction is understood as covering the whole

---

[143] Commission Working Document on the Creation of a European Extra-Judicial Network, 20 March 2000, at <http://europa.eu.int/comm/consumers/redress/out_of_court/eej_net/index_en.htm> (visited 24 April 2003).

[144] This avenue, although not in a revised form, is also suggested by Viitanen, *Lautakuntamenettely*, *supra* note 124, at 85.

[145] Puurunen, 'Choice of Law', *supra* note 1.

spectrum of services offered: negotiation, mediation and arbitration. It would reflect present notions on when consumers should be given the privilege to use local processes. It would also not only increase consumer confidence, but also give oversight to the consumer's State in such cases to see to it that the ODR body addresses the caveats to privatizing justice.

Localization has not, however, always been used to promote consumer confidence. A second regional dispute resolution mechanism that is expanding through co-operation to other continents – OnlineConfidence – seeks more to delocalize rather than localize decision-making. It provides an online platform through which evaluators are assigned to cases. The service does not channel consumer protection by assigning the case to a national body or to an evaluator of the consumer's nationality. Rather, it includes consumer organization representation in the OC Listing Board that appoints the evaluators to the list. The problem is whether, in the eyes of consumers, consumer organization influence will suffice to replace national bodies that have traditionally guarded the interests of the consumer. In this respect, consumer confidence may be increased if, for example, in cases that fall under the consumer protection rules of jurisdictional treaties, an evaluator is assigned to the case that has specific skills that substitute a number of the benefits localization endorses: he may be fluent in the consumer's language and expert in national consumer protection norms.

## The Applicable Norms

When determining which procedural norms the ODR body should abide by, a global or regional system need not necessarily localize the dispute. In fact, the ODR body will normally have one set of procedural rules through which it processes the cases presented to it. It seems clear that an international legal framework for ODR should be based on the majority of those central procedural principles that business-to-business ADR follows: independence and impartiality, equal treatment of parties, fair notice of the proceedings and fair opportunity to present the case. In addition, it should respect principles recognized by the EU Commission or the US Consumer Due Process Protocol that recognize the needs of weaker parties: accessibility, transparency, proper safeguards for comprehension, effectiveness, legality, liberty and representation.

The present paper has identified five juxtapositions that create tension between traditional commercial ADR (or ODR) and consumer concerns, the first three of which are: (a) accessibility/financial viability; (b) confidentiality/transparency; and (c) minimalism, informality, client direction/proper safeguards. Measures should be

taken to prevent the procedural principles from overly proceduralizing or 'judicializing' the services and rendering them unworkable and unattractive.

Adherence to the principles may impose ODR services additional financial burdens that may well prove too heavy. Many ODR services struggle for survival and especially those that specialise in typical low-value consumer disputes.[146] Current and future trends may change the setting: typical consumer e-commerce purchases in some countries already embrace high-value products and services, such as computer hardware, travel and automotive,[147] and soon also financial services, in which the use of more expensive ODR services may be justified. Nevertheless, their financial impact is yet to be seen. Where necessary, the international legal framework may contemplate a procedure through which the deficits could be filled in by public funding. Moreover, innovative methods of generating revenue may also be devised, such as parties' insurance schemes, online market places' security payments (deposit/fixed rate of the online turnover/trustmark scheme fee).

Transparency of the process and its results would, at first sight, seem a drastic requirement for ODR services that have operated virtually in full confidence. The services should publish an annual report that contains essential information on the cases so that a frank assessment can be made on the services' performance. A number of factors, however, mitigate the requirement's impact on businesses: it should only apply to business-to-consumer cases, and publicity is limited to an annual report that is published and transmitted to national, regional or global bodies. Therefore, the proceedings are not public in the sense that court proceedings are. In fact, it is hard to imagine how else a regional or global ODR structure could be monitored and essential information be retrieved for improving the services and make an international legal framework workable.

The obligation to take reasonable steps to ensure that the consumer understands the process and has enough time to contemplate on the issues would not overly proceduralize or raise the services' costs intolerably. The duty could be performed within the normal course of the services: the whole purpose of business-to-consumer ODR should be to make the services accessible, bring the proceedings closer to the consumer and resolve the matter in comprehensible language through informal communication and thus reduce the need to seek professional advice. In

---

[146] A well-developed funding scheme balanced with possible public funding should prevent the ODR provider from sharing the faith of Which? Web Trader scheme. A voluntary, trustmark based and consumer-focused code of practice tailored for UK online businesses had to close down in early 2003 as it was a free service that relied solely on charity. See Silicon.com Web watch, *Which? shuts down e-tail kitemark scheme* (6 Jan. 2003) <www.silicon.com/news/500019/1/1036948.html> (visited 24 April 2003).

[147] See OECD, 'The Latest Official Statistics on Electronic Commerce: A Focus on Consumers' Internet Transactions', <www.oecd.org/pdf/M00027000/M00027669.pdf> (visited 24 April 2003).

fact, a growing trend, at least in Europe, is to tie services to regional systems that assist consumers locally, as Word&Bond through the EEJ-net and OnlineConfidence have done.

The fourth juxtaposition identified is the wide discretion as to applicable substantive law norms versus adherence to certain consumer protection standards. Here, localization does play a vital role. An ODR structure will have to mitigate the costs and uncertainty that the question of applicable law and especially mandatory rules present. It has been suggested that a body could deal with the matter in the same way as is done in international commercial arbitration: on a case-by-case basis, relying on codified principles and other factors, including the fact that one of the parties is a consumer.[148] Such suggestions, however, assume that a case-by-case, discretionary decision-making without an explicit overriding provision on consumer protection will suffice to make consumers confident. This should not be taken for granted. The caveat becomes even more urgent when it is directed not to a single global body where consumer and industry representation could be equal but to various private for-profit ODR services.

Rather, the quest for the applicable law should follow the legality principle complemented by the suggestions presented in connection with jurisdiction. The Consumer Complaints Boards in Finland, Sweden and Denmark, for example, have considered themselves bound by the Rome Convention.[149] This will mean that as both jurisdiction and applicable law norms are uniform, those bodies that are competent in national consumer protection norms will also apply them. These suggestions would in fact go a long way to dampen the difficulties in transplanting an approach similar to that of the Rome Convention to other regions or the global plane.

It has been claimed that the legality principle may be harsh on businesses.[150] Considering the whole scheme presented herein: the choice businesses have to direct their activities to certain States and being able to resort to national ODR bodies where no such direction is established, will lower these burdens considerably.

---

[148] See Heiskanen, 'Dispute Resolution' *supra* note 38, at 42: 'Given the lack of an agreed international standard, the issue could, and should, be resolved in the same way as it is resolved in international commercial arbitration, namely on a case-by-case basis, relying on certain codified principles, such as those included in the UNCITRAL Model Law on Electronic Commerce, and other relevant factors, including the law specified by the parties as the law applicable to the contract, the relevant provisions of the law of the parties to the transaction, the value of the transaction, the fact that one of the parties may be a consumer, etc.'

[149] See Viitanen, *Lautakuntamenettely*, *supra* note 124, at 202.

[150] See Matthew S. Yeo and Marco Berliri, 'Conflict Looms over Choice of Law in Internet Transactions', 4 *Electronic Commerce & Law Report* (1999) 85, at 89.

## Recognition and Enforcement

Finally, the fifth juxtaposition identified concerns the recognition and enforcement of business-to-business ADR outcomes versus limited availability in business-to-consumer disputes. Any regional or global structure should strive for the effective recognition and enforcement of the decisions of ODR bodies belonging thereto. The liberty principle must not be neglected: consumers must be given pre-dispute information on the binding nature of the process and on the non-enforceability of pre-dispute ADR agreements that in fact bar recourse to courts.

As the present regulatory structure of the ODR industry is in its infancy and several caveats have been made to privatizing justice, for the time being, ODR bodies should not expect that their outcomes benefit from a general contract-based recognition and enforcement mechanism, such as arbitral decisions do, or from a law-based structure. In fact, national authorities may often find the bodies' processes and outcomes dubious and will be reluctant to give legal effect to their decisions because they offend local notions of justice. However, there are promising ventures that are taking the caveats seriously – especially Word&Bond and OnlineConfidence – and once the recommendations presented in this article are followed, one should soon expect to see ODR services of such high quality that they should benefit from the recognition and enforcement mechanisms.

# The Status of Self-determination in International Law: A Question of Legal Significance or Political Importance?

James J. Summers*

## Introduction

There is little doubt today that the right of peoples to self-determination is a key part of international law. Self-determination can be found in the first articles the UN Charter of 1945 and the twin Human Rights Covenants of 1966 and has been recognized by the International Court of Justice since the *Namibia* opinion of 1971.[1] In the *East Timor* case of 1995 the International Court called it, 'one of the essential principles of contemporary international law.'[2]

However, at the same time, the concept of self-determination is also fundamentally political. The right of peoples to freely determine their political status, as laid out in Article 1 the Covenants, follows a basic nationalist political principle which holds that nations and peoples form the basis for states. In those doctrines, states are only legitimate to the extent that they represent a nation, that is they are nation-states, and conversely multinational states are seen as artificial and illegitimate.[3] These are principles which have been extremely influential in shaping the basic concept of the statehood,[4] and the nation-state is today seen as the norm

* LL.D., University of Helsinki.

[1] *Namibia*, Advisory Opinion, ICJ Reports (1971) 31, at para. 52.

[2] *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports (1995) 102, at para. 29.

[3] See E. Gellner, *Nations and Nationalism* (Blackwell: Oxford, 1983) at 1; J. Breuilly, *Nationalism and the State* (The University of Chicago Press, 1994) at 2; A. D. Smith, 'Nationalism', 21:3 *Current Sociology* (1973) 10.

[4] J. Breuilly, 'Approaches to Nationalism', in G. Balakrishnan (ed.), *Mapping the Nation* (Verso: London, 1996) 146 at 171; L. Greenfeld, *Nationalism: Five Roads to Modernity* (Harvard University Press: Cambridge, 1992) at 3; E. Gellner, *Thought and Change* (Weidenfeld and Nicolson: London, 1964) at 150.

for the state.[5] The state, of course, is also the basic unit of international law and this means that nationalism and national self-determination not only provide a basic standard for the legitimacy of states, but also for the relations of states and for international law. This position seems to be reflected in international instruments, which give self-determination a fundamental role in international society. The UN Charter makes it the basis for friendly relations between nations and the twin Covenants position it as the first human right.

This does not mean that self-determination is not a legal principle. Its position in treaty law seems to be assured by major multilateral instruments, like the UN Charter and the Covenants. Its position in customary law appears to be supported by instruments, such as the Colonial Independence Declaration, GA Res. 1514(XV) of 1960,[6] the Friendly Relations Declaration, GA Res. 2625(XXV) of 1970,[7] the Helsinki Final Act of 1975[8] and the Vienna Declaration of 1993.[9] These instruments have been recognized either by the ICJ or by national courts in considering the status of self-determination in international law.[10] However, it does mean that self-determination has a more complex relationship with the law. In particular, its legitimizing role can continue within a legal framework. Self-determination has long been criticized for its potential to politicize international law. Already in 1910 John Westlake argued that, 'Nationalities, though often important in politics, must be kept outside international law'.[11] Later on R. Y. Jennings emphasized that, 'though it [self-determination] has legal overtones, [it] is essentially a political principle'.[12] J. H. W. Verzijl took the view that: 'The "right of self-determination" has… always been the sport of national or international politics', and cautioned that, 'for the sake of the law itself it is better that it should remain so'.[13] This article will see how this

[5] C. J. H. Hayes, *A Political and Cultural History of Modern Europe* (Macmillan, New York, 1939) vol. 2, at 647.

[6] GA Res. 1514(IX), 14 December 1960.

[7] GA Res. 2625(XXV), 24 October 1970.

[8] 14 ILM (1975) 1295.

[9] 32 ILM (1993) 1665.

[10] *Namibia*, Advisory Opinion, ICJ Reports (1971) 31, at para. 52; *Western Sahara*, Advisory Opinion, ICJ Reports (1975) 31-2, at paras. 55-8; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, www.icj-cij.org (visited 12/07/04) at paras. 88 and 156; *Re. Secession of Quebec*, 161 DLR (1998), 4th Series, 435-6, at paras. 119-21; *Tatarstan* Case, 30:3 *Statutes and Decisions of the USSR and Its Successor States* (1994) 40-1; *Chechnya* Case, 31:5 *Statutes and Decisions: The Laws of the USSR and Its Successor States* (1995) 52.

[11] J. Westlake, *International Law, Part I: Peace* (Cambridge University Press, 1910) at 5.

[12] R. Y. Jennings, *The Acquisition of Territory in International Law* (Manchester University Press, 1963) at 78.

[13] J. H. W. Verzijl, *International Law in Historical Perspective* (Sijthoff: Leiden, 1968) vol. 1, at 324-5.

political game is played out in international law and how perceptions of legitimacy may have an important role in that law. In particular, it will focus on the question of the status of self-determination in international law. There have been various claims about this. It has been argued that self-determination is a right rather than a principle, that it is *jus cogens*, a peremptory norm of international law, and that it is *erga omnes*, creating obligations for every member of the international community. However, to what extent are characterizations actually legal, or are they simply ways of highlighting that self-determination is something important and essential for the legitimacy of the law?

## Right of Self-Determination

The question of self-determination as a right is indicative of the pressures involved in its interaction with in international law. There is a popular claim that self-determination was originally only a principle in international law but has since been transformed into a right. However, on closer inspection the story of the right of self-determination seems to be one of failure. It appears that political factors inherent in the self-determination limited its development as a legal right, and instead its status as a right took on essentially political overtones connected with the legitimacy of international law.

What is the difference between self-determination as a principle and a right? Comments tend to suggest that it is largely one of perspective. India, for example, in the drafting of the Covenants, claimed that principle and right, 'were two aspects of the same reality: what was a principle and an obligation for the governors was a right for the governed.'[14] Self-determination as a principle seems to be more general, neutrally framed, being applied to a subject rather than being held by a subject or against an object, and also visibly relative. Principles are weighed against each other to determine how they are to be applied. A right of self-determination, on the other hand, is seen to be held by a subject, a 'people', against an object, states, which have obligations towards that subject. It is seen as more active, being claimed by a people rather than being applied to them, and the word itself is emotionally and politically

[14] India, 10 GAOR (1955) 3rd Cmttee., 651st mtg. (A/C.3/SR.651) para. 3. See also Iraq, *ibid.* 643rd mtg. (A/C.3/SR.643) para. 5; Mexico, *ibid.* 646th mtg., (A/C.3/SR.646) para. 25; Greece, *ibid.* 635th mtg., (A/C.3/SR.635) para. 3; Indonesia, *ibid.* 644th mtg. (A/C.3/SR.644) para. 26; USSR, *ibid.* 646 mtg., (A/C.3/SR.646) para. 19; Byelorussian SSR, *ibid.* 644th mtg., (A/C.3/SR.644) para. 19; Saudi Arabia, *ibid.* 641st mtg., (A/C.3/SR.641) para. 27; India, 9 GAOR (1954) 3rd Cmttee., 569th mtg., (A/C.3/SR.569) para. 24; Syria, *ibid.* 572nd mtg., (A/C.3/SR.572) para. 6.

charged.[15] Nonetheless, this does seem to be a difference in perception. It may be that recognition of the principle implies a right for peoples and obligations for states, each one being a different aspect of the other.

However, these descriptions may also point to a more substantial legal distinction over the exercise of the right and the issue of the people. Both the principle and the right of self-determination are ultimately centred and dependent on the identification of a people. However, a right, which is actually held by a people, puts much more emphasis on the subject than a principle, which only applies to a people. While a group cannot exercise a right unless it is a people, and thus identification as a people is a prerequisite for the right's enjoyment, a principle could possibly exist for a long time in a general form, with peoples only being identified on its application. James Crawford, for example, has argued that, 'the notion of a right has no meaning unless, first of all, we can determine the bearers of the right and the persons who are obliged to respect it'.[16] Thus, Britain, in particular, has argued that self-determination in international law is best expressed as a principle, 'primarily because of the almost insuperable difficulty of defining or identifying the category of persons possessing the right.'[17] Self-determination, therefore, could develop real significance as a right if a legal framework was established for its exercise. However, this, in turn, would require some means of identifying the subjects, the peoples, entitled to that right.

Attempts to define peoples, though, are continuously undercut by the political pressures inherent in national self-determination. The basic legitimacy of self-determination depends on it being seen to be exercised by all identifiable peoples. Anything less would be an arbitrary restriction. Thus, instruments on self-determination invariably proclaim it either in a general way or as a right of all peoples. However, while self-determination may apply in principle to all peoples, there is no generally agreed criteria to determine who those peoples are. Whether a group is an authentic nation is essentially a matter of perception. Thus, the problem for international lawyers is that the right is necessarily ambiguously open-ended and any attempt to narrow peoples down to some specific areas can be criticized from a nationalist perspective for being arbitrarily restrictive. This nationalist perspective matters because self-determination is an essentially nationalist right. It may be

---

[15] Netherlands, 7 GAOR (1952) 3rd Cmttee., 447th mtg., (A/C.3/SR.447) para. 9; Venezuala, *ibid.* 458th mtg., (A/C.3/SR.458) para. 60; Greece, 10 GAOR (1955) 3rd Cmttee., 635th mtg., (A/C.3/SR.635) para. 3; Byelorussian SSR, *ibid.* 644th mtg., (A/C.3/SR.644) para. 19; India, *ibid.* 651st mtg., (A/C.3/SR.651) para. 3; Belarus, 43-5 HRCOR (1991-2) I, SR.1151, para. 51.

[16] J. Crawford, 'The Right of Self-Determination in International Law: Its Development and Future', in P. Alston (ed.), *Peoples' Rights* (Oxford University Press, 2001) 7 at 8.

[17] UK, A/AC.125/SR.69 (1967) 18.

doctrine of legitimacy, but is own legitimacy depends on its exercise by authentic peoples. If those groups are lacking, there seems to be little point in even raising it. It is arguable that these pressures have undercut the most notable attempt to develop self-determination as a legal right in Article 1 of the Human Rights Covenants.

Article 1 of the Human Rights Covenants 1966 was a specific attempt to frame self-determination as a legal right. Its background was the decolonization process following the Second World War. Article 1 was drafted between 1950 and 1955 by the UN Human Rights Commission and General Assembly's Third Committee. Its impetus came from Socialist, Arab and Asian countries, who, acutely aware of the growing movement for independence, sought to support those aspirations with a legally binding right of self-determination.[18] However, simply limiting self-determination to colonial peoples also ran counter to the right's basic legitimacy.[19] One of the main criticisms which states levelled at each other's drafts and proposals, often on a partisan basis, was that they fell short of a universal standard.[20] The formula consistently used by supporters of the article was that self-determination was a right of 'all peoples', but of particular relevance to colonial peoples.[21] However, the 'peoples' who exercised the right were not defined, and given this ambiguity, it was argued that there was no reason why minorities within states might

[18] Ukrainian SSR, 8 Comm.HR (1952) 255th mtg., (E/CN.4/SR.255) 3; Saudi Arabia, 6 GAOR (1951) 3rd Cmttee., 367th mtg., (A/C.3/SR.367) para. 45; Iran, *ibid.* 399th mtg., (A/C.3/SR.399) para. 46; Pakistan, 7 GAOR (1952) 3rd Cmttee., 448th mtg., (A/C.3/SR.448) para. 3; Yugoslavia, 9 GAOR (1954) 3rd Cmttee., 568th mtg., (A/C.3/SR.568) para. 49; Uruguay, *ibid.* 580th mtg., (A/C.3/SR.580) para. 33; Egypt, 10 GAOR (1955) 3rd Cmttee., 639th mtg., (A/C.3/SR.639) para. 8; Syria, *ibid.* para. 13; Liberia, *ibid.* 644th mtg., (A/C.3/SR.644) para. 33; Philippines, *ibid.* 646th mtg., (A/C.3/SR.646) para. 39.

[19] See e.g. criticisms of Belgium: 'The principle of self-determination was universal; to attempt to limit its application to an arbitrary defined category of population would be to distort a great principle and seriously weaken its value.' 7 GAOR (1952) 3rd Cmttee., 446th mtg., (A/C.3/SR.446) para. 31; Yugoslavia: 'It was hard to see how "all" peoples could enjoy the right of self-determination if only one class of signatory States was under an obligation to ensure the exercise of the right.' 10 GAOR (1955) 3rd Cmttee., 657th mtg., (A/C.3/SR.657) para. 12; Canada, 7 GAOR (1952) 3rd Cmttee., 457th mtg., (A/C.3/SR.457) para. 1.

[20] USSR, 8 Comm.HR (1952) 254th mtg., (E/CN.4/SR.254) 3; US, *ibid.* 256th mtg., (E/CN.4/SR.256) 6; Yugoslavia, *ibid.* p. 8; France, *ibid.* 257th mtg., (E/CN.4/SR.257) p. 4; Lebanon, *ibid.* 8.

[21] Poland, 6 GAOR (1951) 3rd Cmttee., 400th mtg., (A/C.3/SR.400) para. 11; Afghanistan, 7 GAOR (1952) 3rd Cmttee., 445th mtg., (A/C.3/SR.445) paras. 14, 16; Honduras, *ibid.* 456th mtg., (A/C.3/SR.456) para. 37; India, *ibid.* 457th mtg., (A/C.3/SR.457) paras. 51-3; Syria, 7 GAOR (1952) 3rd Cmttee., 458th mtg., (A/C.3/SR.458) para. 21; Mexico, *ibid.* para. 54; Venezuala, *ibid.* paras. 60, 62; Pakistan, *ibid.* 459th mtg., (A/C.3/SR.459) paras. 2-3; Iraq, *ibid.* 460th mtg., (A/C.3/SR.460) para. 8; Philippines, *ibid.* 460th mtg., (A/C.3/SR.460) para. 13; Brazil, 9 GAOR (1954) 3rd Cmttee., 586th mtg., (A/C.3/SR.586) para. 6.

not be able to claim the right in order to secede.[22] Nonetheless, despite these objections, the majority of states pressed ahead in adopting the article, without defining the peoples who enjoyed the right.

A legal framework to support the exercise of the rights in one of the Covenants, the Civil and Political Covenant was established with an Optional Protocol, which entered into force on 23 March 1976. This allowed the Human Rights Committee to consider communications from individuals who believed that they had suffered from violations of the rights contained in the Covenant. However, with self-determination, the system showed that the problems raised in the drafting of Article 1 had not been solved but merely transferred. The issues that had preoccupied the General Assembly's Third Committee for several years now became responsibility of the Human Rights Committee.

Sure enough, the Committee began to receive communications from groups within states claiming to be peoples with a right of self-determination. In 1980 it received a petition from the Grand Captain of the *Mikmaq Tribal Society* alleging that Canada had denied the Mikmaq 'people' its right of self-determination and that, 'the Mikmaq nation be recognized as a State.'[23] In 1984 the Committee dismissed this claim on the basis that the author had not been proved to be the authorized representative of the Society.[24] This decision, one member, Roger Errera noted left the key question of whether the Mikmaqs were a people unanswered.[25]

Nonetheless, petitions continued and in 1990 the Committee made decisions on *Lubicon Lake Band*, *E. P et al. v. Columbia*, *South Tirol* and *Whispering Pines Indian Band*, in which it laid out its basic approach to self-determination. This was to reject any right of petition over violations of Article 1, and limit communications only to individual rights.[26] This was somewhat at odds with the actual wording of the

---

[22] Belgium, 6 GAOR (1951) 3rd Cmttee., 361st mtg., (A/C.3/SR.361) paras. 10, 13; UK, 7 GAOR (1952), 3rd Cmttee., 444th mtg., (A/C.3/SR.444) para. 24; Netherlands, *ibid.* 447th mtg., (A/C.3/SR.447) para. 8; New Zealand, *ibid.* 460th mtg., (A/C.3/SR.460) para. 24; China (ROC), 10 GAOR (1955) 3rd Cmttee., 642nd mtg., (A/C.3/SR.642) para. 7; Israel, *ibid.* 643rd mtg., (A/C.3/SR.643) paras. 22, 29.

[23] *A. D. v. Canada (Mikmaq Tribal Society)*, 39 GAOR (1984) Supplement No. 40, (A/39/40) 200, at paras. 2.1-2.2.

[24] *Ibid.* at 203, para. 8.2.

[25] Roger Errera raised three questions which he considered were not answered by the decision: '(1) Does the right of "all peoples" to "self-determination", as enunciated in article 1, paragraph 1, of the Covenant, constitute one "of the rights set forth in the Covenant" in accordance with the terms of article 1 of the Optional Protocol? (2) If it does, may its violation by a State party which has acceded to the Optional Protocol be the subject of a communication from individuals? (3) Do the Mikmaq constitute a "people" within the meaning of the above-mentioned provisions of article 1, paragraph 1, of the Covenant?' *Ibid.* at 204.

[26] 'The Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the Covenant, articles 6 to 27,

Optional Protocol, which referred to the Committee's competence to receive communications on, 'any of the rights set forth in the Covenant.'[27] It also squared badly with the committee's own finding that self-determination was, 'an essential condition for the effective guarantee of observance of individual rights and for promotion and strengthening of those rights'.[28] Nonetheless, as the committee recognized in *Lubicon Lake* and *South Tirol*, it did avoid the difficult question of whether those groups were actually peoples.[29]

This failure to establish a legal framework around the right, due to pressures of nationalist legitimacy, meant that the distinction between principle and right gained a more political significance. As a technical matter a difference can be drawn between the exercise and existence of a right.[30] One can still have a right even if one is prevented from exercising it. Indeed, this very fact might make a right more significant. The right of self-determination is invoked far more for peoples under foreign domination than for peoples without it. Once this connection between the existence and exercise of a right is broken, then the line between principle and right also crumbles. With no requirement for a legal framework for its implementation, a right of self-determination has no need for peoples to be defined in order to exist. The Canadian Court in *Re. Secession of Quebec* could recognize both that, '[i]nternational law grants the right to self-determination to "peoples"', and that, 'the precise meaning of the term "people" remains somewhat uncertain.'[31] Similarly, the African Commission on Human and Peoples' Rights appeared to have no problem in proclaiming that, '[a]ll peoples have a right to self-determination', and continuing, '[t]here may however be controversy as to the definition of peoples and the content of the right.'[32] The identification of peoples, then, does not seem to separate a right

inclusive.' *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*, Communication No. 167/1984, 45 GAOR (1990) Supplement No. 40, (A/45/40) vol. II, 27, at para. 32.1; *E. P. et al. v. Columbia*, Communication No. 318/1988, 45 GAOR (1990) Supplement No. 40, (A/45/40) vol. II, 187, at para. 8.2; *A. B. et al. v. Italy*, Communication No. 413/1990, 46 GAOR (1991) Supplement No. 40, (A/46/40) 321, at para. 3.2; *R. L. et al. v Canada*, Communication No. 358/1989, 47 GAOR (1992) Supplement No. 40, (A/47/40) 365, at para. 6.2.

[27] See M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel: Kehl, 1993) at 19; Crawford, *supra* note 16, at 36.

[28] *E. P. et al. v. Columbia*, Communication No. 318/1988, 45 GAOR (1990) Supplement No. 40, (A/45/40) vol. II, 187, at para. 8.2.

[29] *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*, Communication No. 167/1984, 45 GAOR (1990) Supplement No. 40, (A/45/40) vol. II, 27, at para. 32.1; *A. B. et al. v. Italy*, Communication No. 413/1990, 46 GAOR (1991) Supplement No. 40, (A/46/40) 321, at para. 3.2.

[30] J. Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press: Ithaca, N.Y., 1989) at 11.

[31] *Re. Secession of Quebec*, 161 DLR (1998), 4th Series, 437, at para. 123.

[32] *Katangese Peoples' Congress v. Zaire*, in R. Murray and M. Evans (eds.), *Documents of the African Commission on Human and Peoples' Rights* (Hart Publishers: Oxford, 2001) at 389.

from a principle. Ambiguous principles far from preventing the formation of rights, simply lead to ambiguous ones.

This would seem to reflect general practice which does not suggest that there is a great deal of difference between self-determination as a principle and a right. Principle and right have frequently been used interchangeably or combined when describing self-determination. The Friendly Relations Declaration and the Helsinki Final Act refer to self-determination both as a principle and a right. Despite the efforts in the Covenants to frame self-determination as a right, states in the drafting used the terms interchangeably[33] or combined them as 'the principle of the right',[34] and this has continued in reports to the Human Rights Committee.[35] The International Court of Justice used both principle and right to describe self-determination in *Western Sahara*[36] and *East Timor*.[37] In *Western Sahara* it also considered that GA Res. 1514(XV) enunciated, 'the principle of self-determination as a right of peoples', suggesting that a principle could be simultaneously framed as a right.[38] In the *Burkina Faso/Mali Frontier Dispute* case, the Court appeared to equate

[33] See e.g. Belgium: '[I]n proclaiming the right of peoples to self-determination, the Charter has established a principle which was of benefit to all peoples and binding on all States without exception.' 8 Comm.HR (1952) 252nd mtg., (E/CN.4/SR.252) 7; Guatemala: 'Guatemala regarded the right of peoples to self-determination as an unquestionable principle which all civilized nations should accept and respect.' 7 GAOR (1952) 3rd Cmttee., 449th mtg., (A/C.3/SR.449) para. 32; China (Republic of): '[T]he effect of the ammendment was to reaffirm a principle – the right of peoples to self-determination.' 5 GAOR (1950) 3rd Cmttee., 312th mtg., (A/C.3/SR.312) para. 10; France: 'The right of self-determination, however, was a general principle…' 7 GAOR (1952) 3rd Cmtee., 445th mtg., (A/C.3/SR.445) para. 32; Czechoslovakia: '[W]ith regard to the principle of self-determination. Czechoslovakia considered it to be an essential right…' 7 GAOR (1952) 3rd Cmttee., 449th mtg., (A/C.3/SR.449) para. 17; Brazil: '[T]he statement of a principle implied recognition of an unquestionable right…' 6 GAOR (1951) 3rd Cmttee., 402nd mtg., (A/C.3/SR.402) para. 6; Bolivia: '[S]tressed the importance which his country attached to the right of self-determination; respect for the principle of self-determination was one of the foundations of his Government's domestic and international policy…' 10 GAOR (1955) 3rd Cmttee., 651st mtg., (A/C.3/SR. 651) para. 14.

[34] Belgium, 8 Comm.HR (1952) 252nd mtg., (E/CN.4/SR.252) 9; US, 6 GAOR (1951) 3rd Cmttee., 364th mtg., (A/C.3/SR.364) para. 20; Israel, *ibid.* 403rd mtg., (A/C.3/SR.403) para. 77; Turkey, *ibid.* para. 80; Columbia, *ibid.* para. 82; Lebanon, 7 GAOR (1952) 3rd Cmttee., 454th mtg., (A/C.3/SR.454) para. 11; Norway, 9 GAOR (1954) 3rd Cmttee., 569th mtg., (A/C.3/SR.569) para. 3.

[35] Portugal, (CCPR/C/6/Add.6) 11-16 YHRC (1981-2) II, 97; Jordan, (CCPR/C/1/Add.55) *ibid.* 198; Barbados, (CCPR/C/42/Add.3) 31-3 HRCOR (1987-8) II, 298; Austria, (CCPR/C/51/Add.2) 43-5 HRCOR (1991-2) II, 14; Tanzania, (CCPR/C/42/Add.12) 46-8 HRCOR (1992-3) II, 56.

[36] *Western Sahara*, Advisory Opinion, ICJ Reports (1975) 31-2, at paras. 55 and 57, 33, at para. 59, 36, at paras. 70-1, 67, at para. 161, 68, at para. 162.

[37] *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports (1995) 102, at para. 29.

[38] *Western Sahara*, Advisory Opinion, ICJ Reports (1975) 31, at para. 55.

principle and right,[39] and in the *Wall in Occupied Palestinian Territory* opinion combined them: 'the principle of the right'.[40] In *Namibia* it did just call self-determination a principle (in one of two references),[41] but later on referred to the, 'rights of the people of Namibia.'[42] Principle and right were also equated by the Canadian and Russian courts in *Re. Secession of Quebec*,[43] *Tatarstan*[44] and *Chechnya*,[45] the Badinter Commission in Opinion No. 2[46] and the Committee on the Elimination of Racial Discrimination in General Recommendation XXI (48).[47] The fact that this interchangeable use has been so widespread by people who are trained to be careful with words suggests that there is more to it than simple linguistic carelessness.

If the legal significance of self-determination as a right is not substantial, it may have a more political significance. A right does convey the idea that peoples have become defined and that obligations for states, the flip side of a right, have become clearer. It may be this idea underlies the common claim that self-determination has changed from a principle into a right.[48] Behind this assertion is the notion that self-

---

[39] *Frontier Dispute* (*Burkina Faso/Mali)*: 'At first sight this principle conflicts outright with another one, the right of peoples to self-determination'. ICJ Reports (1986) 567, at para. 25.

[40] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, www.icj-cij.org (visited 12/07/04) at para. 118.

[41] *Namibia*, Advisory Opinion, ICJ Reports (1971) 31, at paras. 52-3.

[42] ICJ Reports (1971) 54, at para. 118.

[43] *Re. Secession of Quebec*: 'The existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond "convention" and is considered a general principle of international law'. 161 DLR (1998) 4th Series, 434-5, at para. 114. See also 438, at para. 127.

[44] The Tatarstan Case: '[T]he right to self-determination is one of the basic principles of international law.' 30:3 *Statutes and Decisions of the USSR and Its Successor States* (1994) 40.

[45] The Chechnya Case: '[T]he right to self-determination 'must not be interpreted as sanctioning or encouraging any actions that would lead to the division or the complete violation of the territorial integrity or political unity of sovereign and independent states acting in accordance with the principle of the equal rights and self-determination of nations.'" 31:5 *Statutes and Decisions: The Laws of the USSR and Its Successor States* (1995) 52.

[46] Opinion No. 2: 'Article 1 of the two 1966 International Covenants on human rights establishes that the principle of the right to self-determination serves to safeguard human rights.' 31 ILM (1992) 1498, at para. 3.

[47] General Recommendation XXI (48): 'The right to self-determination of peoples is a fundamental principle of international law.' CERD/C/365/Rev.1 (2000) 16, at para. 2.

[48] See H. Hannum, 'Rethinking Self-Determination', 34 *Virginia Journal of International Law* (1994) 12; K. Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination* (Martinus Nijhoff: The Hague, 2000) at 284; G. Binder, 'The Case for Self-Determination', 29 *Stanford Journal of International Law* (1993) 235-6; P. Alston, 'Peoples' Rights: Their Rise and Fall', in P. Alston (ed.), *Peoples' Rights* (Oxford University Press, 2001) 262-3; D. F. Orentlicher, 'International Responses to Separatist Claims: Are Democratic Principles Relevant?', in S. Macedo and A. Buchanan (eds.), *Secession and Self-Determination* (New York University Press, 2003) 19 at 22; R. Higgins, *The Development of International Law Through the Political Organs of the United Nations*

determination in the UN Charter was originally a mere principle, which through state practice and instruments like the Covenants and the Colonial Independence Declaration was changed into a right, at least in the colonial context. It is a claim very much focussed on colonial self-determination. The clear implication of this theory is that peoples and their rights, and conversely states and their obligations, have become increasingly defined in the colonial context.

There are two basic objections to this claim. First, it can be questioned whether self-determination was really just a principle in the UN Charter. The language of Articles 1(2) and 55 and the drafting points to a more fluid interpretation. The UN Charter proclaimed the principle of equal rights and self-determination of peoples, which suggests not only that self-determination is a principle, but also that in principle peoples have an equal right to it. Comments by the Rapporteur for the subcommittee responsible for the provision support both interpretations: 'what is intended… is to proclaim the equal rights of peoples as such, consequently their right to self-determination. Equality of rights, therefore, extends in the Charter to states, nations and peoples.' He also stated that: 'the principles of equal rights of people and that of self-determination are two component elements or one norm.'[49] This fluidity between principle and right was also reflected in states' opinions.[50] It was true that the Covenants and the Colonial Independence Declaration did frame self-determination as a right. But, later instruments, like the Friendly Relations Declaration referred to both a principle and a right. Thus, in the twenty-five year period between the Charter and the Friendly Relations Declaration there was arguably no change in the status of self-determination as both a principle and a right. One could argue for a change in emphasis between principle and right, but to argue that self-determination was transformed from one into the other seems to ignore a more fluid reality. This is also equally true of the argument that self-determination at the time of UN Charter was a mere principle because it had not yet been incorporated into customary law. However, if self-determination was still largely a political principle, why could it not also be a political right? When the Commission of Jurists in the *Åland Islands* decisions found in 1921 that self-determination was not part of positive

(Oxford University Press, 1963) at 101-2; S. Trifunovska, 'One Theme in Two Variations – Self-Determination for Minorities and Indigenous Peoples', 5 *International Journal on Minority and Group Rights* (1997) 180-1; D. Wippman, 'Introduction: Ethnic Claims and International Law', in D. Wippman (ed.), *International Law and Ethnic Conflict* (Cornell University Press: London, 1998) 1 at 10-1.

[49] Report of Rapporteur, SubCmttee. I/1/A, (Doc. 723, I/1/A/19) UNCIO, vol. VI, at 703-4.

[50] Belgium: '[R]espect for the essential rights and equality of the states and of the rights of the peoples' to self-determination.' (Doc. 374, I/1/17) UNCIO, vol. VI; Yugoslavia: '[T]his principle of the right of self-determination', Comm.I/1, 15 May, 18; Columbia, *ibid.* 20.

international law, it was the, 'principle that nations must have the right of self-determination'.[51] Thus, in the periods when it was essentially political, primarily a treaty-based law and finally part of customary law, self-determination has been expressed as both a principle and a right.

Second, it may be questioned how much the concept of a right can be connected to the clarification of peoples and obligations in the decolonization process. A right of self-determination has not been seen to automatically extend to any colonial population. As the ICJ underlined in its *Western Sahara* opinion, colonial self-determination is still determined by balances of principles and the 'consideration' that a population is a 'people'.[52] This seems much closer to the idea of a principle than a right. It may be that various instruments and the practice of decolonization have worked to expand and develop the content of self-determination in the colonial context. However, when the International Court recognized in *Namibia* that international law had been expanded to make self-determination applicable to all non-self-governing territories, it was self-determination as a principle.[53] The development of self-determination can be expressed just as much with a principle as a right.

Nonetheless, even if self-determination's supposed transformation from a principle into a right may be legally questionable, it did have other implications. Rights generally appear more active and politically charged, and emphasize obligations. These features were particularly important in colonial self-determination, in which self-determination was invoked to challenge the legitimacy of colonial rule and the legal principles that supported it. One of the problems in this challenge was that self-determination, expressed mainly as a principle, sat in the UN Charter alongside the Trust and Non-Self-Governing systems, which regulated, and thus legitimized, continued colonial government. Such a formulation hardly looked like the stick with which to beat colonialism. Therefore, if self-determination was to challenge colonial rule, it needed to appear more active and political, to emphasize obligations, and above all to be seen to be in the hands of the people. A right fulfilled all these functions. Thus, self-determination was seen, in the words of Sudan, to have, 'graduated from the level of principle to that of right.'[54] This was a change that more than anything reflected a new attitude to self-determination. It can

---

[51] Report of the International Commission of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question, League of Nations Official Journal, Special Supplement No. 3, (October 1920) 5-6.

[52] *Western Sahara*, Advisory Opinion, ICJ Reports (1975) 33, at para. 59.

[53] *Namibia*, Advisory Opinion, ICJ Reports (1971) 31, at paras. 52-3.

[54] Sudan, 28 GAOR (1973) 6th Cmttee., 1145th mtg., (A/C.6/SR.1145) para. 29.

be noted that states' views[55] and the literature on this change are often focussed on political aspects,[56] or the changing nature of legal obligations.[57] Thus, in terms of the legitimacy, the transformation from a principle into a right was an integral part of the development of self-determination in the colonial context, even if its legal significance is more questionable.

[55] See Saudi Arabia: 'The right of peoples to self-determination was… not only a recognized principle, but a well-established right. If its implementation required a spirit of compromise, it should be asked of the peoples who were fighting to gain the right when the time came for them to negotiate the conditions of their freedom, rather than the delegations which upheld the right.' 10 GAOR (1955) 3rd Cmttee., 633rd mtg., (A/C.3/SR.633) para. 24; Philippines: 'He could not agree with those representatives who held that self-determination, as contemplated in the Charter of the United Nations, should be regarded as a guiding principle and not as a right. Such a contention ignored the fact that the Charter, like the constitution of any country, required constant adjustment to new needs and consequently had to be flexible… The [General] Assembly, alive to the increasing assertiveness of the peoples' aspirations towards independence, had indicated unambiguously in its resolution 637(VII) that it regarded self-determination as a right. During the ten years in which it had been in existence, the United Nations had never slavishly adhered to the actual words of the Charter, the letter and spirit of which the General Assembly had often had occasion to interpret. Accordingly, so far as the right of peoples to self-determination was concerned, the General Assembly had already taken a decision which it could hardly reverse. Nationalism was on the march and the United Nations could not ignore that historic fact, if the Organization was to continue to exist.' *Ibid.* 646th mtg., (A/C.3/SR.646) para. 39; Venezuela: '[R]egarded self-determination not merely as a political principle but as a right, for which his country, like so many others, had had to struggle before achieving independence.' *Ibid.* para. 42; Ecuador: '[T]he peoples who had thrown off the colonial yoke wished the principle of self-determination to be applied to all the remaining colonies, but, being anxious to observe the rule of law, wanted to formulate the principle as a right and to include it in a legal text which would be universally recognized.' *Ibid.* 650th mtg., (A/C.3/SR.650) para. 13;

[56] 'Under the moral and political imperatives of decolonization, however, the vague "principle" of self-determination soon evolved into the "right" to self-determination.' Hannum, *supra* note 48, at 12; 'The vague principle of self-determination developed through the decolonization process into a full-blown right and this because of the moral and political imperatives of the process.' Henrard, *supra* note 48, at 284; 'During the postwar period, self-determination gradually made the transition from a political principle to a legal right. The impetus behind the transformation was the evolution of human rights norms in general and the need to create a legal vehicle for decolonization in particular.' Wippman, *supra* note 48, at 10; '[S]elf-determination was no longer a mere guiding principle but a right that could be invoked by the peoples concerned to assert their entitlement to sovereign independence.' Alston, *supra* note 48, at 263.

[57] '[I]t seems academic to argue that as Assembly resolutions are not binding nothing has changed, and that "self-determination" remains a mere "principle", and Article 2(7) is an effective defence against its implementation.' Higgins, *supra* note 48, at 101-2.

## Jus Cogens

The issue of the right underlines that self-determination is a doctrine for determining the legitimacy of legal obligations. International law also has a legal mechanism for ranking legal rules and determining their validity: peremptory or *jus cogens* norms. A peremptory norm is defined in Article 53 of the Vienna Convention on the Law of Treaties 1969 as, 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'[58] The Vienna Convention also provided that a treaty would become void if at the time of its conclusion it conflicted with a peremptory norm (Article 53), or if after its conclusion a new and contradictory *jus cogens* norm emerged (Article 64).

Commentators seem divided over whether self-determination is actually peremptory, although there is substantial support for the idea.[59] The right has also been mooted for a long time by the International Law Commission as a 'possible'

---

[58] Article 53, 8 ILM (1969) 698-9.

[59] In support see Judge Ammoun, Separate Opinion, *Barcelona Traction, Second Phase*, Merits, ICJ Reports (1970) 304; L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (Finnish Lawyers' Publishing Company: Helsinki, 1988) at 421; A. Casssese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, 1995) at 140; I. Brownlie, *Principles of Public International Law* (Clarendon Press: Oxford, 1990) at 513; H. Gros Espiell, 'Self-Determination and Jus Cogens', in A. Cassese (ed.), *UN Law/Fundamental Rights: Two Topics in International Law* (Sijthoff & Noordhoff: Alphen aan den Rijn, 1979) 167-173; F. Ermacora, 'Protection of Minorities before the United Nations', 182 *Recueil des Cours* (1983) IV, 325; H. J. Richardson III, 'Constitutive Questions in the Negotiations for Namibian Independence', 78 *American Journal of International Law* (1984) 79; K. Doehring, 'Self-Determination', in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (Oxford University Press, 1994), 56 at 70; S. J. Anaya, 'Self-Determination as a Collective Right under Contemporary International Law', in P. Aikio and M. Scheinin (eds.), *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Åbo Akademi University, Institute for human Rights: Åbo, 2000), 3 at 3; S. Blay, 'Self-Determination: A Reassessment in the Post-Communist Era', 22 *Denver Journal of International Law and Policy* (1993-94) 275; D. Raič, *Statehood and the Law of Self-Determination* (Kluwer Law International: The Hague, 2002) at 444; R. T. Vance Jr., 'Recognition as an Affirmative Step in the Decolonization Process: The Case of Western Sahara', 7 *Yale Journal of World Public Order* (1980-1) 46; M. Bedjaoui, 'The Right to Development', in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (UNESCO, Paris, 1991) 1177 at 1184.

In opposition M. Pomerance, *Self-Determination in Law and Practice: The New Doctrine of the United Nations* (Martinus Nijhoff Publishers: The Hague, 1982) 70; Hannum, *supra* note 48, at 31; G. J. Naldi, 'The Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali: *Uti Possidetis* in an African Perspective', 36 *International and Comparative Law Quarterly* (1987) 902; A. Cristescu, *The Right to Self-Determination*, UN Doc. E/CN.4/Sub.2/404/Rev.1, at 80; J. Crawford, 'Book Review of Antonio Cassese, Self-Determination of Peoples: A Legal Reappraisal', 90 *American Journal of International Law* (1996) 332.

example of *jus cogens*.[60] ILC Rapporteur Gaetano Arangio-Ruiz in his own report on state responsibility suggested in a rather offhand way that it was.[61] The 2001 commentary on the draft articles on state responsibility tentatively and non-committedly noted that in regard to *jus cogens*, 'the obligation to respect the right of self-determination deserves to be mentioned.'[62] This, though, was rather less than a clear endorsement that it had this status.

However, the definition of *jus cogens* in the 1969 Vienna Convention, in fact, provides for three possible tests to assess whether self-determination is peremptory. First, would be evidence of a consensus around self-determination as *jus cogens*, which might be consistent with recognition by the international community of states as whole. However, while there have been statements of support by some states in the drafting of the Vienna Convention on the Law of Treaties,[63] the Friendly Relations Declaration[64] and in submissions to the ICJ in the *Wall* Opinion,[65] this would seem to fall someway short of acceptance by the community of states 'as a whole'.

The second is the status of treaties. If self-determination were *jus cogens* there may be examples of treaties which were found to be void when concluded because they conflicted with it. If no such treaties were concluded at all, that might, at least, point in the same direction.[66] There might also be examples of treaties concluded in

---

[60] Article 37: Commentary, Report of the Commission to the General Assembly (A/5509) YILC (1963) II, 199, at para. 3; Article 50: Commentary, Reports of the Commission to the General Assembly (A/6309/Rev.1) YILC (1966) II, 248, at para. 3.

[61] '[T]he *jus cogens* limitation already covers subject-matters not included in the specific limitations mentioned (for example, the prohibition of countermeasures deriving from the peremptory rule on self-determination of peoples).' G. Arangio-Ruiz, *Fourth Report on State Responsibility*, (A/CN.4/444 and Add.1-3), YILC (1992), II, pt. 1, 34, at para. 91.

[62] Article 40: Commentary, Report of the International Law Commission, 56 GAOR (2001) Supplement No. 10, (A/56/10) 284.

[63] USSR, 1 UNCLT (1968), (A/CONF.39/11), Plenary Meetings, 52nd mtg., para. 3; Sierra Leone, *ibid.* 53rd mtg., para. 9; Ghana, *ibid.* para. 16; Cyprus, *ibid.* para. 66; Czechoslovakia, *ibid.* 55th mtg., para. 25; Ecuador, 2 UNCLT (1969), (A/CONF.39/11/Add.1), Plenary Meetings, 19th mtg., para. 35; Cuba, *ibid.* para. 42; Poland, *ibid.* para. 71; Byelorussian SSR, *ibid.* 20th mtg., para. 48;

[64] Iraq, 25 GAOR (1970) 6th Cmttee., 1180th mtg., (A/C.6/SR.1180) para. 6; Ethiopia, *ibid.* 1182nd mtg., (A/C.6/SR.1182) para. 49; Trinidad and Tobago, *ibid.* 1183rd mtg., para. 5.

[65] Written Statement of the Kingdom of Saudi Arabia, 30 January 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), (2004), www.icj-cij.org, 12 July 2004, 3; Written Statement Submitted by the Hashemite Kingdom of Jordan, 30 January 2004, 52, at para. 5.39, 54-5, at paras. 5.45-49; Written Statement of the League of Arab States, January 2004, 62, at para. 8.2; Written Statement Submitted by the Government of the Republic of South Africa, 30 January 2004, 11, at para. 25.

[66] B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', 12 *Australian Yearbook of International Law* (1991) 103-4; Cassese, *supra* note 59, at 173.

earlier times which have subsequently been treated as void because they clashed with self-determination.

However, there are a number of treaties that appear to conflict with self-determination.[67] The Timor Gap Treaty 1989 between Australia and Indonesia, which established a régime for the exploitation of East Timor's natural resources after its forcible annexation by Indonesia, scarcely seemed to be in conformity with self-determination.[68] Yet practice with this instrument does not suggest that it violated a *jus cogens* norm. The treaty lay at the centre of the 1995 *East Timor* case, although the Court in this instance declined to exercise jurisdiction. Nonetheless, with East Timor's transition to independence, the United Nations Transitional Authority in East Timor (UNTAET) provisionally upheld the terms of the treaty in 2000.[69] In 2001 UNTAET and Australia signed a new accord, the Timor Sea Arrangement, which maintained the basic régime in the Timor Gap Treaty, but gave a greater share of oil revenues to East Timor.[70] This Arrangement, in turn, became the Timor Sea Treaty, which was signed by a newly independent East Timor and Australia on 20 May 2002. While in an Exchange of Notes accompanying the new treaty, Australia and East Timor explicitly recognized that the Timor Gap Treaty was invalid, they also upheld its terms until the new Timor Sea Treaty had entered into force.[71] This took place following its ratification by East Timor on 17 December 2002[72] and by Australia on 6 March 2003.[73] It is hard to see how this régime could have been provisionally unpheld and then incorporated into a new treaty if it had violated *jus cogens*.

The Treaty of Utrecht 1713, which in Article X provides for a Spanish right of pre-emption if Britain relinquishes its title over the non-self-governing territory of

---

[67] See also J. A. Frowein, 'Self-Determination as a Limit to Obligations under International Law', in C. Tomuschat (ed.), *Modern Law of Self-Determination* (1993) 211 at 219.

[68] Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia, 29 ILM (1990) 475-537.

[69] D. M. Ong, 'The Legal Status of the 1989 Australia-Indonesia Timor Gap Treaty Following the End of Indonesian Rule in East Timor', 31 *Netherlands Yearbook of International Law* (2000) 120.

[70] *Ibid.* at 123-8.

[71] Article 3 and Article 8, Exchange of Notes Constituting An Agreement between the Government of the Democratic Republic of East Timor and the Government of Australia Concerning Arrangements for Exploration and Exploitation of Petroleum in an Area of the Timor Sea between East Timor and Australia, www.austlii.edu.au/au/other/dfat/special/etimor/Treaty-Exchange_of_Notes.html, 27 October 2004. See G. Triggs and D. Bialek, 'The New *Timor Sea Treaty* and Interim Arrangements for Joint Development of Petroleum Resources of the Timor Gap', 3 *Melbourne Journal of International Law* (2002) 323 at 328-31.

[72] *Keesing's Record of World Events* (December 2002) 45147.

[73] *Keesing's Record of World Events* (March 2003) 45296.

Gibraltar,[74] might be seen as a treaty which conflicts with the subsequent the emergence of self-determination. The article, which also prohibits Jews and Moors from residing in the territory, would, at least, seem inconsistent with subsequent standards on non-discrimination and minority rights.[75] Nonetheless, both Britain, the administering state, and Spain have argued that the treaty restricts the exercise of self-determination in Gibraltar.[76] Both types of treaty may be seen in Hong Kong, which was also originally designated as a non-self-governing territory. In 1997 the territory was transferred by Britain to China on the basis of a treaty, the Sino-British Joint Declaration of 1984,[77] without regard to the wishes of the population, on the basis of previous commitments under the Treaty of Peking of 1898.

It may, of course, be argued that populations like Gibraltar and Hong Kong were simply not 'peoples' with a right to self-determination. This might be harder for East Timor, which is now an independent state and was recognized as a people in Security Council and General Assembly resolutions. However, at the same time, this ambiguity over non-self-governing territories undermines the very idea that self-determination is a well-established legal principle with a status of *jus cogens*.

The third test is evidence of self-determination's relationship with other legal principles. If self-determination were *jus cogens* it should prevail over other norms unless they were peremptory too. The law of self-determination is normally structured as a balance between the right and other principles, so one would expect to see the right override those principles unless they could also be shown to be *jus cogens*. However, generally in its relations with principles like state sovereignty, territorial integrity, *uti possidetis* and the inviolability of frontiers, self-determination seems to take a subordinate role.

---

[74] Article X: 'And in case it shall hereafter seem meet to the crown of Great Britain, to grant, fell, or by any means to alienate therefrom the propriety of the said town of Gibraltar, it is hereby agreed, and concluded, that the preference of having the same, shall always be given to the crown of Spain before any others.' Treaty of Utrecht 1713, 28 CTS (1713-4) 331.

[75] Article X: 'And her Britannic Majesty, at the request of the Catholic King, does consent and agree, that no leave shall be given, under any pretence whatsoever, either to Jews or Moors, to reside or have their dwellings, in the said town of Gibraltar'. *Ibid.* at 330.

[76] See statement by the British Minister, Foreign and Commonwealth Office: 'Under the treaty of Utrecht independence is not an option, unless Spain is prepared to agree.' 61 *British Yearbook of International Law* (1990) 510; also the Spanish representative to the United Nations Special Political and Decolonisation Committee: 'Gibraltar could continue to be a British colony or revert to Spain. No other solution was possible. Spain would continue to oppose any initiative that would lead to the question of Gibraltar being settled other than in accordance with the retrocession clause of the Treaty of Utrecht…', 6 *Spanish Yearbook of International Law* (1998) 140.

[77] Joint Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Future of Hong Kong, 26 September 1984, 23 ILM (1984) 1366-1387.

Its peremptory status might still be tenable if those principles were likewise *jus cogens*, but for some of these principles this is questionable. *Uti possidetis*, for example, is a pragmatic rather than a fundamental principle,[78] derived from a Latin defence of the status quo: *uti possidetis, ita possideatis* (as you may possess, so you may possess).[79] If it was peremptory then colonial borders could not be overturned even by mutual agreement. Such borders, though, have been changed, for example, in the union of Italian and British Somaliland, British Togoland with Ghana (The Gold Coast), Zanzibar with Tanganyika, and the British Cameroons with Nigeria and Cameroon, and the division of Rwanda and Burundi.[80] It would also mean that border disputes in Africa or Latin America could not be settled by adjudication or even by agreement between the parties if the result deviated from *uti possidetis*. This again would seem inconsistent with practice.[81]

The same argument can be made for the inviolability of frontiers, which balanced self-determination in the Helsinki Final Act. States in the drafting of that instrument specifically recognized that 'inviolability' did not mean 'immutability' and allowed that frontiers might be changed by mutual agreement.[82]

Thus, although self-determination proposes that legal obligations which run counter to it are invalid, the idea that this can be explained by *jus cogens* is contradicted by the available evidence. However, self-determination as a political doctrine is involved in determining the legitimacy of international law. Self-determination might seem important and fundamental and may challenge other legal principles, but these may be essentially political attributes. The fact that a principle is important does not necessarily mean that it is also peremptory. It may be that much of the support for self-determination as *jus cogens* may simply reflects this perception of importance.[83] However, peremptory norms do entail specific legal consequences,

---

[78] For a sceptical view on *uti possidetis* as *jus cogens* see S. R. Ratner, 'Ethnic Conflict and Territorial Claims: Where Do We Draw the Line', in D. Wippman (ed.), *International Law and Ethnic Conflict* (Cornell University Press: London, 1998), 112 at 115-6; R. Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press: Oxford, 1994) 123-4.

[79] S. R. Ratner, 'Drawing a Better Line: *Uti Possidetis* and the Borders of New States', 90 *American Journal of International Law* (1996) 593.

[80] See Judge Luchaire, Separate Opinion, *Burkina Faso/Mali Frontier Dispute*, ICJ Reports (1986) 652-3.

[81] *Beagle Channel Arbitration (Argentina v. Chile)*, 52 ILR at 133; *Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, ICJ Reports (1960) 199-200, 215; *The Indo-Pakistan Western Boundary (Rann of Kutch) Case (India v. Pakistan)*, 50 ILR at 470.

[82] Ireland, (CSCE/I/PV.6) 86; Denmark, (CSCE/I/PV.2) 22; Canada, (CSCE/I/PV.4) 26; FRG, (CSCE/I/PV.3) 26; US, (CSCE/I/PV.5) 72; Belgium, (CSCE/I/PV.6) 73; Netherlands, (CSCE/I/PV.7) 19; UK, (CSCE/III/PV.2) 11; Greece, (CSCE/III/PV.2) 26; Sweden, (CSCE/III/PV.4) 52, 53-5; Spain, (CSCE/III/PV.4) 82.

[83] 'The studies on the notion of *jus cogens* and on the identification of rules having that character have often been influenced by ideological conceptions and by political attitudes.' *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, 83 ILR at 25.

and if self-determination is considered in light of those consequences, it is much harder to make the case for its *jus cogens* status.

## Erga Omnes

This question of the ranking and importance of legal rules also leads on to the issue of self-determination as a principle *erga omnes*.[84] *Erga omnes*, like *jus cogens*, presumes a mechanism for ranking legal rules. As defined by the ICJ in *Barcelona Traction* in 1970, *erga omnes* obligations were held by states, 'towards the international community as a whole', and in view of their 'importance', 'all States can be held to have a legal interest in their protection'.[85] In *East Timor* in 1995 the Court found the idea that self-determination had an *erga omnes* character was 'irreproachable',[86] and this was reaffirmed in the *Wall* Opinion in 2004.[87] But what did this actually mean? Did the label of *erga omnes* simply reflect the perception that self-determination was important, or did it give the right a new legal significance?

There are a number of reasons why self-determination might be seen to have an *erga omnes* character. First, the right has been widely presented as a cornerstone of the international community. Friendly relations between nations, in Articles 1(2) and 55 of the UN Charter, were based on respect for the principle, and it was seen to promote friendly relations and co-operation among states in the Friendly Relations Declaration. In the drafting of the Covenants it was frequently argued that self-

[84] See Judge Weeramantry, Dissenting Opinion, *East Timor (Portugal v. Australia)*, ICJ Reports (1995) 142, 172-3; Judge Higgins, Separate Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), (2004), <www. icj-cij.org>, 12 July 2004, paras. 37-9; Judge Kooijmans, Separate Opinion, *ibid.* paras. 40-4; Judge Al-Khasawneh, Separate Opinion, *ibid.* para. 13; Judge Elaraby, Separate Opinion, *ibid.* para. 3.4; M. Lachs, 'The Law in and of the United Nations (Some Reflections on the Principle of Self-Determination)', 1 *Indian Journal of International Law* (1960-1) 429, 433; Frowein, *supra* note, 67, at 215; Cassese, *supra* note, 59, at 134, 152-3, 177-8; B. Kingsbury, 'Restructuring Self-Determination: A Relational Approach', in P. Aikio and M. Scheinin (eds.), *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Åbo Akademi University, Institute for Human Rights: Åbo, 2000), 19 at 22; M. Ragazzi, *The Concept of International Obligations Erga Omnes* (Clarendon Press: Oxford, 1997) 137-9, 212; C. Brandt Ahrens, 'Chechnya and the Right of Self-Determination', 42 *Columbia Journal of Transnational Law* (2004) 585-93.

[85] *Case Concerning the Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)*, (Second Phase), ICJ Reports (1970) 32, at para. 33.

[86] *Case Concerning East Timor (Portugal v. Australia)*, ICJ Reports (1995) 102, at para. 29.

[87] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), (2004), <www.icj-cij.org>, 12 July 2004, paras. 88, 156.

determination was a prerequisite for human rights.[88] With such apparently fundamental roles self-determination would seem to be necessarily the concern of all states.

Second, self-determination is framed universally as a right of all peoples. If states assume the obligation to respect the right of self-determination, they necessarily have the duty to respect its exercise by all peoples. The Friendly Relations Declaration spells out the duty of every State to promote realization of the equal rights and self-determination of peoples and this was cited by the International Court in the *Wall* Opinion.[89] Article 1(3) of the Covenants also imposes the duty on states parties to promote the realization of self-determination and in the *Wall* Opinion the Court considered that this applied for 'all peoples'.[90] The Human Rights Committee in General Comment No. 12 (21) affirmed that the provision extended to all peoples unable to exercise the right.[91] The Russian Constitutional Court in *Tatarstan* also recognized that Article 1 imposed obligations on 'all states' for 'all peoples'.[92]

Third, self-determination is closely connected with a number of principles which by their nature would seem to be the concern of all states.[93] The principle of sovereign equality must by definition equally apply to all states. Non-intervention in

---

[88] Syria, 5 GAOR (1950) 3rd Cmttee., 311th mtg., (A/C.3/SR.311) para. 4; Indonesia, 6 GAOR (1951) 3rd Cmttee., 401st mtg., (A/C.3/SR.401) para. 45; Pakistan, 7 GAOR (1952) 3rd Cmttee., 448th mtg., (A/C.3/SR.448) para. 6; Iraq, *ibid.* 460th mtg., (A/C.3/SR.460) para. 5; Saudi Arabia, 9 GAOR (1954) 3rd Cmttee., 578th mtg., (A/C.3/SR.578) para. 49; USSR, *ibid.* 565th mtg. (A/C.3/SR.565) para. 24; Afghanistan, 10 GAOR (1955) 3rd Cmttee., 638th mtg., (A/C.3/SR.638) para. 22; Byelorussian SSR, *ibid.* 644th mtg., (A/C.3/SR.644) para. 20; Chile, *ibid.* 645th mtg., (A/C.3/SR.645) para. 8; Czechoslovakia, *ibid.* para. 12; El Salvador, *ibid.* para. 20; Iran, *ibid.* para. 29; India, *ibid.* 651st mtg., (A/C.3/SR.651) para. 1.

[89] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), (2004), www.icj-cij.org, 12 July 2004, para. 156.

[90] *Ibid.* para. 88.

[91] General Comment No. 12 (21), 39 GAOR (1984) Supplement No. 40, (A/39/40) 142, at para. 6. See also Mr. Ndiaye, 37-39 HRCOR (1989-90) I, SR.993, para. 70.

[92] *Tatarstan Case*, 30:3 *Statutes and Decisions of the USSR and its Successor States* (1994) 40.

[93] Israel, 7 GAOR (1952) 3rd Cmttee., 450th mtg., (A/C.3/SR.450) para. 42; Venezuala, 10 GAOR (1955) 3rd Cmttee., 646th mtg., (A/C.3/SR.646) para. 42; Columbia, *ibid.* 648th mtg., (A/C.3/SR.648) para. 2. Yugoslavia, A/AC.125/SR.69 (1967) 5; Canada, *ibid.* 9; Venezuala, A/AC.125/SR.73 (1967) 5; UK, *ibid.* 20; Ghana, A/AC.125/SR.88 (1968) 73; Cameroon, A/AC.125/SR.91 (1968) 105; Nigeria, *ibid.* 111; Ukrainian SSR, 21 GAOR (1966) 6th Cmttee., 928th mtg., (A/C.6/SR.928) para. 16; Columbia, *ibid.* 929th mtg., (A/C.6/SR.929) para. 12; France, *ibid.* 932 mtg., (A/C.6/SR.932) para. 34; Afghanistan, *ibid.* 936th mtg., (A/C.6/SR.936) para. 43; Mali, *ibid.* 938th mtg., (A/C.6/SR.938) para. 15; Rwanda, 22 GAOR (1967) 6th Cmttee., 1000th mtg., (A/C.6/SR.1000) para. 65; Liberia, *ibid.* 1001st mtg., (A/C.6/SR.1001) para. 2; Portugal, (CSCE/III/PV.5) 11; US, (CSCE/III/PV.5) 23-5. San Marino, (CSCE/I/PV.6) 97; Netherlands, (CSCE/I/PV.7) 19.

the internal affairs of states or the prohibition of the threat or use of force would be meaningless if they did not apply to all states in their relations with all other states.

The proposition that every state has a legal interest in the right of self-determination may then reflect its fundamental character, its political importance, its universal application and the generality of the obligations it imposes. However, a legal interest for all states in the self-determination of all peoples does not need to be expressed through the language of *erga omnes*. It can be quite simply accommodated in the statement that the right of peoples to self-determination is part of customary international law. This proposition, which is widely accepted, would establish a general obligation on states to respect, and even promote, the self-determination of all peoples. The question is, what would *erga omnes* add to such an obligation? The International Court has now had two opportunities to spell out what the 'irreproachable' *erga omnes* character of self-determination means. On both counts the results have been question-begging.

The Court in *East Timor* did not elaborate on why it considered the *erga omnes* character of self-determination to be irreproachable, although it did subsequently describe it as, 'one of the essential principles of contemporary international law'.[94] The Court has used similar language in other cases, like *Corfu Channel*,[95] *Reservations to the Genocide Convention*,[96] *Barcelona Traction*,[97] *Tehran Hostages*,[98] *Nicaragua*[99] and the *Nuclear Weapons* opinion,[100] when accepting principles of a clear moral or

---

[94] *East Timor (Portugal v. Australia)*, ICJ Reports (1995) 102, at para. 29.

[95] 'Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity'. *Corfu Channel Case* (Merits), ICJ Reports (1949) 22; Also cited in *Nicaragua*, ICJ Reports (1986) 114, at para. 218 and *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), ICJ Reports (1996) 257, at para. 79.

[96] '[P]rinciples which are recognized by civilized nations as binding on States, even without any conventional obligation.' *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) ICJ Reports (1951) 23.

[97] '[P]rinciples and rules concerning the basic rights of the human person'. *Case Concerning the Barcelona Traction Light and Power Company Limited (Belgium v. Spain)* (Second Phase) (Merits), ICJ Reports (1970) 32, at paras. 33-4.

[98] '[F]undamental principles enunciated in the Universal Declaration of Human Rights'. *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran)* (Judgement), ICJ Reports (1980) 42, at para. 91.

[99] '[F]undamental general principles of humanitarian law'. *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)* (Merits), ICJ Reports (1986) 113, at para. 218.

[100] '[U]niversally recognized humanitarian principles'. *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), ICJ Reports (1996) 258, at para. 82; see also the Court's application of the Martens Clause, *ibid.* 260, at para. 87.

humanitarian character without enquiring as to their formal source.[101] The legal consequences of this finding were also obscure.

One possible consequence of every state having a legal interest in the right of self-determination of any people might be *actio popularis*, a right of any interested state to bring actions before the ICJ.[102] Controversially, this concept was rejected by the Court in the *South West Africa Cases* in 1966. In this case Liberia and Ethiopia as members of the former League of Nations attempted to bring an action against South Africa over the violation of its mandate over South West Africa (Namibia), including the denial of self-determination.[103] Nonetheless, despite its *erga omnes* rhetoric, the Court in *East Timor* did not appear to make this connection. On the contrary, it stated that: 'the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things.'[104] It is by no means clear whether *erga omnes* would allow states to bring actions in the ICJ over violations of self-determination to which they are not directly parties.

*Erga omnes* was also developed in the *Wall* opinion, but this also underlined the uncertainty in the concept. The Court confidently stated that, 'self-determination is today a right *erga omnes*',[105] but its later application appeared less sure. In considering the obligations for states as a result of the illegality of the Israeli construction of the wall, the Court recalled the '*erga omnes* character' of self-determination. But, it appealed equally to customary international law, and the provision in the Friendly Relations Declaration that every state had a duty to promote the realization of the principle of equal rights and self-determination of peoples.[106] Its other finding that certain obligations under international humanitarian law also had an *erga omnes* character was similarly backed by custom.[107] In neither case did the Court extend *erga omnes* where it could not demonstrate existing general obligations for states

---

[101] See Simma and Alston, *supra* note 66, at 105-6.

[102] See J. Klabbers, 'The Scope of International Law: *Erga Omnes* Obligations and the Turn to Morality', in M. Tupamäki (ed.), *Liber Amicorum Bengt Broms: Celebrating his 70th Birthday 16 October 1999* (Finnish Branch of the International Law Association, Helsinki, 1999), 149 at 169; J. Dugard, '1966 and All That: The South West Africa Judgment Revisited in the East Timor Case', 8 *African Journal of International and Comparative Law* (1996) 561.

[103] *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, (Second Phase), ICJ Reports (1966) 47, at para. 88.

[104] *East Timor (Portugal v. Australia)*, ICJ Reports (1995) 102, at para. 29.

[105] *Legal Consequences of the Construction of a Wall on the Occupied Palestinian Territory* (Advisory Opinion), www.icj-cij.org, 12 July 2004, para. 88.

[106] *Ibid.* para. 156.

[107] '[A] great many rules of humanitarian law… are "to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law". In the Court's view, these rules incorporate obligations which are essentially of an *erga omnes* character.' *Ibid.* para. 157.

under international custom. As Judge Higgins noted in her separate opinion, the obligations covered by *erga omnes* flowed either from the 'self-evident' principle that, 'an illegal situation is not to be recognized or assisted by third parties', or from, 'customary international law, no more and no less.'[108]

Thus, it remains questionable from the practice of the ICJ whether self-determination as *erga omnes* actually involves distinct legal obligations, rather, to the extent that it might be seen to produce obligations, it seems to shadow the general nature of obligations under customary international law. However, if the legal consequences of *erga omnes* remain open, it appears to have significance in terms of legitimacy. The designation of, 'a right *erga omnes*',[109] suggests that self-determination is somehow something more than a mere 'right'. The Court's discussion of *erga omnes* in *Barcelona Traction*, *East Timor* and the *Wall* Opinion are punctuated with words like 'importance', 'essential' and 'character'.[110] *Erga omnes*, whatever its ambiguous legal significance, may also function as a ribbon, which can be attached to self-determination to highlight its importance and the legitimacy of its obligations.

## Conclusion

This article has looked at the question of whether the various assertions as to the status of self-determination in international law should be looked at as one of legal or political significance. Self-determination is primarily a principle of political legitimacy, and while it has been incorporated into international law through regular sources, such as treaties and instruments expressing *opinio juris*, there is no reason why its role should change in this process. Self-determination can function as a political-legal principle for the legitimacy of legal obligations and seems to use legal characterizations like right, *jus cogens* and *erga omnes* to underline its importance and legitimacy. The question is whether these titles actually have legal significance, or whether they are simply used to emphasize the legitimacy of self-determination? If the latter is the case, and there is a strong argument that it is, then the designations

[108] Judge Higgins, Separate Opinion, *ibid.* paras. 38-9.

[109] *Legal Consequences of the Construction of a Wall on the Occupied Palestinian Territory* (Advisory Opinion), www.icj-cij.org, 12 July 2004, para. 88.

[110] 'Given the character and the importance of the right and obligations involved…' *Legal Consequences of the Construction of a Wall in the Occupied Palestian Territory*, www.icj-cij.org, 12 July 2004, para. 159; 'As the Court indicated in the *Barcelona Traction* case, such obligations are by their very nature "the concern of all States" and, "In view of the importance of the rights involved, all States can be held to have a legal interest in their protection."' *Ibid.* para. 155; *East Timor (Portugal v. Australia)*, ICJ Reports (1995) 102, at para. 29.

of right, *jus cogens* and *erga omnes*, at least in relation to self-determination, would seem to function more as a political rhetoric in international law rather than representing a specific legal status.

# La médiation officieuse: la spécificité des bons offices dans la gamme des procédures non juridictionnelles de règlement pacifique des différends

Michel Béniard

La pratique internationale contemporaine donne des exemples très nombreux d'intervention d'un tiers pour essayer de résoudre un différend. Cette intervention d'un tiers peut prendre deux formes distinctes de procédure, soit celle de médiation, soit celle de bons offices. Toutefois, les deux notions, médiation et bons offices, sont souvent considérées comme interchangeables. Les manuels de droit international contemporain relèguent souvent la question des bons offices à leur aspect le moins politique, c'est à dire les bons offices à titre humanitaire. Quelquefois, dans le cadre d'une étude sur les Nations unies, on aborde la question des bons offices du Secrétaire général sans toujours bien marquer leur spécificité. J.G. Merrills, dans sa remarquable étude *International Dispute Settlement*[1] qui traite des différentes procédures de règlement pacifique des différends, néglige la question des bons offices n'y consacrant que quelques phrases elliptiques. Cette distinction entre bons offices et médiation a pourtant une importance et ne doit pas être considérée comme une simple relique léguée par les diplomates et les juristes du dix-neuvième siècle. Il est vrai que les bons offices fondés essentiellement sur la coutume ont été une procédure courante dans la pratique diplomatique au dix-neuvième siècle, mais les règles de procédure posées par ce modèle n'ont pas fondamentalement changé, même si, en ce qui concerne le Secrétaire général des Nations unies, les bons offices ont quelques particularités qui les distinguent du modèle original[2]. Il est regrettable que l'on ne porte plus une grande attention à cette distinction entre bons offices et médiation. Et même si les deux notions ne doivent pas être considérées comme contradictoires, néanmoins les bons offices sont souvent une alternative à la

[1] J. G. Merrills, *International Dispute Settlement* (Cambridge University Press: Cambridge, 1998,) p. 354.

[2] En ce qui concerne la spécificité des bons offices du Secrétaire général, voir l'étude de Vratislav Pechota, *A quiet Approach. A study of the Good Offices Exercised by the Secretary-General in the Cause of Peace* (United Nations Institute of Training and Research: New York, 1972) p. 91.

médiation. En fait, la gravité d'un différend se mesure généralement à la façon dont les parties l'envisagent. Quelquefois le choix de la procédure adéquate pour résoudre ce différend n'est pas inconséquent quant aux effets de cette procédure sur le déroulement de la négociation et son résultat. En particulier, les bons offices se sont avéré être une procédure très utile pour mettre fin à une impasse diplomatique. La médiation implique un degré minimal de coopération entre les parties antagonistes. En revanche, quand le contact est tout à fait rompu, la mission de bons offices peut apparaître comme la méthode permettant d'ouvrir un dialogue aussi indirect soit-il entre les parties. En cela réside sans doute la fonction primordiale des bons offices. Dans cette notion de bons offices il existe de part les différents aspects que peut prendre cette procédure et c'est en essayant de circonscrire la spécificité de cette notion de bons offices, que nous pourrions peut-être mieux appréhender ce qui distingue cette procédure de la médiation.

## Bons offices et médiation: la distinction nécessaire.

### Le modèle.

Un des membres de la délégation américaine à la troisième commission[3] de la première conférence de La Haye, Frederick W. Holls, considérait que les bons offices étaient une forme de médiation plus légère et plus générale[4]. En fait, l'expression "bons offices" devrait être rapprochée de l'adjectif officieux signifiant qui n'est pas officiel ou qui n'est pas encore officiel, en fait, semi-officiel. Les bons offices pourraient se définir ainsi comme une médiation officieuse.

Les bons offices ont existé de temps immémorial, mais la variété de formes que peuvent prendre les bons offices et la souplesse de la méthode nous empêche d'en saisir la spécificité. Il est certain qu'il y a beaucoup d'analogies entre les bons offices et la médiation. Dans les deux cas, il s'agit de l'intervention d'une tierce partie. Le rôle des bons offices est d'aider à trouver une solution à un différend que les parties ne veulent ou ne peuvent résoudre par elles-mêmes. De ce point de vue, la médiation et les bons offices ont le même but. Les bons offices impliquent la participation d'un ou de plusieurs représentants d'un Etat ou de plusieurs Etats ou d'une organisation internationale qui interviennent dans le but d'établir des contacts entre deux Etats séparés par un litige ou par une question litigieuse. Le but des négociateurs ayant ces fonctions de bons offices, est de rapprocher les points de vue

[3] La commission chargée de la convention pour le règlement pacifique des conflits internationaux.

[4] 'In other words, good offices constitute a mild and more general form of mediation' dans Frederick W.Holls *The Peace Conference at the Hague* (The Macmillan Company: New York, 1900) p.177.

des deux parties et d'une certaine façon de contribuer dans certains cas à la solution du litige. Les auteurs du dix-neuvième siècle, souvent plus sensibles à cette spécificité des bons offices, ont donné peut-être une description plus distincte de cette fonction. Pradier-Fodéré[5] dans son *Traité de droit international* de 1885 en parle de la façon suivante:

> Les *bons offices,* sont les démarches, les actes au moyen desquels une tierce Puissance essaye d'ouvrir la voie aux négociations des parties intéressées ou de renouer ces négociations, quand elles sont interrompues. Ils peuvent être offerts spontanément ou accordés à la suite d'une demande directe; ils peuvent aussi résulter d'engagements souscrits à titre éventuel. En général, ils n'emportent aucune responsabilité, à moins d'une stipulation expresse. La Puissance qui prête ses bons offices fait usage de son autorité et de son influence morale, en donnant de bienveillants conseils pour apaiser les ressentiments, pour amener la concorde; elle propose des moyens pour arriver à une transaction, afin d'empêcher de prendre les armes ou d'obtenir qu'on les dépose.[6]

Il nous faut retenir quelques éléments dans ces phrases de Pradier-Fodéré: « ouvrir la voie aux négociations », tel est bien la mission première des bons offices. Quand les parties à un différend ne peuvent se résoudre à négocier directement, en raison peut-être d'une tension trop grande, une mission de bons offices apparaît particulièrement appropriée pour entamer d'une façon indirecte un dialogue ou bien pour renouer ce dialogue. L'intermédiaire peut apporter de nouveaux éléments permettant d'amorcer ou de reprendre une négociation entre les parties. Ensuite, l'intermédiaire dans les bons offices ne conduira pas la négociation, il ne présentera pas une solution pouvant s'imposer aux parties, mais de « bienveillants conseils ». C'est-à-dire qu'il mettra en avant des propositions, quelquefois sans que cela implique l'obligation pour les parties de se rencontrer. Dans ce cas, l'intermédiaire ira de l'une à l'autre partie essayant de rapprocher les points de vue et de faire état de quelques propositions pouvant « apaiser les ressentiments » et ouvrir la voie à une solution. La souplesse et la discrétion de la méthode en fait toute sa force. Quelquefois cette mission de rapprochement des bons offices peut prendre la forme de diplomatie de la navette plus connue par l'expression anglaise de *shuttle diplomacy*. Pradier-Fodéré rappelle également les fonctions essentielles des missions de bons

[5] Paul Louis Ernest Pradier-Foderé (1827). Professeur de droit international à l'Ecole libre des sciences politiques en 1873 et par la suite professeur de sciences politiques et doyen de l'Université de Lima au Pérou. L'oeuvre de Pradier-Foderé est considérable, plus particulièrement dans le domaine du droit international. On peut retenir son commentaire sur *Du droit de la guerre et de la paix de Grotius* (1865-1866), son *Traité du droit international public européen et américain suivant les progrès de la science et de la pratique contemporaine* (1885-1888 en six volumes) et *Le Congrès de droit international sud-américain et les traités de Montevideo* (1890).

[6] Paul Louis Ernest Pradier-Fodéré, *Traité de droit international public européen et américain suivant les progrès de la science et de la pratique contemporaine* (8 vols, G.Pedone-Lauriel: Paris, 1885-1906), vol I, p.466.

offices: « empêcher de prendre les armes » ou « obtenir qu'on les dépose », la fonction préventive et celle de rétablissement de la paix.

S'il est vrai qu'en général les deux notions bons offices et médiation sont souvent proches, toutefois dans la médiation non seulement le médiateur présente généralement une solution ou des solutions au différend, cet essai de solution pouvant d'ailleurs être remanié par les parties, mais encore le médiateur prend une part directe à la négociation. En fait, il négocie au même titre que les parties. Dans la médiation officieuse, c'est à dire les bons offices, l'intermédiaire prend une part indirecte à la négociation. La médiation propose une base de négociation. Dans une mission de bons offices il est tout à fait possible de soumettre des propositions d'une partie à l'autre, et même de donner des conseils, voire de suggérer, mais il n'est pas possible pour les Etats qui offrent leurs bons offices de prendre une part directe ou de conduire directement la négociation. Oppenheim nous rappelle le rôle du médiateur: « He makes certain propositions on the basis of which the States at variance may come to an understanding. He even conduct the negotiations himself, always anxious to reconcile the opposing claims and to appease the feeling of resentment between the parties »[7].

Dans la procédure de bons offices, l'intermédiaire ne peut pas véritablement conduire la négociation. L'assentiment des parties à ses propositions est indispensable à toutes les étapes. Javier Perez de Cuellar, à l'occasion de sa mission à Chypre, rappelait « as a person entrusted with a mission of good offices, my function was to produce ideas and suggestions to help the two sides find a solution, but that I could not impose anything on either side. Progress could be made only when both sides were in agreement »[8].

Dans la démarche de médiation, même si le médiateur n'impose pas une solution, il peut directement imposer un projet de solution, dans la procédure de bons offices la solution ne pourra résulter que des parties elles-mêmes. Dag Hammarskjöld en 1956, à l'occasion du différend sur la nationalisation du canal de Suez par l'Egypte, ne se considérait pas comme un médiateur, mais décrivait comme but principal de sa tâche de trouver un commun dénominateur entre les parties[9]. La tâche de l'intermédiaire dans les missions de bons offices est justement de trouver les éléments permettant de rapprocher les parties, ce « commun dénominateur » dont parlait Hammarskjöld. Une négociation, quel qu'en soit la forme, devrait aboutir à un compromis, mais dans un cas de bons offices ce compromis ne peut

---

[7] L. Oppenheim, *International Law a Treatise*, (Third edition, ed by Ronald F.Roxburgh, 2 vols, Longmans, Green and Co: Edimburgh) volume II, *War and Neutrality*, 1921, p.13.

[8] Report by the Secretary-General on the United Nations Operation in Cyprus (for the period 1 June-30 November 1986), U.N doc, S/18491(2 December 1986), paragraphe.54, p.12.

[9] Mark W. Zalher, *Dag Hammarskjöld's United Nations* (Columbia University Press: New York, 1970) p. 295.

provenir que des parties elles-mêmes. L'intermédiaire essayera d'identifier les points sur lesquels un compromis est peut-être possible et il tentera éventuellement d'obtenir des concessions réciproques des parties. Ces concessions pourront quelquefois porter sur les conditions de la négociation, moins souvent sur le fond même du différend. L'essentiel pour l'intermédiaire est de surmonter le blocage existant entre les parties antagonistes. En fait, la mission principale des bons offices est d'effacer les causes sous-jacentes du différend, qui empêchent les parties de négocier, mais l'intermédiaire ne présentera pas de solution globale, il se place derrière la volonté des parties.

Dans certains cas de médiation spéciale, plutôt rares, il est possible d'envisager tel que le fait l'article 8 de la Convention de La Haye de 1907[10] que les parties, pendant un certain laps de temps, se dessaisissent entièrement de la négociation au profit du médiateur ou des médiateurs. Cela n'est pas envisageable en cas de bons offices car les parties demeurent toujours saisi du différend, quelles que puissent être par ailleurs, les suggestions ou les recommandations de l'intermédiaire.

Les bons offices quelquefois ne se distinguent guère de simples contacts diplomatiques. En fait, l'informalité de la méthode est dans certains cas un atout décisif. Souvent par leur discrétion, les bons offices rejoignent l'expression et le procédé que le premier Secrétaire général de la Société des Nations, Sir Eric Drummond[11] affectionnait particulièrement des discussions «behind the scenes». De cette façon Sir Eric Drummond essayait de formuler ou de recueillir des suggestions confidentielles pouvant éventuellement aboutir à un compromis entre les parties, tout en évitant toute déclaration publique afin que même si son rôle pût être déterminant, il ne devait pas apparaître comme tel[12]. Les parties antagonistes accepteront quelquefois plus aisément une offre de bons offices qu'une offre de médiation par crainte que la médiation ne les conduisent à négocier sur un plan trop

---

[10] Convention sur le règlement pacifique des différends, La Haye, le 18 octobre 1907, entrée en vigueur le 26 janvier 1910, Deuxième conférence internationale de la paix (Trois tomes, ministère des Affaires étrangères, Martin Nijhoff: La Haye, 1908) tome premier, pp 604-619.

Article 8: « Les Puissances contractantes sont d'accord pour recommander l'application, dans les circonstances qui le permettent, d'une médiation spéciale sous la forme suivante.

En cas de différend grave compromettant la paix, les Etats en conflit choisissent respectivement une Puissance à laquelle ils confient la mission d'entrer en rapport direct avec la Puissance choisie d'autre part, à l'effet de prévenir la rupture des relations pacifiques.

Pendant la durée de ce mandat dont le terme, sauf stipulation contraire, ne peut excéder trente jours, les Etats en litige cessent tout rapport direct au sujet du conflit, lequel est considéré comme déféré exclusivement aux Puissances médiatrices. Celles-ci doivent appliquer tous leurs efforts à régler le différend.

En cas de rupture effective des relations pacifiques, ces Puissances demeurent chargées de la mission commune de profiter de toute occasion pour rétablir la paix. »

[11] Secrétaire général de la Société des Nations de 1920 à 1933.

[12] Arthur W. Rovine, *The First Fifty Years. The Secretary-General in World Politics 1920-1970* (A.W. Sijthoff: Leyden, 1970) p. 25.

contraignant, le médiateur étant plus apte à faire valoir ses vues puisqu'il est partie à la négociation. Dans la procédure de bons offices, les parties gardent sans doute le sentiment que leur liberté d'action est mieux préservée. Les bons offices ont un caractère discret. Souvent la forme des bons offices est celle de simples consultations informelles, tandis que la médiation de par son caractère plus officiel implique souvent qu'une certaine information soit donnée aux médias sur l'initiative elle-même de la médiation. L'informalité des bons offices peut prévenir des réactions prématurées, aussi bien celles des opinions publiques à l'intérieur des Etats concernés, que celles des Etats extérieurs à la négociation, qui pourraient faire des pressions dommageables. De plus, cette informalité de la méthode permet aux parties d'accepter ou de rejeter les suggestions de l'intermédiaire, sans que cela puisse être perçu comme un revers vers la voie d'une solution. Dans la médiation, on attend plus d'informations sur le déroulement de la négociation et il est par conséquent difficile d'en occulter les revers. Dans une médiation, à l'arrière plan existe le sentiment implicite général que la médiation doit réussir. L'échec sera ressenti d'autant plus vivement. En cas de bons offices, l'échec sera presque imperceptible, puisque la mission de bons offices apparaît à première vue comme une simple mise en contact des parties, ce qui permettra par ailleurs de nouvelles tentatives de bons offices. Quelquefois dans une véritable médiation, la solution peut apparaître, surtout au moment de son application effective, comme ayant été le fait du médiateur. Cela peut être pour l'une des parties, voire pour les deux ou pour leurs opinions publiques, à l'origine de ressentiments envers le médiateur ou envers la solution préconisée. En revanche, cela est beaucoup plus improbable dans une procédure de bons offices, en raison du fait que les parties au différend gardent une plus grande indépendance envers l'intermédiaire.

Souvent dans l'acte final qui met fin à une négociation, la partie médiatrice pourra signer, bien que cela n'ait pas un caractère absolu, ce document dont elle est souvent à l'origine. Dans une procédure de bons offices, l'intermédiaire s'effacera devant les parties qui seuls signeront le document final.

Une mission de bons offices peut se transformer en médiation d'une façon souvent presque imperceptible. Il n'y a en aucune façon incompatibilité entre les deux méthodes. La tierce partie, après être intervenue d'une façon indirecte dans la négociation, peut choisir une méthode plus directe, plus officielle. Dans la médiation comme dans les bons offices, il ne s'agit que de conseils qui n'ont pas de force obligatoire, comme le rappelle l'article 6 de la Convention de La Haye[13]. En raison même de cette proximité entre les deux procédures, les instruments juridiques n'ont

[13] Article 6 (Convention sur le règlement pacifique des différends, 1907): Les bons offices et la médiation, soit sur le recours des Parties en conflit, soit sur l'initiative des Puissances étrangères au conflit, ont exclusivement le caractère de conseil et n'ont jamais une force obligatoire.

pas toujours délimité d'une façon précise le domaine de la médiation et celui des bons offices.

## Les instruments juridiques.

Les traités et conventions internationales évoquent assez peu les bons offices. Des traités internationaux au dix-neuvième siècle purent prévoir, en cas de dissentiment entre les parties, le recours aux bons offices. C'est le cas du Protocole vingt-trois du 14 avril 1856 attaché au Traité de Paris du 30 mars 1856, qui mit fin à la guerre de Crimée.

> MM. les Plénipotentiaires n'hésitent pas à exprimer au nom de leurs Gouvernements, le vœu que les Etats entre lesquels s'élèverait un dissentiment sérieux, avant d'en appeler aux armes eussent recours, en tant que les circonstances l'admettraient, aux bons offices d'une puissance amie. MM. les Plénipotentiaires espèrent que les Gouvernements non représentés au Congrès s'associeront à la pensée qui a inspiré le vœu consigné au présent Protocole[14]

En fait, on remarque qu'il s'agit seulement de « vœu » et l'on ajoute « en tant que les circonstances l'admettraient ». Par conséquent, cette possibilité de recours aux bons offices, bien qu'elle fasse l'objet d'une stipulation particulière, ne saurait avoir aucune force obligatoire. Cette clause fut invoquée notamment lors de la Conférence des Ambassadeurs réunie à Constantinople (décembre 1876 - janvier 1877), dont l'objectif était d'empêcher une nouvelle confrontation entre l'Empire Ottoman et la Russie. D'une façon semblable, deux jours avant la guerre franco-prussienne de 1870, Lord Granville, le ministre britannique des affaires étrangères, recommanda par télégramme à Berlin et à Paris qu'avant l'usage de la force, un recours aux bons offices d'une puissance amie ou de puissances amies acceptables pour les deux parties, conformément au Protocole précité du Traité de Paris se référant aux bons offices, soit envisagé. Il déclara que le gouvernement britannique était prêt à jouer ce rôle si cela était souhaité par les parties. Cette tentative ne put aboutir.

La Convention de la Haye sur le règlement pacifique des différends de 1899 ainsi que celle de 1907[15] consacre un titre entier aux bons offices. Cependant il est

---

[14] Protocole vingt-trois (paragraphe 26) de la conférence tenue à Paris le 14 avril 1856, au sujet des principes de droit maritime, Congrès de Paris, entré en vigueur au moment de la signature, *Recueil des traités de la France* publié par Mr Jules de Clerc, Tome septième, 1856-1859 (éd. A.Durand et Pedone Lauriel, Paris, 1880) pp. 84-85. Le traité de Paris du 30 mars 1856 entra en vigueur le 28 juillet 1856, voire même recueil, pp. 59-68, (reproduction microfiches 1995).

[15] Convention sur le règlement pacifique des différends, La Haye, le 29 juillet 1899, entrée en vigueur le 4 septembre 1900, *Conférence internationale de la paix*, La Haye 18 mai-29 juillet 1899 (Imprimerie nationale: La Haye, 1899), pp. 224-234. Voir note 10 pour la Convention de 1907.

significatif de noter que bons offices et médiation sont regroupés sous le même titre. Les différences entre les deux conventions sont minimes. En ce qui concerne les bons offices et la médiation, seuls quelques termes changent. Il est utile de rappeler que ces deux conventions sont toujours en vigueur. Il est intéressant de souligner que ces deux Conventions présentent des descriptions détaillées des divers modes de règlement pacifique des différends. Ces Conventions n'ont pas été invalidées par des instruments juridiques ultérieurs dans la mesure où elles ne sont pas en conflit avec la Charte des Nations unies et son chapitre VI, qui aurait justifié une invalidation selon l'article 103[16]. Mais en fait, ces conventions ont plutôt un caractère complémentaire dans l'objectif de règlement pacifique des différends.

Les rédacteurs des Conventions ne niaient pas qu'il existât une différence entre bons offices et médiation, mais ils pensaient que la nature des deux procédures était suffisamment similaire pour pouvoir les regrouper sous le même titre. De plus, ils remarquaient que la Puissance qui avait offert ses bons offices pouvait parfois conduire les négociations entre les parties et par-là même faire œuvre de médiation[17].

Le précédent de la Société des nations peut aussi être instructif. L'article 12 du Pacte [18] qui marque l'engagement pour les membres de régler pacifiquement leurs différends, n'énonce pas les procédures traditionnelles de règlement des différends. Probablement les rédacteurs du Pacte n'ont pas voulu considérer que les tentatives de règlement d'un différend par des moyens non juridictionnels était un préalable nécessaire avant l'examen de la question par le Conseil, les moyens diplomatiques exigeant le consentement des parties l'article 12 a voulu ouvrir la possibilité à une partie de saisir le Conseil même sans le consentement de l'autre partie. Le Pacte s'est gardé par ailleurs de vouloir exclure les méthodes traditionnelles. Une rédaction antérieure de cet article 12 parlait de « différends qui n'ont pu se régler par les

---

[16] Article 103: En cas de conflit entre les obligations des Membres des Nations unies en vertu de la présente Charte et leurs obligations en vertu de tout autre accord international, les premières prévaudront.

[17] *Conférence internationale de la paix*, La Haye 18 mai-29 juillet 1899, (ministère des Affaires étrangères, La Haye, Imprimerie nationale, 1899), Annexe au Procès verbal de la séance du 25 juillet, p.102.

[18] Pacte de la Société des Nations, Versailles, incorporé aux traités de paix mettant fin à la première guerre mondiale, Traité de Versailles (28 juin 1919), Traité de Saint-Germain-en-Laye (19 septembre 1919), Traité de Trianon (2 juin 1920), Traité de Neuilly (27 novembre 1919), Traité de Sèvres (10 août 1920). Le Pacte est entré en vigueur le 10 janvier 1920 par l'entrée en vigueur du traité de Versailles.

Article 12: « Tous les Membres de la Société conviennent que s'il s'élève entre eux un différend susceptible d'entraîner une rupture, ils le soumettront, soit à la procédure de l'arbitrage ou à un règlement judiciaire, soit à l'examen du Conseil. Ils conviennent encore qu'en aucun cas ils ne doivent recourir à la guerre avant l'expiration d'un délai de trois mois après la décision arbitrale ou judiciaire ou le rapport du Conseil. Dans tous les cas prévus par cet article, la décision doit être rendue dans un délai raisonnable et le rapport du Conseil doit être établi dans les six mois à dater du jour où il aura été saisi du différend. »

moyens ordinaires de la diplomatie »[19] et cette formule est reprise par l'article 13 envisageant les différends pouvant trouver une solution juridictionnelle où il est alors question de différend ne pouvant « se régler de façon satisfaisante par la voie diplomatique ». Toutefois, le Pacte n'énumère pas ces méthodes diplomatiques.

La Charte des Nations unies en son article 33[20] du chapitre VI n'indique pas les bons offices dans la gamme des modes de règlement pacifique des différends. A Dumbarton Oaks, Soviétiques, Américains et Chinois ont déclaré que les différends devaient être résolus d'une façon pacifique. Toutefois, seul le projet américain énumère quelques unes des procédures traditionnelles de règlement pacifique des différends. A la conférence de San Francisco, les propositions de Dumbarton Oaks ont servi de base pour les discussions ultérieures. En ce qui concerne le règlement pacifique des différends, le paragraphe 3 de la section A du Chapitre VIII des propositions de Dumbarton Oaks[21] reprend d'une façon similaire le libellé du projet américain. Les délégations participant aux travaux du Comité 2 de la Troisième Commission, qui débattit à la Conférence de San Francisco de la question du règlement pacifique des différends, proposèrent quelques amendements. Toutefois, l'énumération des méthodes non-juridictionnelles de règlement pacifique des différends ne fit pas l'objet d'amples discussions. La délégation tchécoslovaque fit remarquer que le Conseil de la nouvelle organisation « ne devrait intervenir que lorsque tous les autres moyens de règlement pacifique, qu'il s'agisse de mesures prévues d'avance ou de mesures ad hoc acceptées par les parties intéressées, auront été épuisés »[22]. La délégation écuadorienne commenta l'importance de la procédure de conciliation et proposa d'ajouter un paragraphe visant à la création par l'Assemblée générale de commissions continentales ou régionales de conciliation[23].

---

[19] Voir à ce sujet Olof Hoijer, *Le Pacte de la Société des Nations, commentaire théorique et pratique* (éditions Spes : Paris, 1926), p. 215.

[20] Article 33: 1. Les parties à tout différend dont la prolongation est susceptible de menacer le maintien de la paix et de la sécurité internationales doivent en rechercher la solution, avant tout, par voie de négociation, d'enquête, de médiation, de conciliation, d'arbitrage, de règlement judiciaire, de recours aux organismes ou accords régionaux, ou par d'autres moyens pacifiques de leur choix. 2.Le Conseil de sécurité, s'il le juge nécessaire, invite les parties à régler leur différend par de tels moyens.

[21] Chapitre VIII, Section A, 3: Les parties à un différend dont la prolongation semble devoir menacer le maintien de la paix et de la sécurité internationales devraient s'engager, avant tout, à en rechercher la solution par la négociation, la médiation, la conciliation, l'arbitrage ou le règlement judiciaire, ou autres moyens pacifiques de leur choix. Le Conseil de sécurité devrait enjoindre aux parties de régler leur différend par de tels moyens. *Documents de la conférence des Nations unies sur l'organisation internationale*, San Francisco, 1945, Tome IV, Propositions de Dumbarton Oaks, commentaires et projets d'amendements, Doc1 G/1, (United Nations Information Organizations: New York, 1945) p.12.

[22] *Documents de la conférence des Nations unies sur l'organisation internationale*, San Francisco, 1945, Tome IV, Propositions de Dumbarton Oaks, commentaires et projets d'amendements, Doc.2, G/14(b), 2 mai 1945 (United Nations Information Organizations: New York 1945) p. 658.

[23] *Documents de la Conférence des Nations unies sur l'organisation internationale*, San Francisco, 1945, Commentaires et amendements aux propositions pour la création d'une organisation générale de la conférence de Dumbarton Oaks, présentés par la délégation de l'Equateur à la Conférence des Nations

La délégation chilienne proposa un amendement afin que l'enquête soit mentionnée dans l'énumération des procédures de règlement pacifique des différends[24]. Le paragraphe 1 de l'article 33 de la Charte reprit le libellé du paragraphe 3, section A, Chapitre VIII des propositions de Dumbarton Oaks, en y ajoutant une référence à l'enquête et au recours aux organismes ou accords régionaux. La question des bons offices n'a pas même été évoquée par les délégations à San Francisco. Il est certain que les délégations se sont concentrées sur le rôle du Conseil et de l'Assemblée de la nouvelle organisation en ce qui concerne le règlement pacifique des différends et non pas sur les méthodes traditionnelles de règlement pacifique des différends. Leland Goodrich qui était membre de la délégation des Etats-Unis à San Francisco dans son Commentaire de la Charte estime que l'article 33 n'a pas pour but de donner une liste exhaustive des modes de règlement pacifique des différends, car cela entraînerait une interprétation trop restrictive, le libellé du paragraphe 1 de l'article 33 de la Charte n'excluant par ailleurs aucune forme de procédure pouvant aboutir à un règlement d'un différend[25]. Ce commentaire rejoint la position de la délégation tchécoslovaque qui avait invoqué des « mesures ad hoc acceptées par les parties intéressées. » Bien que l'article 33 n'exclue en aucune façon la procédure de bons offices dans la mesure ou dans la recherche d'une solution, cette procédure peut-être déduite de l'expression « par d'autres moyens pacifiques de leur choix ». Toutefois, l'argument de Goodrich et Hambro n'est pas absolument convaincant. La procédure de bons offices ayant été traditionnellement importante dans la pratique des relations internationales, son absence à l'article 33 peut apparaître comme relativement énigmatique, d'autant plus que les autres moyens de règlement non juridictionnel des différends sont mentionnés, à moins de refuse,r comme le font certains auteurs, d'établir une distinction marquée entre bons offices et médiation. Cette omission des bons offices ne semble pas être véritablement involontaire, d'autant plus que pour les rédacteurs de la Charte, régler les différends par les procédures traditionnelles semble être la première procédure envisageable, les rédacteurs de la Charte ayant déplacé l'article 3 des propositions de Dumbarton Oaks à l'article 1 du Chapitre VI afin que le Chapitre commence par l'énumération

unies pour l'organisation internationale, Doc 2, G/7(p), 1 mai 1945, (United Nations Information Organizations: New York, 1945), Tome IV, pp. 556-557, voir aussi Tome V, Doc 2, G/7, 1 Mai, 1945, p.21 et voir aussi Tome XII, Commission III, Conseil de sécurité, Doc 356, III/2/11,p. 38 et Doc 351,111/2/10, 16 Mai 1945, p. 41.

[24] *Documents de la Conférence des Nations unies sur l'organisation internationale*, San Francisco, 1945, Tome IV , Propositions de Dumbarton Oaks, commentaires et projets d'amendements, Doc.2, G/7(i), p. 408. Voir aussi Tome XII, Commission III, Conseil de sécurité, Doc.992, III/2/27, 15 juin 1945, p. 114.

[25] Leland M. Goodrich and Edvard Hambro, *Charter of the United Nations, Commentary and Documents* (second edition, World Peace Foundation Boston. The London Institute of World Affairs, 1949), pp 240-242.

de ces procédures[26]. Par conséquent, il est probablement apparu aux rédacteurs de la Charte qu'il n'était pas nécessaire de mentionner les bons offices en raison du fait que cette méthode se confondait dans une large mesure avec la médiation ; à moins qu'il ne faille se résoudre à partager l'opinion de la délégation néo-zélandaise concernant la section A du chapitre VIII des propositions de Dumbarton Oaks (articles 33 à 38 de la Charte ) comme ayant « the doubtful distinction of being regarded as one of the most poorly drafted sections »[27]. Il est cependant intéressant de remarquer que dans le cadre des Nations unies, même si les bons offices ne sont pas mentionnés de façon explicite par la Charte, cette méthode a été particulièrement utilisée. Les missions de bons offices du Secrétaire général ou de ses envoyés spéciaux sont innombrables. La pratique a élargi d'une façon originale la portée du chapitre VI.

De plus, dès sa cinquième session, l'Assemblée générale rappelait l'importance des bons offices par la résolution 379(V)[28] qui proposait la création d'une commission permanente de bons offices en conformité avec l'esprit de l'article 13 paragraphe 1a traitant du développement international dans le domaine politique. Bien que cette commission n'eut qu'une existence éphémère, elle n'en était pas moins symbolique de l'importance que la communauté internationale attachait à cette procédure traditionnelle de règlement pacifique des conflits. A l'arrière plan, il y avait le sentiment de certains Etats que l'Assemblée générale et le Conseil de sécurité étaient des organes peu adaptés à l'élimination des causes initiales empêchant l'établissement de relations amicales entre les Etats et que par conséquent dans ce but, la création d'un organe subsidiaire serait souhaitable, d'autant plus que la compétence de cette commission étant limitée aux bons offices, elle ne mettrait pas en cause l'action du Conseil de sécurité. La Commission permanente de bons offices se composa de représentants de trois pays membres: l'Iran, la Suède et le Mexique. Elle n'eut pas réellement d'activité et décida de mettre fin, en 1951, à son existence, probablement en prenant pour hypothèse qu'une commission de bons offices pour des tâches spécifiques serait préférable à une commission permanente. Préalablement, une commission de bons offices ayant un but précis, joua un rôle dans une question particulière de décolonisation. Ce fut la commission de bons offices concernant l'Indonésie (1947-1948), prélude à une

[26] Conférence des Nations unies sur l'organisation internationale San Francisco, Compte rendu de la douzième séance du Comité III/2, Doc92, III/2/27, June 15, 1945, (United Nations Information Organizations: New York) Volume XII, p. 113.

[27] *Report on the Conference held at San Francisco*, (Department of External Affairs, New Zealand) p. 80. Voir aussi Ruth B.Russell, *A History of the United Nations Charter* (The Brookings Institution: Washington D.C, 1958) p. 657.

[28] AG rés. 379 (V) du 17 novembre 1950.

conférence (23 août - 2 novembre 1949) qui permit le transfert de souveraineté des Pays-Bas à la nouvelle République indonésienne.[29]

La déclaration de Manille sur le règlement pacifique des différends, adoptée par une résolution de l'Assemblée générale le 15 novembre 1982[30], est sans doute le signe d'une tendance voulant bien marquer à nouveau la spécificité des bons offices. En effet, le paragraphe 5 de la première section[31] de la résolution énumère les différentes procédures de règlement pacifique des différends. Dans cette énumération les bons offices ne sont pas confondus avec la médiation. Les bons offices sont détachés des autres modes de règlement.

Le document sur le recours à une commission de bons offices, de médiation et de conciliation, présenté par le Comité spécial de la Charte des Nations unies et du raffermissement du rôle de l'Organisation[32] et annexé à la décision 44/415 de l'Assemblée générale du 4 décembre 1989, fait apparaître la même tendance. Les Nations unies donnent une certaine considération à la procédure de bons offices, ne l'assimilant pas à la médiation. Le paragraphe 7[33] traite des bons offices et le paragraphe 8[34] de la médiation. Les fonctions des deux procédures sont très

---

[29] *Yearbook of the United Nations 1950* (Department of Public Information, United Nations: New York), p.17 et pp. 204-207 et *Resolutions adopted by the General Assembly during the period 19 September to 15 December 1950* (General Assembly, Official Records: Fifth Session, Supplement 20(A/1775)) p.13, *Yearbook of the United Nations 1951*, (Department of Public Information, United Nations: New York), pp. 13 et 35.

[30] A/RES/37/10. Déclaration de Manille sur le règlement des différends internationaux.

[31] I-Paragraphe 5: Les Etats doivent rechercher de bonne foi et dans un esprit de coopération une solution rapide et équitable de leurs différends internationaux par n'importe lequel des moyens suivants: négociation, enquête, médiation, conciliation, arbitrage, règlement judiciaire, recours à des accords ou organismes régionaux, ou par d'autres moyens pacifiques de leurs choix, y compris les bons offices. En recherchant cette solution, les parties conviendront des moyens pacifiques qui seraient appropriés aux circonstances et à la nature du différend.

[32] Cette proposition d'une commission avait été introduite par le Nigeria, les Philippines et la Roumanie en 1983. Cette proposition avait par la suite été examiné chaque année par le Comité spécial jusqu'à sa présentation à l'Assemblée générale en décembre 1989. Le Comité spécial avait été établi par la résolution 3499 (XXX) du 15 décembre 1975.

[33] Paragraphe 7: « After taking note of the elements of the respective dispute, on the basis of submissions made by the States parties and, as appropriate, of information provided by the Secretary-General, the commission in performing its good offices functions will seek to bring the parties to enter immediately into direct negotiations for the settlement of the dispute, or to resume such negotiations or to resort to another means of peaceful settlement.

If the States parties to the dispute so request, the commission will seek to establish the aspects on which the States parties agree, as well as their differences of opinion and perception, and to elucidate the elements related to the dispute with a wiew to making suggestions for the beginning or the resuming of negotiations, including their framework and stages, as well as problems to solve. »

[34] Paragraphe 8: « If the States parties to the dispute request the commission, at any time, to mediate, the commission will offer to the parties proposals which it deems adequate for facilitating the

nettement délimitées. Le rôle de la commission des bons offices, tel que l'envisage le paragraphe 7, est très traditionnel, puisqu'il s'agit par cette procédure de mettre en contact les deux parties afin d'ouvrir une négociation ou bien de permettre la reprise d'une négociation qui serait interrompue. Le paragraphe 7 mentionne ensuite la possibilité pour l'intermédiaire, s'il obtient le consentement des parties, d'établir les aspects sur lesquels les parties s'accordent aussi bien que les aspects sur lesquels des différences existent et également d'élucider les éléments de ce différend. La médiation, telle qu'elle est envisagée par le paragraphe 8, implique des propositions de la part du médiateur durant la négociation jusqu'à l'accord final. La médiation est constante tout au long de la négociation, alors que la commission dans la procédure de bons offices devrait permettre l'ouverture de la négociation et ne pas aller au-delà des suggestions. Il est intéressant de remarquer que ce projet rejoint la conception originelle des bons offices, ce qui laisse à penser que cette distinction n'apparaît pas fallacieuse, mais qu'elle permet d'utiliser la procédure la plus adéquate en fonction de la nature du différend. Cette commission ne devait pas avoir un caractère permanent, mais être établi pour chaque cas particulier. Pour les bons offices, la médiation ou la conciliation le choix des membres de la commission restait le même. Trois représentants d'Etats extérieurs au différend devaient être nommés par les Etats parties au différend ou avec leur accord par le Président du Conseil de sécurité, le Président de l'Assemblée générale ou le Secrétaire général, les membres pouvant agir en tant qu'intermédiaires pour les bons offices, médiateurs ou conciliateurs suivant la forme de procédures que l'on adopterait. Dans l'esprit des rédacteurs, cette commission allait dans le sens d'une rationalisation des procédures des Nations unies, sans vouloir cependant remettre en cause ou minimiser le rôle du Secrétaire général ou de ses envoyés spéciaux. Le Comité spécial considérait que cette proposition pouvait donner des indications utiles et être un élément de plus dans la voie des règlements pacifiques des différends.

Dans le cadre régional, le procédé de bons offices a fait l'objet d'articles dans des conventions sur le règlement pacifique des différends. A cet effet particulièrement significatif fut le Traité Interaméricain sur les Bons Offices et la Médiation de 1936[35] ou le chapitre II du Pacte de Bogota[36] de 1948. Le Pacte de

negotiations and seeking through mediation to bring closer their positions until an agreement is reached. »

[35] Traité Interaméricain sur les Bons offices et la Médiation, adopté par la conférence interaméricaine pour le maintien de la paix, Buenos-Aires, le 23 décembre 1936, entré en vigueur pour les Etats parties suivant l'ordre de ratification respective en conformité avec l'article VIII dudit traité, pour les Etats-Unis d'Amérique le 29 juillet 1937, pour Cuba le 1 mars 1938, le traité a été enregistré à la Société des nations le 13 mai 1938, les effets de ce traité prirent fin par l'entrée en vigueur du Pacte de Bogota conformément à l'article LVIII du Pacte, *Société des Nations-Recueil des Traités*, No 4353, volume CLXXXVIII, pp. 75-97.

[36] Traité américain de règlement pacifique, Pacte de Bogota, Bogota, le 30 avril 1948, entré en vigueur le 6 mai 1949 pour le Mexique et le Costa Rica, pour les autres Etats suivant l'ordre de dépôts de leurs

Bogota en son chapitre deux marque très explicitement la délimitation entre bons offices et médiation. Les articles IX et X[37] estiment que la mission essentielle des bons offices est de rapprocher les parties, ce qui n'exclu pas pour la partie ayant offert ses bons offices d'être présente pour la négociation qui suit ce rapprochement. En revanche, les articles XI et XII[38] traitant de la médiation considèrent que le différend doit être soumis aux parties médiatrices et que le rôle des médiateurs est d'assister les parties au différend de la façon la plus directe. Une analyse plus approfondie des conditions d'exercice des bons offices pourra mettre en lumière quelques éléments de cette distinction.

# Les conditions d'exercice des bons offices.

## Les différents degrés de bons offices.

Il y a réellement une ambiguïté, voire une certaine confusion, dans cette notion de bons offices, en raison du fait qu'il existe différents degrés de bons offices.

Une distinction doit être établie entre les bons offices d'ordre technique et les bons offices d'ordre politique, même si cette distinction n'est pas toujours judicieuse, car souvent les bons offices à caractère technique ont déjà un caractère politique. Par exemple si un Etat invite des parties à un différend à se rencontrer sur son territoire, sans prendre aucune part aux conversations diplomatiques, il s'agit alors de bons offices d'ordre technique. Le degré minimum des bons offices consiste pour un Etat à inviter les parties à une conférence ou même à organiser cette conférence sans intervention de cet Etat hôte sur le sujet de la négociation. Les

ratifications respectives conformément à l'article LIII du Traité, *Nations Unies-Recueil des Traités*, No 449, vol 30, 1949, pp. 55-116.

37 Article IX. La procédure des bons offices consiste dans les démarches d'un ou de plusieurs gouvernements américains, ou d'un ou de plusieurs citoyens éminents de l'un quelconque des Etats américains étrangers à la controverse, en vue de rapprocher les parties en leur offrant la possibilité de trouver directement une solution adéquate; Article X. Dès que le rapprochement des parties aura été réalisé et que les négociations directes auront repris, la mission de l'Etat ou du citoyen qui avait offert ses bons offices ou accepté l'invitation de s'interposer sera considérée comme terminée; cependant, par accord des parties, le dit Etat ou le dit citoyen pourra être présent aux négociations.

38 Article XI. La procédure de médiation consiste à soumettre le différend soit à un ou plusieurs gouvernements américains, soit à un ou plusieurs citoyens éminents de l'un quelconque des Etats américains étrangers au différend. Dans l'un et l'autre cas le ou les médiateurs seront choisis d'un commun accord par les parties; Article XII. Les fonctions du ou des médiateurs consisteront à assister les parties dans le règlement de leur différend de la manière la plus simple et la plus directe, en évitant les formalités et faisant en sorte de trouver une solution acceptable. Le médiateur s'abstiendra de faire aucun rapport et, en ce qui le concerne, les procédures seront strictement confidentielles.

bons offices d'ordre technique peuvent se limiter à la transmission de messages. Par exemple en 1898, après trois mois de guerre entre les Etats-Unis et l'Espagne, l'Ambassadeur de France à Washington transmet un message d'un ministre d'Etat espagnol demandant quelles sont les conditions pour mettre fin au conflit. Le Président des Etats-Unis donna sa réponse à Madrid par l'intermédiaire du même Ambassadeur. Le gouvernement français a parlé à ce sujet de bons offices. Les bons offices consistent aussi pour un pays à s'occuper des intérêts d'un autre pays dans un pays tiers, si dans ce pays tiers ce premier pays n'entretient plus de relations diplomatiques. Les bons offices dans le sens de prendre en charge les intérêts d'un Etat tiers se trouvent couverts par les articles 45 et 46 de la convention de Vienne sur les relations diplomatiques de 1961[39] et par l'article 8 de la convention de Vienne sur les relations consulaires [40] et en temps de guerre par les conventions de Genève de 1949, en particulier les articles 8 et 11 des trois premières conventions et les articles 9 et 12 de la quatrième convention[41]. Dans cette catégorie de bons offices à titre humanitaire, on pourrait considérer le rôle du Secrétaire général pour atténuer de différentes manières les effets d'un conflit[42]. Les bons offices à titre humanitaire sont un élément important de ce concept que l'on a fréquemment évoqué de construction de la paix. En fait, les bons offices à titre humanitaire ont le plus

[39] Convention de Vienne sur les relations diplomatiques, Vienne, le 18 avril 1961, entrée en vigueur le 24 avril 1964, *Nations Unies-Recueil des traités*, No.7310-7312, vol 500, pp. 95-239; Article 45. En cas de rupture des relations diplomatiques entre deux Etats, ou si une mission est rappelée définitivement ou temporairement: a. l'Etat accréditaire est tenu, même en cas de conflit armé, de respecter et de protéger les locaux de la mission, ainsi que ses biens et ses archives; b. l'Etat accréditant peut confier la garde des locaux de la mission, avec les biens qui s'y trouvent, ainsi que les archives, à un Etat tiers acceptable pour l'Etat accréditaire; c. l'Etat accréditant peut confier la protection de ses intérêts et de ceux de ses ressortissants à un Etat tiers acceptable pour l'Etat accréditaire; Article 46. Avec le consentement préalable de l'Etat accréditaire, et sur demande d'un Etat tiers non représenté dans cet Etat, l'Etat accréditant peut assumer la protection temporaire des intérêts de l'Etat tiers et de ses ressortissants.

[40] Convention de Vienne sur les relations consulaires, Vienne, le 24 avril 1963, entré en vigueur le 19 mars 1967, *Nations Unies-Recueil des Traités*, No 8638-8640, vol. 596, pp. 262-512; Article 8. Exercice de fonctions consulaires pour le compte d'un Etat tiers. Après notification appropriée à l'Etat de résidence et à moins que celui-ci ne s'y oppose, un poste consulaire de l'Etat d'envoi peut exercer des fonctions consulaires dans l'Etat de résidence pour le compte d'un Etat tiers.

[41] Les conventions de Genève, furent signées à Genève 12 août 1949, entrèrent en vigueur le 21 octobre 1950, *Nations Unies-Recueil des Traités*, vol 75, 1950. Convention (I), pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne, No 970, pp. 31-83, Convention (II), pour l'amélioration du sort des blessés et des malades et des naufragés des forces armées sur mer, No 971, pp. 85-133, Convention (III) relative au traitement des prisonniers de guerre, No 972, pp. 135-285, Convention (IV) relative à la protection des personnes civiles en temps de guerre, No 973, pp. 287-468. Les articles 9 et 12 de la quatrième convention de Genève sont respectivement identiques aux articles 8 et 11 des trois premières conventions, l'article 9 a néanmoins omis la dernière phrase de l'article 8 des trois premières conventions.

[42] Les bons offices du Secrétaire général à titre humanitaire ont été analysés dans l'étude de B.G. Ramcharan, *Humanitarian Good offices in International Law. The Good Offices of the United Nations Secretary-General in the Field of Human Rights,* (Martinus Nijhoff Publishers: The Hague 1983), p. 220.

souvent des implications politiques indéniables. On pourrait donner en exemple le rôle de Dag Hammarskjöld auprès du gouvernement de la République Populaire de Chine de décembre 1954 à janvier 1955, qui a permis la libération de pilotes américains qui étaient prisonniers en Chine[43]. En fait, cette mission extrêmement délicate de bons offices à titre humanitaire avait déjà un caractère éminemment politique. En décembre 1954, le gouvernement de la République Populaire de Chine déclara qu'il détenait des pilotes américains qu'il avait fait prisonniers. Cette situation survenait dans un contexte politique tendu. La convention d'armistice mettant fin à la guerre de Corée avait été signée à Pan Mun Jon le 27 juillet 1953. Pour les Etats-Unis le cas relevait de l'accord d'armistice coréen demandant le rapatriement des prisonniers de guerre. Le gouvernement de la République Populaire de Chine n'étant pas partie à cet accord considérait qu'il ne pouvait en aucune façon s'appliquer à ce cas. Il n'y avait pas de communication entre le gouvernement de la République Populaire de Chine et celui des Etats-Unis d'Amérique. Les Etats-Unis ne pouvaient négocier avec la Chine, car cela aurait impliqué une certaine forme de reconnaissance même d'une manière minimale de leur part, ce qu'il n'envisageait pas alors. Au début de janvier 1955, le Secrétaire général se rendit à Pékin où il fut reçu par le Premier ministre Zhou Enlai. Cette mission était importante dans la mesure où elle brisait l'isolement du gouvernement de la République Populaire de Chine. Des conversations entre Dag Hammarskjöld et Zhou Enlai durèrent quatre jours et se terminèrent par un bref communiqué commun indiquant que ces conversations avaient été utiles[44]. Le premier août, le gouvernement de la République Populaire de Chine annonça que les pilotes seraient relâchés par déférence envers le Secrétaire général. En fait, Dag Hammarskjöld avait réussi sa mission en la présentant comme une mission strictement humanitaire et en évitant de faire des recommandations publiques sur son issue. En réalité, en jouant un rôle d'intermédiaire entre Pékin et Washington, ses suggestions officieuses eurent pour résultat d'amener les deux parties antagonistes à déclarer séparément, en juillet 1955, qu'elles étaient prêtes à ouvrir des conversations directes à Genève, donc mettre fin à cette absence totale de communication entre les deux gouvernements. Une des raisons de ce succès de Hammarskjöld tient en partie à cette forme peu spectaculaire d'intervention auquel il était attaché et qui en fait caractérise la médiation officieuse. La ligne est donc quelquefois difficile à établir entre bons offices à caractère humanitaire et bons offices d'ordre politique.

Il faut souligner toutefois que les bons offices d'ordre politique interviennent sur le fond du différend et la tierce partie offre alors des propositions, des suggestions pouvant rapprocher les points de vue et avoir dans certains cas une

[43] Leon Gordenker, *The UN Secretary General and the Maintenance of Peace*, (Columbia University Press: New York, 1967) pp. 177-182.

[44] Arthur Rovine, *The First Fifty Years*, voir *ci-dessus* note 12, pp. 279-281.

valeur décisive. Il ne faudrait pas considérer les bons offices dans leur degré le plus élevé, c'est à dire les bons offices d'ordre politique, comme on l'a souvent fait, comme une forme inférieure de médiation. La méthode est différente, ce qui n'empêche pas l'intermédiaire de jouer quelquefois un rôle plus important et peut-être dans certains cas plus efficace quant au résultat à obtenir que le rôle qu'il aurait pu jouer dans une médiation officielle. Il est vrai qu'apparemment l'intervenant semble moins impliqué dans la négociation dans les bons offices politiques que dans la médiation. Toutefois, ce sentiment n'est qu'apparent.

Le rôle de la tierce partie dans une mission de bons offices peut être décisif, surtout si la puissance de l'Etat qui offre, voire qui organise, cette mission de bons offices est considérable. Par exemple à la conférence de Washington en 1922, les conversations sur le Shandong entre la Chine et le Japon se sont tenues en présence d'observateurs britanniques et américains qui ont offert leurs bons offices[45]. La volonté de négocier des parties chinoises et japonaises n'était pas absolument absente. Toutefois, la Chine ne pouvait concevoir une négociation directe, car du fait de la supériorité militaire du Japon, la solution qui en aurait été l'issue serait apparue comme dictée par le Japon. La méfiance était trop grande entre les parties antagonistes pour envisager une véritable médiation. Les parties ne voulaient pas que la solution puisse apparaître comme imposée par l'intermédiaire, par conséquent, seule la procédure de bons offices semblait plus acceptable. La simple présence de l'intermédiaire peut souvent avoir un aspect bénéfique sur le déroulement d'une négociation. En particulier l'aspect émotionnel de la confrontation peut en être atténué[46]. En fait, par leur seule présence les observateurs jouèrent déjà un rôle afin d'apaiser les tensions. John MacMurray qui fut l'un des observateurs américains lors de ces « conversations » nota l'originalité de la méthode « the innovation of providing neutral observers, performing a function analogous to that of a catalytic agent in chemical processes, originated a diplomatic technique which may again have opportunities of usefulness in cases where settlement is difficult but not in itself repugnant to either party »[47]. Les suggestions des observateurs ne pouvaient être avancées qu'à la demande de la délégation chinoise ou japonaise. Les observateurs à la table de négociation constituaient un premier niveau de bons offices. En dehors de la salle de réunion, le Secrétaire d'Etat Charles Evans Hughes et Lord Balfour, le chef de la délégation britannique à la conférence

---

45 Pour suivre le déroulement de cette négociation, *Conversations between the Chinese and Japanese representatives in regard to the Shantung Question, Minutes prepared by the Japanese Delegation* (Government Printing Office: Washington, 1922) p. 396 et *Conversations between the Chinese and Japanese representatives in regard to the Shantung Question, Minutes prepared by the Chinese Delegation* (Government Printing Office: Washington, 1923) p. 74.

46 Oran R. Young, *The Intermediaries, Third Parties in International Crises* (Princeton University Press: Princeton, New Jersey, 1967) p. 36.

47 Lettre de MacMurray à Russell Fifield du 17 octobre 1952 dans Russell H. Fifield « Secretary Hughes and the Shantung question », *Pacific Historical Review*, volume 23, 1954, p. 377.

de Washington, formaient un ultime recours, une sorte de second niveau de bons offices. Cette procédure créative de bons offices a permis de rapprocher les points de vue. Britanniques et Américains ont conseillé les parties dans des conversations privées et leur ont fait savoir qu'il était souhaitable de trouver une solution et même parmi les solutions présentées par les parties ils ont indiqué celle qui leur semblait être la meilleure alternative. Toutefois, leurs suggestions ou conseils n'avaient qu'un caractère de recommandations. Ils ne proposèrent pas de plan ou de solution. La solution est venue des parties elles-mêmes. En réalité, s'ils ont joué un rôle décisif dans la négociation par leurs suggestions, cela tenait plus au poids politique considérable que représentaient alors l'Empire britannique et les Etats-Unis d'Amérique. Dans certains cas, les grandes puissances, en usant de leur influence, peuvent grandement contribuer à trouver des solutions, mais en revanche, on a pu penser que les grandes puissances étaient trop impliquées dans les litiges pour qu'elles puissent faire abstraction de leurs intérêts. Le problème se pose alors de savoir dans quelles conditions peut se faire une offre de bons offices.

## L'offre de bons offices.

Les bons offices peuvent être offerts par un Etat ou une organisation internationale de sa propre initiative ou bien elles peuvent être demandées par une partie au litige ou bien par les deux parties au litige. Dans le cadre des Nations unies, c'est le Secrétaire général qui offre ses bons offices, quelquefois sous la responsabilité de l'Assemblée générale ou du Conseil de sécurité, ce que nous indique l'article 98[48] de la Charte qui stipule que le Secrétaire général remplit toutes les autres fonctions dont il est chargé par ses organes. Lorsque les organes des Nations unies prennent, par une résolution, l'initiative d'une mission de bons offices, le Secrétaire général devient le représentant de la volonté de l'organe. Il est dans l'obligation alors de suivre les lignes préétablies par la résolution. Dans une mission de bons offices traditionnelle, il n'y a pas de lignes préétablies. La solution ne proviendra que des parties elles-mêmes. Les bons offices, lorsqu'ils sont le résultat d'une résolution d'un organe des Nations unies, prennent donc une forme nouvelle qui nécessiterait peut-être une expression nouvelle, tout en notant que les bons offices émanant d'une résolution ne sont toutefois pas la médiation. Le médiateur peut éventuellement présenter un plan, en discuter avec les parties, ce plan pouvant être constamment remanié de telle façon que l'accord final puisse être très éloigné des propositions initiales, tandis qu'on ne peut s'éloigner de l'objectif d'une recommandation d'un organe des

[48] Article 98: Le Secrétaire général agit en cette qualité à toutes les réunions de l'Assemblée générale, du Conseil de Sécurité, du Conseil économique et social et du Conseil de tutelle. Il remplit toutes autres fonctions dont il est chargé par ces organes. Il présente à l'Assemblée générale un rapport annuel sur l'activité de l'Organisation.

Nations unies. Les bons offices à la demande d'un organe des Nations unies ont certaines particularités. On peut tout de même considérer que cette procédure reste dans le cadre des bons offices dans la mesure où il s'agit de rapprocher les points de vue pour obtenir le but recherché par la résolution et non pas de négocier avec les parties pour obtenir un accord acceptable.

En fait, la pratique a montré que le Secrétaire général pouvait aussi exercer de sa propre initiative une mission de bons offices, sans la nécessité d'une approbation formelle du Conseil de Sécurité ou de l'Assemblée générale. Les bons offices du Secrétaire général ne sont pas envisagés par la Charte des Nations unies. Bien que l'article 7 paragraphe 1[49] de la Charte mentionne le Secrétariat au même titre que les autres organes des Nations unies, ce qui ne peut que renforcer la position du Secrétaire général, l'article 99[50], s'il permet au Secrétaire général d'attirer l'attention du Conseil de sécurité sur telle ou telle question, ne mentionne pas l'offre de bons offices. Attirer l'attention du Conseil de sécurité ne signifie en aucune façon engager une mission de bons offices. Seul une interprétation quelque peu fallacieuse pourrait conclure que cet article permet au Secrétaire général un droit d'initiative, tel qu'une mission de bons offices, pour maintenir la paix. Il est vrai cependant que la pratique a autorisé le Secrétaire général à jouer un rôle que la Charte n'avait pas explicitement prévu. Dag Hammarskjöld, tout en reconnaissant l'importance du Conseil de sécurité et de l'Assemblée générale, écrivait néanmoins en 1959 en faisant allusion aux missions de bons offices de ses envoyés spéciaux: « The steps to which I refer here have been taken with the consent or at the invitation of governments concerned, but without formal decisions of other organs of the United Nations. Such actions by the Secretary-General fall within the competence of his office and are, in my view, in other respects also in strict accordance with the Charter, when they serve its purpose »[51]. L'idée prévalant dans la pratique semble bien celle qu'indique Hammarskjöld. Si ces missions ne sont pas conformes à la lettre de la Charte par contre elles se rattachent à son esprit et à son but principal le maintien de la paix. Les paragraphes vingt et vingt et un[52] de la « Déclaration sur la prévention et

[49] Article 7: 1-Il est créé comme organes principaux de l'Organisation des Nations unies: une Assemblée générale, un Conseil de sécurité, un Conseil économique et social, un Conseil de tutelle, une Cour internationale de Justice et un Secrétariat.

[50] Article 99: Le Secrétaire général peut attirer l'attention du Conseil de Sécurité sur toute affaire qui, à son avis, pourrait mettre en danger le maintien de la paix et de la sécurité internationales.

[51] Wilder Foote ed, *Dag Hammarskjöld. Servant of Peace: A selection of his Speeches and Statements*, New York, Harper 6 Row, 1962, pp. 226-227.

[52] Paragraphe 20: Le Secrétaire général devrait, si un Etat ou des Etats directement concernés par un différend ou une situation s'adressent à lui, répondre rapidement en invitant instamment les Etats à rechercher une solution ou un ajustement par les moyens pacifiques de leur choix conformément à la Charte et en offrant ses bons offices ou d'autres moyens à sa disposition comme il le juge approprié.

Paragraphe 21: Le Secrétaire général devrait envisager d'entrer en rapport avec les Etats directement concernés par un différend ou une situation pour tenter d'empêcher que le différend ou la situation en question ne mette en danger le maintien de la paix et de la sécurité internationales.

l'élimination des différends et des situations qui peuvent menacer la paix et la sécurité internationales et sur le rôle de l'Organisation des Nations unies dans ce domaine » (cette déclaration fut adoptée par l'Assemblée générale et annexée à la résolution 43/51 du 5 décembre 1988) ont réaffirmé la reconnaissance de ce pouvoir d'initiative du Secrétaire général. Toutefois, une offre de mission de bons offices du Secrétaire général en opposition implicite ou explicite à un membre ou à des membres permanents du Conseil de Sécurité semble extrêmement contestable. L'article 24 en son paragraphe 1[53] affirme la prééminence du Conseil de Sécurité en ce qui concerne le maintien de la paix. Quelquefois le Conseil de Sécurité a dû rappeler au Secrétaire général les prérogatives du Conseil en la matière. Pechota évoque un cas en mars 1969 où le Secrétaire général U.Thant avait informé le Président en exercice du Conseil de Sécurité de son intention d'entreprendre une initiative de bons offices en Guinée Equatoriale. Le Président en informa alors le Conseil de Sécurité. Le Secrétaire général en montra une grande irritation. Il considérait qu'il n'avait fait part de cette initiative qu'à titre informatif ne souhaitant pas que le Conseil de Sécurité en tant que tel en soit informé. Le Président devait alors rappeler au Secrétaire général la responsabilité principale du Conseil en ce qui concerne les questions relatives au maintien de la paix. U. Thant pensait toutefois que le Secrétaire général pouvait exercer ses bons offices sans demander l'autorisation d'un organe des Nations unies ou même sans en informer cet organe.[54] Pour éviter qu'une mission de bons offices du Secrétaire général ne rencontre des obstacles insurmontables ou ne soit vouée à l'échec, des consultations avec les membres du Conseil, plus particulièrement les membres permanents, semblent indiquées ou même indispensables. Une certaine approbation tacite de l'Assemblée générale ou d'une majorité de ses membres à l'occasion d'une initiative personnelle du Secrétaire général, quoique moins déterminante que celle du Conseil de sécurité, peut être importante pour renforcer l'initiative du Secrétaire général, apparaissant alors comme conforme à la volonté de la communauté internationale. Le Secrétaire général n'est pas un organe extérieur aux Nations unies. Son pouvoir est tributaire dans une large mesure des autres organes de l'organisation et des membres qui les composent. Il y a un équilibre et une hiérarchie qui ne sauraient être remis en cause sans bouleverser tous les fondements de l'organisation conçus par la Charte. Par-là même, cela différencie une mission de bons offices dans le cadre des Nations unies d'une mission de bons offices prise sur l'initiative d'un Etat extérieur au différend ou d'une personnalité indépendante qui pourraient agir avec une plus grande liberté d'action.

[53] Article 24: 1-Afin d'assurer l'action rapide et efficace de l'Organisation, ses Membres confèrent au Conseil de sécurité la responsabilité principale du maintien de la paix et de la sécurité internationales et reconnaissent qu'en s'acquittant des devoirs que lui impose cette responsabilité le Conseil de sécurité agit en leur nom.

[54] Pechota, *The Quiet Approach*, voir *ci-dessus*, note 2, pp. 35-36.

Quelquefois les bons offices ont pour dessein une reprise de contact entre deux parties, après l'échec d'une négociation directe. La tentative infructueuse du Secrétaire général Kofi Annan de renouer le dialogue entre l'Autorité palestinienne et le Gouvernement de l'Etat d'Israël, en octobre 2000, en est un exemple. Le Secrétaire général avait effectué une mission de bons offices de sa propre initiative. L'objectif du Secrétaire général était explicite « le retour à la table de négociations », tout en ayant conscience de « l'issue incertaine » de cette mission[55]. Le Secrétaire général ne présentait pas aux parties une solution de la crise israélo-palestinienne ou un plan de médiation, mais il s'agissait exclusivement de conversations informelles qui auraient pu ouvrir la voie à une négociation. Souvent les bons offices du Secrétaire général se confondent avec ce que Dag Hammarskjöld appelait « the diplomacy of reconciliation »[56].

Les bons offices peuvent avoir une fonction préventive, afin d'empêcher l'aggravation d'un différend, comme nous le remémore l'article 2 de la Convention de la Haye pour le règlement pacifique des conflits internationaux[57], puisqu'il est question de bons offices « avant d'en appeler aux armes ». Cette mission de bons offices peut alors prendre la forme de conversations confidentielles, pouvant être des éléments permettant d'atténuer une controverse sans cela susceptible peut-être de conduire vers une situation irréversible. En fait, certains différends ont un caractère difficilement réductible, en raison de la profondeur du désaccord qui touche à des questions fondamentales, comme la survie d'un groupe ou la remise en cause d'une entité étatique. On ne peut guère envisager un règlement de ce genre de controverse, sans une très longue négociation dans le temps, impliquant de nombreux échecs et de nouvelles tentatives. Il y a une différence entre le fait de contrôler une crise et le fait de résoudre en profondeur toutes les causes d'un litige grave[58]. Dans ces circonstances une mission de bons offices du Secrétaire général peut empêcher qu'une crise ne dégénère en conflit armé ou en émeutes, s'il s'agit d'une situation interne. Il serait alors plus difficile de remettre les parties sur la voie d'un règlement global du différend, en raison de l'effet toujours extrêmement déstabilisateur d'une crise ou d'une tension entre deux entités, dont la controverse a des causes profondes. Empêcher une crise de s'aggraver par une mission de bons offices est sans doute une tâche très importante mais dont l'importance est difficile à évaluer. M. Kofi Annan le rappelait dans son rapport du 7 juin 2001 sur la

---

[55] Voir les communiqués de presse suivants du 9 octobre 2000:SG/SM/7579, la Déclaration prononcée par le Secrétaire général SG/SM/7582 et le rapport du Secrétaire général à l'Assemblée générale et au Conseil de sécurité, 22 novembre 2000, A/55/639-S/2000/1113.

[56] Voir Vratislav Pechota, *The Quiet Approach*, *ci-dessus* note 2, p. 3.

[57] Article 2 de la Convention de 1907: En cas de dissentiment grave ou de conflit, avant d'en appeler aux armes, les Puissances contractantes conviennent d'avoir recours, en tant que les circonstances le permettront, aux bons offices ou à la médiation d'une ou de plusieurs Puissances amies.

[58] Sur cette question voir Oran R.Young, *The Intermediaries, Third Parties in International Crises*, *ci-dessus* note 46, p. 35.

prévention des conflits armés: « A mon avis, si mon intervention est de plus en plus sollicitée pour ce type d'action préventive, c'est parce que l'on reconnaît que le Secrétaire général peut être efficace lorsqu'il mène une action discrète, sans se faire remarquer du public, même si les résultats ne sont pas toujours apparents ni faciles à évaluer »[59].

Dans certains cas exceptionnels, on peut envisager qu'un Etat offre ses bons offices à la demande d'une seule partie à un différend, l'essentiel d'une telle démarche étant de présenter à l'autre partie les motivations de son adversaire dans le but d'ouvrir des négociations. L'Etat qui offre ses bons offices peut donc inviter une partie à prendre en considération les vues de la partie adverse et adopter une certaine ligne qui facilitera l'ouverture de négociations. La Charte de l'Organisation des Etats Américains envisage en son article 85[60] la possibilité pour une partie à un litige de saisir unilatéralement le Conseil de l'Organisation pour obtenir ses bons offices. Toutefois, cette disposition ne fit pas l'unanimité. Certains Etats émirent des réserves. Le Pérou fit valoir, qu'en conformité au droit international, la procédure de bons offices impliquait le consentement des parties et que par conséquent, la portée de l'article 84 devait être comprise de cette façon. Au moment de l'adoption du Protocole de Cartegena de Indias, le gouvernement péruvien formula la réserve suivante: « Also, in accordance with international law, good offices are a means of peaceful settlement whose scope has been specified in international treaties, including the Pact of Bogotá. This procedure assumes the consent of the parties, and it is in this sense that the Delegation of Peru understands the powers conferred upon the Permanent Council in the new article 84 of this Protocol »[61]. Dans une rédaction de l'article 85, antérieure aux amendements du Protocole de Cartagena de Indias, les bons offices du Conseil Permanent de l'O.E.A ne pouvaient intervenir

[59] Rapport du Secrétaire général à l'Assemblée générale et au Conseil de sécurité, 7 juin 2001, A/55/985-S/2001/574, paragraphe 52, p. 15.

[60] La Charte de l'O.E.A signée à Bogota le 30 avril 1948, entrée en vigueur le 13 décembre 1951, *Nations Unies-Recueil des Traités*, No 1609, vol. l19 (1952), modifiée par les amendements du Protocole de Buenos Aires de 1967, par le Protocole de Cartagena de Indias de 1985, par le Protocole de Washington de 1992 et par le Protocole de Managua de 1993, entrée en vigueur sous sa nouvelle forme le 25 septembre 1997 (voir « Charte de l'organisation des Etats américains », <www.oas.org/juridico/français/charte.html>); Article 85: « Conformément aux dispositions de la Charte, toute partie à un différend non encore soumis à l'une des procédures de règlement pacifique prévues par la Charte peut faire appel aux bons offices du Conseil permanent. Celui-ci, conformément aux dispositions de l'article précédent, prête assistance aux parties et recommande les procédures qu'il estime propres au règlement pacifique du différend ». (Article 84: Le Conseil veille au maintien des relations amicales entre les Etats membres et, à cette fin, les aide d'une manière effective à régler leurs différends de façon pacifique, conformément aux dispositions suivantes).

[61] Protocol of Cartagena de Indias, Cartagena de Indias (Colombia), le 5 décembre 1985, entré en vigueur le 5 décembre 1988 conformément à l'article IX du Protocole, Statements, OAS, Treaty Series, No 66.

qu'avec le consentement préalable de toutes les parties au litige.[62] La médiation ne peut absolument pas avoir lieu sans le consentement explicite des deux parties. Bien que l'article 3 de la convention de la Haye sur le règlement pacifique des conflits du 18 octobre 1907 rappelle que le droit d'offrir ses bons offices ne peut être considéré comme inamical[63], toutefois une insistance à jouer un rôle de bons offices pourrait apparaître inopportune ou même malveillante dans le cas où une seule partie l'approuverait et l'autre partie ne donnerait pas un consentement au moins implicite à cette initiative.

D'autre part, il n'y a pas d'obligation pour un Etat d'offrir ses bons offices. L'opportunité de cette offre dépend de la volonté des Etats, selon que « les Puissances Contractantes jugent utiles et désirables », on ajoute d'ailleurs « en tant que les circonstances s'y prêtent ». Chaque Etat est donc libre, selon cet article 3 de la Convention de La Haye, d'apprécier si les circonstances s'y prêtent. Au Comité d'Examen de la troisième commission à la première conférence de La Haye cette expression avait fait l'objet d'une controverse au moment de la rédaction de cette convention. Le représentant des Pays-Bas insistait pour que cette expression soit omise. En effet, elle affaiblissait la portée de la disposition[64].

En principe, dans un litige d'ordre interne, l'offre de bons offices semble moins adéquate, puisque traditionnellement le droit international n'admettait pas l'ingérence d'une partie extérieure aux affaires intérieures d'un Etat. Toutefois, si ce litige interne a des conséquences internationales, non seulement l'offre de bons offices ne saurait être exclu, mais pourrait même s'imposer. Les Etats ont souvent hésité à offrir leurs bons offices dans une guerre civile et bien que les principes en la matière puissent être envisagés de différentes manières, les Nations unies ont multiplié leurs interventions dans les conflits internes pour amener les parties à la négociation. L'article 34 de la Charte rappelle que le Conseil de sécurité peut enquêter non seulement sur tout différend international mais aussi sur « toute situation qui pourrait entraîner un désaccord entre nations afin de déterminer si la prolongation de cette situation semble devoir menacer le maintien de la paix et de la sécurité internationales ». De plus, le paragraphe 3 de l'article 11 stipule que « l'Assemblée générale peut attirer l'attention du Conseil de sécurité sur les situations

---

[62] Voir à ce sujet A. A. Cançado Trindade, « Mécanismes de réglement pacifique des différends en Amérique Centrale: de Contadora à Esquilas II », *Annuaire français de droit international*, vol. 23, 1987, pp. 798-822, p. 804.

[63] Article 3: Indépendamment de ce recours, les Puissances contractantes jugent utiles et désirable qu'une ou plusieurs Puissances étrangères au conflit offrent de leur propre initiative, en tant que les circonstances s'y prêtent, leurs bons offices ou leur médiation aux Etats en conflit. Le droit d'offrir les bons offices ou la médiation appartient aux Puissances étrangères au conflit, même pendant le cours des hostilités. L'exercice de ce droit ne peut jamais être considéré par l'une ou l'autre des Parties au litige comme un acte peu amical.

[64] *Conférence internationale de la paix*, La Haye 18 mai-29 juillet 1899, voir note 17, Troisième commission deuxième séance, 28 mai 1899, p.100.

qui semblent devoir mettre en danger la paix et la sécurité internationales ». Le terme situation dans ces articles devrait pouvoir être interprété en référence à une situation interne. De cette possibilité d'enquêter sur une situation, le terme enquêter ayant dans ce libellé le sens de s'informer, on pourrait en déduire qu'une action peut être envisagée sous la forme d'une mission de bons offices sous l'autorité du Conseil de sécurité ou même provenant d'une initiative du Secrétaire général, conformément à l'esprit de la Charte. Un des éléments qui pourrait légitimer une offre de bons offices dans une situation interne peut être la gravité du conflit. D'autre part, si ce conflit présente un risque de remettre en cause la paix générale ou régionale, cela serait un facteur justifiant cette forme d'intervention[65].

Le rôle des envoyés spéciaux du Secrétaire général des Nations unies à Chypre est à ce titre significatif. La tension conflictuelle entre la communauté grecque et la minorité turque à Chypre a eu et a encore des implications graves. Les accords de Zurich et ceux de Londres du 19 février 1959 contenaient des dispositions garantissant les droits spécifiques de la minorité turque et sont à l'origine de trois traités confirmant l'indépendance de Chypre. Le traité de garantie, le traité relatif à la création de la République de Chypre et le traité d'alliance entre le Royaume de Grèce, la République de Turquie et la République de Chypre furent officiellement signés à Nicosie le 16 août 1960 et entrèrent en vigueur au moment de la signature, conformément à l'article V du premier traité, à l'article XII du second et à l'article VI du troisième[66]. Le traité de garantie entre la Grèce, la Turquie et la Grande Bretagne du 16 août 1960 garantissait l'indépendance et l'intégrité territoriale de Chypre. En outre, les trois parties au traité se réservaient le droit d'intervenir conjointement ou séparément, conformément à l'article 4[67] de ce traité, en cas de partition de l'île(taksim) ou d'union avec un autre Etat(enosis). Dès 1963, des troubles graves éclatèrent. Les Nations unies ne sont pas arrivées à aider les parties à aboutir à une solution pacifique de ce conflit interne, malgré les nombreuses missions de bons offices des envoyés spéciaux. A l'occasion d'un incident grave entre les deux communautés chypriotes en 1967, des missions de bons offices furent entreprises, afin de prévenir une confrontation gréco-turque. Il y eut alors des

---

[65] Stowell, Ellery Cory, *Intervention in International Law* (Washington, 1921), p. 51 et Raymond Goy, « Quelques accords récents mettant fin à des guerres civiles », dans *Annuaire français de droit international*, éditions du CNRS, Paris, 1992, pp. 112-125.

[66] Treaty of Guaranteee (Traité de garantie), *Nations Unies- Recueil des Traités*, volume 382, No 7475, 1960, pp. 3-7; Treaty of Establishment (Traité relatif à la création de la République de Chypre) *Nations Unies-Recueil des Traités*, volume 382, No 5476, 1960, pp. 10-16 et Treaty of Alliance (Traité d'alliance), *Nations Unies-Recueil des Traités*, volume 397, No 5716, 1961, pp. 287-295.

[67] Article 4: « In so far as common or concerned action may not prove possible, each of the three guaranteeing Powers reserves the right to take action with the sole aim of reestablishing the state of affairs created by the present treaty » in *United Nations Treaty Series*, volume 382, number 7475 (1960), pp. 3-7.

initiatives différentes, dont le but était identique. Le Secrétaire général des Nations unies délégua un envoyé à Chypre. Le Secrétaire général de l'OTAN fit aussi une tentative de bons offices. Toutefois, c'est grâce semble-t-il au rôle de Cyrus Vance, envoyé du Président des Etats Unis, que les parties antagonistes mirent un terme temporaire à leur différend. Les missions de bons offices se sont depuis multipliées, celles d'envoyés des Nations unies et celles de diplomates américains, car ce litige chypriote ne trouvait pas de solution. Après les graves événements de 1974 et la séparation effective de la partie turque de l'île en février 1975, suivie par la suite de la proclamation de la République turque de Chypre le 15 novembre 1983, les missions incessantes de bons offices du Secrétaire général et de ses envoyés ont pu apparaître comme vaines, dans la mesure où elles n'ont pu permettre aux parties antagonistes de régler leur différend. Quelquefois, comme par exemple lors de négociations à l'automne 1984, le Secrétaire général pensait que les parties trouveraient un compromis, mais cet espoir fut déçu[68]. Le rôle du Secrétaire général et de ses envoyés spéciaux est d'aider les parties à trouver une solution, mais dans un cadre spécifique, en suivant certaines lignes directrices. En particulier, il est demandé aux négociateurs de prendre en compte l'intégralité des résolutions des Nations unies sur la question chypriote et de tenir compte des traités pertinents, comme le rappellent de nombreuses résolutions du Conseil de sécurité, ce qui exclu « l'union en totalité ou en partie, avec un autre pays, ou tout autre forme de partition ou de récession ».[69] Toutefois, elles ont, semble-t-il aidé, les deux parties à prendre conscience de la nécessité, malgré les ressentiments, d'aboutir à une solution. Dans la mesure où cette conviction pourrait être et semble le devenir celle de la Grèce et de la Turquie, ces missions de bons offices auraient pu ouvrir la voie vers une solution de compromis. La procédure de bons offices semble correspondre à la situation. Le fait d'utiliser des méthodes indirectes, telle que la diplomatie de la navette, ou des rencontres distinctes avec les deux dirigeants (Clerides et Denktash), comme l'ont fait le Secrétaire général et ses représentants, ainsi que la confidentialité de la méthode, semblaient avoir un aspect constructif[70]. De nombreuses résolutions du Conseil de sécurité réaffirmèrent ce rôle jugé positif de bons offices du Secrétaire général[71]. Néanmoins les dernières tentatives de bons offices du Secrétaire général, qui aboutirent à l'échec du 11 mars 2003, prouvent qu'un différend de la gravité de la question chypriote et dont la durée a été si longue peut difficilement trouver une

[68] Bengt Broms, *The United Nations* (Suomalainen Tiedeakatemia: Helsinki, 1990) pp. 384-389.

[69] S/RES/1475(2003), S/RES/1251(1999), S/RES/1250(1999), S/RES/1283(1999), S/RES/1179(1998), S/RES/1217(1998), S/RES/1218(1998), S/RES/1218(1998), sont les résolutions récentes sur cette question.

[70] Voir S/1999/ 707 Rapport du Secrétaire général sur sa mission de bons offices à Chypre, 22 juin 1999, paragraphe 4 et S/2001/1122 Rapport du Secrétaire général sur l'opération des Nations unies à Chypre, 30 novembre 2001.

[71] Voir par exemple les résolutions du Conseil de sécurité S/RES/1218 du 22 décembre 1998, S/RES/1250 du 29 juin 1999.

solution d'une manière trop précipitée. Le calendrier que s'était fixé le Secrétaire général et qui devait permettre par un référendum permettant à une Chypre réunifiée de rejoindre l'Union européenne le 16 avril 2003 semblait trop intempestif[72]. D'autant plus que le Secrétaire général s'est départi de sa stricte mission de bons offices en proposant un plan de règlement global, rapprochant sa mission d'une procédure de médiation, sans toutefois négocier comme protagoniste à part entière avec les parties. La reprise des démarches du Secrétaire général conduisirent finalement au référendum du 24 avril 2004 et au rejet du plan dit Annan par les Chypriotes grecs, une situation qu'il qualifiait lui-même « d'impasse »[73]. Dans la question chypriote sans doute la modestie de la méthode traditionnelle de bons offices avait permis de résoudre de nombreuses crises, toutefois sans établir une solution définitive du problème chypriote. Cette approche par la procédure de bons offices semblait tout au long des années avoir bénéficié de la faveur des parties antagonistes. Déjà en 1986, la partie chypriote turque rappelait au Secrétaire général sa position concernant la procédure: « In regard to the question of procedure as a whole, Your Excellency has always rightly pointed out that your mission is one of 'good offices', not one of 'mediator', a principled position which enjoys our full backing »[74].

D'une façon générale cette pratique de bons offices permettant d'aboutir à un règlement pacifique d'un conflit interne tend à être accepté par la communauté internationale. En revanche, l'offre de bons offices pour mettre fin à un conflit entre Etats bénéficie sans équivoque du soutien de la tradition.

Une mission de bons offices peut avoir lieu alors que l'état de guerre existe entre deux Etats. Dans ce cas, aussi la Convention de La Haye en son deuxième paragraphe de l'article 2 le rappelle, puisqu'on évoque le droit d'offrir ses bons offices « même pendant le cours des hostilités ». Le but de cette mission peut être justement de mettre fin à cet état de conflit. Une mission de bons offices peut être particulièrement souhaitable en état de guerre, car il est souvent probable qu'aucune des deux parties belligérantes ne cherche à être la partie proposant l'ouverture de négociations, cela pouvant apparaître comme un aveu de faiblesse. L'avantage des bons offices est que, la méthode étant plus discrète que la médiation, elle permettra aux deux parties en conflit d'accepter plus facilement le mécanisme de rapprochement parce que moins visible et ne demandant pas aux parties de montrer

---

[72] Sur cette question voir le Rapport du Secrétaire général sur sa mission de bons offices à Chypre, NU doc S/2003/398(1er avril 2003), p. 38.

[73] Concernant les dernières démarches du Secrétaire général, voir S/2004/302 Rapport du Secrétaire général sur Chypre, NU doc S/2004/302 et Rapport du Secrétaire général sur sa mission de bons offices á Chypre, NU doc S/2004/437.

[74] Letter dated 21 April 1986 from his Excellency Mr. Denktas addressed to the Secretary General, paragraphe 10 dans Report by the Secretary-General on the United Nations Operation in Cyprus (For the period 10 December 1985-11 June 1986), NU doc.S/18102/Add.1, 11 June 1986, Annex V, p.21.

explicitement leur volonté de mettre fin à la confrontation. Il existe de nombreux exemples de bons offices pour mettre fin à un conflit armé, chaque cas ayant des particularités qui lui sont propres. On se limitera à deux cas éloignés dans le temps et dans un contexte politique fort différent. Le premier cas, à une époque antérieure à la création des organisations internationales, reste sans doute un exemple classique. En revanche, le second cas dans le cadre des Nations unies est plutôt un contre-exemple. Ces deux cas permettront peut-être d'entrevoir certaines caractéristiques des différents aspects de cette procédure de bons offices.

Les bons offices du Président des Etats-Unis Théodore Roosevelt entre la Russie et le Japon en avril-août 1905 demeurent un exemple extrêmement célèbre et une sorte de modèle. C'est à l'initiative confidentielle et discrète de l'une des parties, le Japon, que le Président Roosevelt fit des propositions qui devaient conduire à l'ouverture de négociations entre les deux parties adverses. En fait, le gouvernement japonais avait fait savoir dans une première initiative au gouvernement des Etats-Unis, par l'intermédiaire de son représentant à Washington, que « it had no intention to close the door to friendly offices exerted purely for the purpose of bringing the belligerents together. On the contrary the Japanese Government fully recognize that it is not unlikely that the friendly good offices of some Power might be necessary »[75]. Sans mentionner le nom du Président des Etats-Unis, bien que cela soit tout à fait implicite; le Japon exprimait le souhait d'une initiative de bons offices de sa part. La confidentialité était un élément essentiel de la démarche, afin d'éviter l'impression de collusion entre l'intermédiaire et l'une des parties. Le Président fut ultérieurement informé d'une façon indirecte de la volonté de la Russie de lui demander de prendre une initiative pour ouvrir des négociations. Le 8 juin 1904, Théodore Roosevelt adressa aux deux gouvernements une invitation formelle d'ouvrir des négociations, qui fut rendue publique deux jours plus tard, dans laquelle il minimisa le rôle qu'il pourrait jouer:

> While the President does not feel that any intermediary should be called in in respect to the peace negotiations themselves he is entirely willing to do what he properly can if the two powers concerned feel that his services will be of aid in arranging the preliminaries as to the time and place of meeting. But if even these preliminaries can be arranged directly between the two Powers, or in any other way, the President will be glad, as his sole purpose is to bring a meeting which the whole civilized world will pray may result in peace.

Le Président Roosevelt savait que son initiative en raison des négociations qui en furent à l'origine avait l'assentiment des parties. Il notait d'ailleurs dans une lettre au sénateur Henry Cabot Lodge: « I was amused by the way in which they asked me to

[75] Cité par Tyler Dennett, *Roosevelt and the Russo-Japanese War* (Doubleday, Page & Company: New York, 1925), pp. 175-180.

invite the two belligerents together directly on my own motion and initiative »[76]. Il donne à cette mission de bons offices une signification très stricte et très restrictive: ouverture de négociations de paix entre les belligérants, proposition d'en arranger les préliminaires, le lieu et le temps. Les bons offices apparaissent alors comme des bons offices d'ordre technique. Toutefois, pour trouver un accord sur le lieu de la rencontre, cela demandera une grande activité diplomatique de la part du Président et de ses envoyés et le Président exprima à plusieurs reprises son point de vue pour permettre une ouverture de la négociation. Les suggestions répétées du Président ont en fait aplani les difficultés inhérentes à l'ouverture de cette négociation. Une mission de bons offices, dans l'optique d'une négociation devant mettre fin à un conflit armé est particulièrement délicate. L'intermédiaire doit essayer de convaincre les deux parties que son action n'est pas motivée par des arrière-pensées. Le Président Roosevelt en avait conscience. Il notait: « Russia, of course, does not believe in the genuineness of my motives and words, and I sometimes doubt whether Japan does »[77]. Lorsque les négociations s'ouvrent à Portsmouth, le 9 août 1905, la partie américaine est absente. Il s'agit alors de négociations directes entre les parties. On aurait pu penser que la mission de bons offices du Président était terminée. Les délégations russe et japonaise s'étaient limitées à effectuer une visite de courtoisie au Président qui n'était pas présent à Portsmouth. Il y eut douze sessions entre les deux délégations. Après la huitième session, il y eut un blocage et la possibilité d'un échec apparaissait plausible. Le Président Roosevelt joua alors un rôle important pour empêcher cet échec. Tout en restant à l'extérieur de la table de négociation, par l'envoi de télégrammes aux deux gouvernements, il fit des suggestions aux deux parties, afin de faciliter les obstacles sur la voie de la paix. Cette mission de bons offices devenait donc éminemment politique. Dans le Traité de Portsmouth du 5 septembre 1905[78], toutes les suggestions du Président Roosevelt ne furent pas retenues. Toutefois, on peut penser que son intervention indirecte a joué un rôle décisif pour l'aboutissement de la négociation.

Dans le cadre des Nations unies, dans la mesure où la mission de bons offices pour mettre fin à une guerre est la conséquence d'un mandat d'un organe, la procédure est d'autant plus complexe. Le cas de l'Afghanistan est à ce titre significatif. Les bons offices dans la question afghane aboutissant aux accords de Genève de 1988 pourraient être qualifiés, non pas d'exemple, mais plutôt de contre-exemple. Après l'invasion de l'Afghanistan par les troupes soviétiques le 24

[76] Cité par Tyler Dennett, *Roosevelt and the Russo-Japanese War*, voir *ci-dessus* note 75, p. 192.

[77] Lettre du Président Roosevelt au Sénateur Henry Cabot Lodge, le 16 Juin 1904, cité par Tyler Dennett, *Roosevelt and the Russo-Japanese War*, voir *ci-dessus*, note 76, p. 5.

[78] Traité de Portsmouth, Portsmouth, le 5 septembre 1905, entré en vigueur le 14 octobre 1905, dans Amos S.Hershey, *The International Law and Diplomacy of the Russo-Japanese War* (The Macmillan company, London, 1906), pp. 341-346.

décembre 1979 et l'instauration d'un régime communiste à Kaboul, l'Assemblée générale se réunit en session extraordinaire d'urgence et se déclara par une résolution du 14 janvier 1980 en faveur du rétablissement de l'Afghanistan dans ses droits d'Etat souverain[79]. Dans toutes les résolutions qui suivront de 1980 à 1987, l'Assemblée affirma la nécessité d'une solution politique[80]. Dès la résolution de novembre 1980, le Conseil de Sécurité confia au Secrétaire général une mission de bons offices. Le représentant du Secrétaire général fut d'abord Javier Perez de Cuellar, puis après sa nomination au poste de Secrétaire général, Diego Cordovez de 1982 à 1988. En dehors du gouvernement de Kaboul, dans cette question d'Afghanistan, l'Iran et le Pakistan jouaient un rôle important, en raison de l'appui qu'ils apportaient aux oppositions armées au régime de Kaboul et à l'arrière plan, le rôle déterminant était celui de l'Union Soviétique et des Etats Unis. L'Iran ne souhaitait pas s'engager dans un processus de négociation, en raison peut être de l'influence limitée de l'Iran sur l'opposition armée en Afghanistan, mais plus vraisemblablement en raison de la guerre du golfe et de la volonté de ne pas se trouver dans une situation de confrontation avec l'Union Soviétique. L'Iran adopta comme position constante qu'une négociation sans l'opposition afghane était inacceptable.[81] Le gouvernement du Pakistan et celui de l'Afghanistan seuls vont s'engager dans une négociation. Le gouvernement de l'Afghanistan exigeait des pourparlers entre représentants des gouvernements, ce que n'acceptait pas le Pakistan, ne considérant pas que les dirigeants de Kaboul étaient les véritables représentants de l'Afghanistan. Ils n'étaient pour eux que les représentants du Parti communiste de l'Afghanistan. Dans cette situation la mission de bons offices de l'envoyé du Secrétaire général sera déterminante. La négociation s'ouvrit à Genève en 1982 et dura jusqu'en 1988, mais les délégations ne se rencontrèrent pas même lorsqu'elles se trouvaient toutes deux au Palais des Nations à Genève. Le représentant du Secrétaire général eut des conversations séparées avec chacune des délégations. Les deux délégations ne se rencontrèrent qu'au moment de la signature des accords le 14 avril 1988. Cette procédure indirecte a permis d'ouvrir des négociations et d'aboutir à un résultat. Une autre procédure n'aurait pas permis ces possibilités. Une médiation aurait impliqué la présence des différentes parties et leur volonté de négocier ensemble, or dans ce cas, cela était impossible. Les bons offices apparaissaient alors comme la procédure la plus adéquate. Toutefois, quelque fût l'ingéniosité de la procédure de bons offices, l'objectif réel de la négociation ne semblait pas véritablement être un retour à la paix, mais en fait, de permettre un

[79] Le Conseil ayant été bloqué par le veto soviétique, en utilisant le mécanisme de la résolution 377(V) convoque l'Assemblée générale pour une session extraordinaire.

[80] Pour une analyse de la situation internationale concernant l'Afghanistan de 1980 à 1988 voir Victor-Yves Ghebali et Richard L'Homme "Les accords de Genève sur le règlement de la situation concernant l'Afghanistan" dans *l'Annuaire français de droit international* 1988, Editions du CNRS, Paris, pp. 91-107.

[81] Voir à ce sujet Ghebali et L'Homme, « Les accords de Genève sur le règlement de la situation concernant l'Afghanistan », *ci-dessus*, note 80, p. 95.

retrait des troupes soviétiques. Simultanément aux accords de Genève, le gouvernement communiste d'Afghanistan et le gouvernement soviétique confirmèrent cette décision de retrait des Soviétiques d'Afghanistan par le communiqué commun de Tachkent d'avril 1988. C'est en sens que l'on peut avancer le terme de contre-exemple de bons offices, dans la mesure où l'accord qui en résulta n'avait pas réellement pour but le rétablissement de la paix, puisqu'en fait, un recours à la force n'en était pas exclu.

Une mission de bons offices peut avoir lieu pour empêcher un éclatement d'hostilités ou encore mettre fin à un état de belligérance. En réalité, seul un Etat maintenant une certaine neutralité dans un différend peut offrir ses bons offices.

## La neutralité de l'Etat offrant ses bons offices

Les bons offices ne peuvent être offerts que par un Etat n'étant pas directement impliqué dans le différend en cause et n'étant pas trop proche de l'une des parties. A ce sujet Sir Ernest Satow notait: « In any case the offer(of good offices) can only be made by, or accepted from, a neutral Power, and this should be a Power of whose friendly sentiments towards both parties there cannot be any doubt.[82]» Ce principe de neutralité, en ce qui concerne le différend en question, n'a cependant pas un caractère absolu. On peut penser dans certains cas que l'intermédiaire juge les prétentions d'une partie plus justifiables que celles de l'autre partie. Le fait même d'intervenir dans une crise pour une tierce partie implique qu'il existe pour elle un intérêt peut être même très louable à jouer un rôle pour résoudre cette crise. Toutefois, l'intermédiaire doit avoir une certaine forme d'impartialité et de crédibilité qui puisse susciter de la part des parties au différend, une certaine confiance en son action permettant ainsi aux deux parties de trouver une solution équitable, qui ne serait pas la cause de nouveaux ressentiments.

Souvent un pays neutre ou qui maintient une politique de neutralité est plus apte qu'un autre à jouer ce rôle de bons offices, car la neutralité crée des conditions favorables à l'exercice des bons offices. Au niveau des bons offices d'ordre technique ou humanitaire, la Suisse a souvent joué un rôle important. La Suisse a quelquefois accepté un mandat de bons offices, afin de protéger les intérêts d'un Etat dans un pays où cet Etat n'avait pas de relations diplomatiques. Actuellement la Suisse exerce cette fonction de bons offices pour les Etats-Unis à Cuba. La Finlande, en raison de sa position entre l'Est et l'Ouest, a pu jouer ce rôle pendant les années de guerre froide. La conférence sur la sécurité et la coopération en Europe s'est ouverte à Helsinki en 1975. Si la Finlande a perdu avec la fin de la guerre froide cette position privilégiée, néanmoins une certaine tradition perdure. La

[82] Sir Ernest Satow, *A guide to Diplomatic Practice*, (second and revised edition, 2 tomes, Longmans-Green and Co: London New York, 1922) tome I, p. 327.

Finlande a reçu par exemple les Présidents Ieltsine et Clinton pour une conférence au sommet (20 - 21 mars 1997). D'autre part, les petits pays et plus particulièrement les pays nordiques semblent plus aptes dans certains cas à faciliter les contacts des parties à un litige qu'une grande puissance, dont les parties pourraient craindre une trop grande volonté d'imposer une solution ou encore d'être trop partial. Voir par exemple les accords d'Oslo entre l'O.L.P et Israël (octobre 1993).

Les bons offices du Secrétaire général des Nations unies posent beaucoup de difficultés, parce que l'indépendance et l'impartialité de l'intermédiaire sont très importantes dans une mission de bons offices. Cependant le Secrétaire général représente l'organisation et d'une façon indirecte la volonté des Etats qui la composent. Par conséquent, même lorsqu'il s'agit d'une mission de bons offices prise à l'initiative seul du Secrétaire général, cette garantie d'impartialité peut quelquefois être plus controversée que le rôle que pourrait jouer une personnalité ou le représentant d'un Etat extérieur au différend.

«Qu'est ce que l'impartialité?» s'est demandé Javier Perez de Cuellar lorsqu'il était Secrétaire général des Nations unies et il a tenté d'y répondre: «Elle se juge, avant tout, à la capacité de gagner la confiance des parties en présence. Le Secrétaire général ne doit pas seulement se montrer impartial; il doit aussi être considéré comme tel... ». En tous les cas, il est important d'être attentif, comme le suggère Javier Pérez de Cuellar, aux craintes de l'une et de l'autre partie.[83]

Etre considéré comme impartial est sans doute décisif pour une mission de bons offices, le plus important étant que les parties considèrent l'intermédiaire comme impartial, même s'il ne l'est pas d'une façon absolue. Une crise de confiance d'une des parties est toujours possible. Dans sa mission le Secrétaire général aide les parties à trouver une solution, mais non pas à imposer le point de vue d'un certain nombre d'Etats membres de l'organisation. Le Secrétaire général représente effectivement la communauté internationale, mais il ne peut sans mandat représenter les vues d'une fraction de cette communauté, même si cette fraction est majoritaire. Une mission de bons offices semble incompatible avec une diplomatie militante.

Il exista des cas graves où le terme bons offices fut utilisé pour masquer un acte de force, l'Etat intervenant n'ayant même pas prétendu agir en fonction d'une certaine impartialité. En août 1940 par exemple, l'Allemagne et l'Italie imposèrent leurs « bons offices » à la Roumanie, afin de l'obliger à céder une grande partie de la Transylvanie à la Hongrie. Les gouvernements allemand et italien ont utilisé pour qualifier leur action dans un premier temps le terme de bons offices et ensuite le terme arbitrage. Si apparemment le terme arbitrage semble plus judicieux puisque la sentence arbitrale doit être considérée par les parties comme obligatoire, toutefois le consentement des Etats à l'arbitrage doit être réel et l'excès de pouvoir des arbitres

[83] Javier Pérez de Cuellar, « Le rôle du Secrétaire général des Nations unies », *Revue générale de droit international public* (1985/2), tome 89, pp. 233-242, et pp. 235-236.

dans ce cas est flagrant. Dans les deux cas, bons offices ou arbitrage, l'expression ne recouvrait aucune authenticité.

De la même façon, on peut mentionner les « bons offices » japonais (janvier - mai 1941), qui furent d'ailleurs accompagnés à l'occasion d'une menace d'emploi de la force et qui contraignirent la France à céder des territoires de l'Indochine (les provinces d'Angkor, Battembang, SiemRéap et Sisophon) au profit de la Thaïlande, l'allié du Japon. Une mission de bons offices qui s'assimile à un acte de force ne peut plus être considérée réellement comme une mission de bons offices. Il s'agit alors de l'usurpation d'une expression qui ne renvoie à aucune réalité. Lorsqu'on ne laisse à un Etat aucune autre alternative que d'accepter les bons offices d'une puissance, dont on connaît par ailleurs l'extrême partialité pour l'autre partie, on ne peut plus considérer cette intervention comme une forme de bons offices. Les accords qui pourraient en résulter ne sauraient dans ces conditions avoir aucune force obligatoire, puisque imposés par la force. Il existe néanmoins des cas moins extrêmes, mais non dépourvus d'une certaine ambiguïté, ce qui pose alors le problème des limites à l'exercice des bons offices.

## Les limites

Certaines offres de bons offices semblent plus qu'inopportunes. Un Etat garant d'un traité peut-il réellement offrir ses bons offices dans un conflit où l'une des parties a violé les clauses du traité? Le problème s'est posé lors de la proposition de bons offices par les Etats-Unis en juillet 1937 à propos du conflit sino-japonais. Le gouvernement des Etats-Unis avait proposé aux deux parties antagonistes une offre de bons offices. Toutefois, le gouvernement des Etats-Unis, en tant que partie au Traité des Neuf Puissances[84], étaient garant de l'intégrité territoriale de la Chine, bien que le terme garantie n'apparaisse pas dans le traité des Neuf Puissances. Une controverse a donc été possible sur la portée de ce traité. Toutefois, le fait que les Etats parties au Traité s'engageaient à respecter l'intégrité territoriale de la Chine (article 1) et d'autre part, le fait que ce principe impliqua des conséquences juridiques (article 2) renforce l'idée de garantie, même si cette garantie ne préjuge pas de la possibilité d'entreprendre une action en cas de non-respect de ces articles, si ce n'est sous la simple forme de consultation (article 7). Toute violation de ce traité, y compris par un Etat partie au traité, ne pouvait entraîner de la part des autres signataires, bien que cela ne soit pas tout à fait explicite dans les termes du traité, que des sanctions ou tout au moins une condamnation même verbale. L'offre

[84] Traité entre les Etats Unis d'Amérique, la Belgique, l'Empire Britannique, la Chine, la France, l'Italie, le Japon, les Pays Bas et le Portugal, relativement aux principes et à la politique concernant la Chine, Washington, le 6 février 1922, entré en vigueur le 5 août 1925, *Conférence de la limitation des armements, 12 novembre 1921-6 février 1922* (Government Printing Office: Washington 1922), pp. 1621-1629.

de bons offices et l'impartialité américaine dans la controverse sino-japonaise, auquel avait fait référence le gouvernement des Etats Unis en 1937, semblait pour le moins hors de propos. Le gouvernement japonais refusa l'offre américaine et par conséquent, cette offre de bons offices n'eut pas de suite.[85]

En fait, le règlement pacifique des différends ne peut être, comme l'énonce l'article 1 § 1 de la Charte des Nations unies qu'en conformité avec les « principes de la justice et du droit international »[86]. A Dumbarton Oaks on avait originellement mentionné l'obligation de régler pacifiquement les différends. C'est sur l'initiative d'un amendement de la délégation chinoise que l'on ajouta que cette obligation devait être conforme aux principes du droit international[87]. Dans le cadre des Nations unies, la mission de bons offices du Secrétaire général ne devrait pas amener à une solution qui ne serait pas conforme aux grands principes de la Charte des Nations unies, tels qu'ils sont énoncés dans le chapitre I de la Charte et pas exclusivement dans le chapitre I, mais tels que l'on peut les déduire de l'ensemble des articles de la Charte. Dans les bons offices, on ne négocie pas avec les parties, contrairement à la médiation, mais le rôle de l'intermédiaire est de procurer les conditions de la négociation, en rapprochant les points de vue. Toutefois, si les parties parvenaient à un accord et si cet accord était contraire aux principes de la Charte, cela serait en fait inacceptable. Les grands principes de la Charte étant toutefois partie intégrante du droit international et d'ailleurs ces principes de droit international étant bien antérieurs à la rédaction de la Charte, tout accord, quel que soit la forme ou le cadre de la négociation, qui serait contraire à ces principes, ne saurait être admis. La résolution 53/101 du 8 décembre 1998 de la cinquante-troisième session de l'Assemblée générale sur les principes devant guider la négociation internationale nous le remémore:

> L'Assemblée Générale...
>
> Considérant également que les États devraient être guidés dans leurs négociations par les principes et règles du droit international applicables...
>
> 2. Affirme qu'il importe de conduire les négociations conformément au droit international d'une manière qui soit compatible avec la réalisation de leur objectif déclaré et favorable à cette réalisation, et suivant les principes ci-après: ...

---

[85] Voir *Peace and War, United States Foreign Policy, 1931-1941* (United States Government Printing Office: Washington, 1943), pp 371-380.

[86] Article 1 §1: Maintenir la paix et la sécurité internationales et à cette fin: prendre des mesures collectives efficaces en vue de prévenir et d'écarter les menaces à la paix et de réprimer tout acte d'agression ou autre rupture de la paix, et réaliser, par des moyens pacifiques, conformément aux principes de la justice et du droit international, l'ajustement ou le règlement de différends ou de situations, de caractère international, susceptibles de mener à une rupture de la paix.

[87] Ruth B. Russell, *A History of the United Nations Charter* (Brookings Institution: Washington, D.C, 1958) p.656.

> c) Le but et l'objet de toutes les négociations doivent être pleinement compatibles avec les principes et les normes du droit international, notamment les dispositions de la Charte.

Quelle que soit la procédure envisagée, on ne peut concevoir un accord qui mettrait en cause un grand principe du droit international, tel que par exemple le respect de l'intégrité territoriale d'un Etat. Il faut toutefois noter que ces grands principes ont été particulièrement malmenés dans la décennie passée, au nom peut-être de nouveaux principes plus controversés.

Les limites à l'offre de bons offices souvent ne proviennent pas du fait que cette offre serait illicite, mais plutôt du contexte politique, qui permet d'accueillir ou de refuser cette initiative. Dans le cadre des organisations internationales, nous pourrions citer la proposition de bons offices de U. Thant en 1967, concernant la guerre du Vietnam. Il était évident alors que le contexte international était peu propice à ce genre d'initiative et par conséquent, cette démarche ne suscita aucune réponse[88]. Dans certains cas, une offre de bons offices, comme toute autre forme d'intervention d'une tierce partie, peut être plus qu'inopportune, en raison de la gravité du litige qui sépare les antagonistes, et peut être à l'origine de l'aggravation d'un différend[89]. Un Etat ou un groupe d'Etats peut, par exemple pour s'affirmer sur la scène internationale, offrir ses bons offices, alors que rien ne permet de présager une issue favorable à cette démarche, la motivation profonde de la démarche étant étrangère à une volonté réelle de résoudre le différend. Une offre de bons offices dans ces circonstances peut être la cause de distorsions des faits et des motivations et peut avoir une charge émotionnelle entièrement négative, qui peut être à l'origine de nouvelles suspicions retardant une approche plus acceptable.

## Les bons offices : procédure préalable ou postérieure à une autre forme de règlement d'un différend

On peut, comme nous l'avons déjà noté, passer imperceptiblement d'une mission de bons offices à une mission de médiation. Les bons offices permettant dans ce cas d'amorcer un dialogue entre les parties, à l'aide de suggestions et de propositions indirectes, provenant de la partie tierce, cette action pouvant mener à une conduite directe des négociations par cette partie au moyen de projet d'accord ou de tentative de solution, afin de résoudre le litige en cause. Il est plus rare, en revanche, de passer d'une mission de médiation à une mission de bons offices, l'implication de

[88] Vratislav Pechota, *A Quiet Approach*, voir *ci-dessus* note 2, p. 47.

[89] Young, *The Intermediaries*, voir *ci-dessus* note 46, p. 49.

l'intermédiaire dans une mission de médiation étant en apparence beaucoup plus grande. Toutefois, quelques exemples apportent un démenti à cette assertion.

Dans la question chypriote, on est passé de la médiation aux bons offices. En effet, la résolution 186 du Conseil de sécurité du 4 mars 1964 en son paragraphe 7[90] prévoyait une mission de médiation. Deux médiateurs se succédèrent. Le second médiateur Galo Plaza proposa un véritable projet de solution. Ce projet apparut aux Chypriotes turcs et aussi à la Turquie comme s'alignant sur les positions les plus intransigeantes des Chypriotes grecs et ce fut alors la notion même de médiation que l'on remis en cause[91]. Après la démission de M. Galo Plaza le 22 décembre 1965, toutes les résolutions subséquentes du Conseil de sécurité confièrent des missions de bons offices au Secrétaire général et à son représentant à Chypre. Les bons offices étaient une méthode qui apparaissait beaucoup plus adéquate sur le problème chypriote. Elle permettait de ménager les susceptibilités. Le consentement des parties dans toute amélioration de la situation chypriote étant indispensable, cela permettait d'éviter un plan d'ensemble qui aurait pu paraître outrageux à l'une des parties et risquant de bloquer tout progrès vers une solution[92].

On pourrait aussi citer le cas des Etats-Unis dans le cadre du conflit israélo-arabe, qui est à ce titre significatif. Les Etats-Unis, après avoir joué un rôle actif de médiation dans le processus de paix israélo-palestinien (de 1993 au sommet de Camp David 2000), ont du revenir à des tentatives de bons offices pour essayer d'établir un cessez-le-feu et éventuellement renouer le dialogue entre Israéliens et Palestiniens après l'éclatement de la violence en septembre 2000. On pourrait à ce titre comparer le sommet de Wye River en octobre 1998, où il y a eu une véritable médiation de la part du Président Clinton, qui a négocié avec les parties, au sommet de Sharm El Sheik en octobre 2000, où le Président Clinton a utilisé ses bons offices pour que les parties reprennent contact et qui a abouti à l'acceptation d'une commission d'établissement des faits (ou commission d'enquête, sans qu'il faille voir dans cette préférence respective de dénomination autre chose que la mesure des désaccords des parties), sans pour autant qu'un dialogue s'établisse entre les parties antagonistes.

---

[90] Paragraphe 7: *Recommande en outre* que le Secrétaire général désigne, en accord avec le Gouvernement chypriote et avec les Gouvernements de la Grèce, du Royaume-Uni et de la Turquie, un médiateur, qui s'emploiera, conjointement avec les représentants des communautés ainsi qu'avec les quatre gouvernements susmentionnés, à favoriser une solution pacifique et un règlement concerté du problème qui se pose à Chypre, conformément à la Charte des Nations unies et eu égard au bien-être du peuple de Chypre tout entier et à la préservation de la paix et de la sécurité internationales. Le médiateur rendra compte périodiquement au Secrétaire général de ses efforts.

[91] Georges Stergiou Kaloudis, *The Role of the U.N.in Cyprus from 1964 to 1979* (American university studies, Series IX, History: vol 107, Peter Lang Publishing Inc: New York, 1991) pp. 47-48 et Joseph S.Joseph, Cyprus, *Ethnic Conflict and International Concern* (American University Studies, Series X, Political Science, vol 6, Peter Lang Publishing Inc: New York, 1985) pp. 219-220.

[92] En tous les cas jusqu'au Plan Annan du 26 février 2003, voir ci-dessus pp. 31-33.

L'enquête peut aussi être combinée à une procédure de bons offices. L'enquête peut apparaître comme une procédure préliminaire ouvrant la voie à un règlement d'un litige. L'enquête a pour but l'élucidation des faits étant à l'origine de la divergence entre les Etats parties. La Convention de La Haye présente l'enquête comme un stade préliminaire du règlement d'un différend[93]. En principe et dans certaines circonstances, l'élucidation des faits devrait apporter un certain apaisement pouvant, pour reprendre les termes de l'article 9 de cette Convention de La Haye de 1907, « faciliter la solution des litiges ». Toutefois, l'enquête n'apporte pas de solution au différend. La suite à donner au rapport d'enquête dépend entièrement des parties, comme nous le confirme l'article 35 de la même convention: « Le rapport de la Commission, limité à la constatation des faits, n'a nullement le caractère d'une sentence arbitrale. Il laisse aux Parties une entière liberté pour la suite à donner à cette constatation ». Afin de poursuivre par une procédure pouvant aboutir à une solution du litige, l'enquête doit être suivie par un dialogue direct entre les parties ou au moyen d'une intervention d'une tierce partie par une mission de bons offices ou de médiation, si la tension entre les parties reste trop vive pour pouvoir envisager une négociation directe. Lorsque le rapport d'enquête est établi, il n'y a pour les parties au litige aucune obligation de recourir à cette procédure de négociation directe, de bons offices, de médiation ou voir même à un règlement juridictionnel, mais le litige restera sans solution si l'enquête n'est pas suivie d'une procédure de règlement. Les Traités Bryan, qui sont un exemple d'utilisation de l'enquête pouvant mener à un apaisement de la tension entre les deux Etats parties au Traité et qui prévoient même une commission internationale permanente, stipulent toutefois que « les Hautes Parties contractantes se réservent une entière liberté pour la suite à donner au rapport de la Commission »[94]. Il n'est pas impossible par conséquent, pour une mission de bons offices de suivre une procédure d'enquête, mais aussi dans certains cas d'être à l'origine de l'ouverture d'une procédure d'enquête.

---

[93] L'article 9 de la Convention de la Haye (1907) stipule en effet: «Dans les litiges d'ordre international n'engageant ni l'honneur ni des intérêts essentiels et provenant d'une divergence d'appréciation sur des points de fait, les Puissances contractantes jugent utile et désirable que les Parties qui n'auraient pu se mettre d'accord par les voies diplomatiques instituent, en tant que les circonstances le permettront, une Commission internationale d'enquête chargée de faciliter la solution des litiges en éclaircissant, par un examen impartial et consciencieux, les questions de fait. »

[94] Traité pour le Règlement des litiges (Treaty between the United States and Sweden for the Advancement of General Peace), Washington, le 13 octobre 1914, entré en vigueur le 11 janvier 1915, (article V, paragraphe 5. Cette clause se retrouve sous une forme identique ou quelque peu différente dans tous les traités Bryan.) *Treaties for the Advancement of Peace, presented by James Brown Scott* (Oxford University Press: New York, 1920) pp. 92-97. Le nom des traités Bryan a continué d'être utilisé pour une série de traités signés par les Etats Unis entre 1928-1931 et 1939-1940 bien après que Bryan ait quitté le secrétariat d'Etat puisqu'ils étaient similaires aux premiers traités élaborés par Bryan.

Dans l'affaire du *Dogger Bank* en 1904, durant la guerre russo-japonaise (6 février 1904 - 5 septembre 1905), cinq ans après la première Convention de la Haye sur le règlement pacifique des différends, les bons offices de la France permirent l'ouverture d'une enquête. Dans la nuit du 21 au 22 octobre 1904, la flotte russe qui se rendait en Extrême-Orient ouvrit le feu sur des bateaux de pêche anglais en Mer du Nord, croyant peut-être en raison de la brume ou de l'incompétence du commandement russe, qu'il s'agissait de navires de guerre japonais. Non seulement la flotte russe causa de graves dommages matériels aux bateaux de pêche, mais encore il y eut de nombreux pêcheurs anglais tués. De plus, la flotte russe s'éloigna sans porter assistance. La Grande Bretagne demandait des excuses que la Russie refusait. La tension était d'autant plus vive entre la Grande Bretagne et la Russie, que la Grande Bretagne depuis 1902 était l'allié du Japon, et bien que l'alliance anglo-japonaise[95] n'obligeât la Grande Bretagne à n'intervenir qu'au cas où son allié serait attaqué par deux Etats. Néanmoins la possibilité d'une intervention britannique ne pouvait être écartée d'une façon absolue. L'article III de l'accord anglo-japonais du 30 janvier 1902 stipulait que l'intervention militaire d'une partie en faveur de l'autre ne se ferait que si l'une des parties était en guerre contre deux Etats. Dans le cas où l'une des parties serait en guerre contre un seul Etat, l'autre partie garderait une stricte neutralité. Toutefois, si les intérêts de la partie non-belligérante étaient en jeu et que la tension politique devint très vive, comme ce fut le cas à l'occasion de l'incident du *Dogger Bank,* il semblait alors que les dispositions de l'article II concernant la stricte neutralité n'auraient pu être maintenues.[96] C'est dans cette situation de tension que la France exerça sa mission de bons offices par l'intermédiaire de son Ambassadeur à Londres. L'Ambassadeur de France ne fit que rapprocher les points de vue. La France, en tant qu'allié de la Russie depuis l'alliance franco-russe de 1891[97] et ayant d'autre part établi des relations étroites avec la

[95] Agreement relative to China and Corea, Londres, le 30 janvier 1902, entré en vigueur au moment de la signature, l'alliance fut renouvelée sous une nouvelle forme le 12 août 1905 et à nouveau le 13 juillet 1911, MacMurray, *Treaties and Agreements with and concerning China*, Number 1902/2, p. 324. Cette alliance fut abrogée par l'entrée en vigueur le 17 août 1923 du Traité entre les Etats Unis d'Amérique, l'Empire Britannique, la France et le Japon relativement à leurs possessions insulaires et leurs dominions insulaires dans la région du Pacifique signé à Washington le 13 décembre 1921. Ce traité expira dix ans après son entrée en vigueur conformément aux stipulations de son article III, Société des nations-Recueil des traités, Tome 25, No 183.

[96] Article II: If either Great Britain or Japan, in the defense of their respective interests as aboved described, should become involved in war with another Power, the other High Contracting Party will maintain a strict neutrality, and use its efforts to prevent other Powers from joining in hostilities against its ally; Article III: If, in the above event, any other Power or Powers should join in hostilities against that ally, the other High Contracting Party will come to its assistance, and will conduct the war in common, and make peace in mutual agreement with it.

[97] Accord politique de 1891 suivi d'un accord militaire le 17 août 1892, entré en vigueur le 4 janvier 1894, *Documents diplomatiques français* (1934) 1ère série, 1871-1914, tome 8, pièce 514, p.684 (accord politique) et tome 9 (1938) pièce 444 modifiée par annexe à pièce 461, p. 682 (accord militaire).

Grande Bretagne en raison de l'Entente Cordiale du 8 avril 1904[98], qui mit fin aux différends coloniaux entre les deux pays, était à même de faire entendre ses conseils de modération. Les suggestions de la France permirent de soumettre le différend à une commission internationale d'enquête. La commission précisa les faits et mis en lumière les responsabilités[99].

En revanche, la procédure de conciliation va plus loin que l'enquête, puisque la commission de conciliation propose aux Etats parties une solution du litige. Cette solution n'est qu'une proposition de solution, qui n'a pour les parties aucune force obligatoire. Toutefois, l'ouverture même d'une procédure de conciliation a été la suite d'une négociation directe ou indirecte entre les parties. Par conséquent, l'échec de la conciliation ne pourrait entraîner que d'une façon très improbable une renégociation, même si cette renégociation devait intervenir au moyen d'une mission de bons offices. Il n'est pas impossible néanmoins d'envisager, après l'échec d'une tentative de bons offices ou de médiation, le recours à une commission de conciliation, tel que l'avait prévu par exemple l'article IV du Traité interaméricain sur les bons offices et la médiation de 1936[100]. La pratique a montré qu'il était possible de passer de la procédure de bons offices à celle de conciliation. Dans la question du Chaco, un différend territorial entre la Bolivie et le Paraguay, il y eut d'abord une tentative de bons offices de l'Argentine en 1927 pour aider les parties à prévenir un conflit. Après l'éclatement d'hostilités en décembre 1928, une commission de conciliation fut établie sur l'initiative de la conférence panaméricaine, composée de deux délégués représentant respectivement chacun des Etats parties et de trois autres délégués désignés d'un commun accord par cinq Etats. Elle siégea à Washington du 13 mars au 13 septembre 1929 et réussit à trouver une solution à la crise sans résoudre le différend sur le fond. D'une procédure de bons offices le recours à la conciliation était apparu souhaitable, après l'aggravation du différend et devant l'échec pour aider les parties à trouver une solution.[101]

---

[98] Déclaration concernant l'Egypte et le Maroc, signée à Londres le 8 avril 1904, entrée en vigueur le même jour, *Droit international et histoire diplomatique, Documents choisis par Claude Albert Colliard* (Editions Domat: Paris, 1948) pp. 299-306.

[99] Sur la question de l'enquête concernant l'affaire du Dogger Bank, voir Nissim Bar-Yaacov, *The Handling of International Disputes by Means of Inquiry*, (Oxford University Press: London New York Toronto, 1974), pp. 45-88.

[100] Article IV: « Le médiateur fixera un délai qui ne dépassera pas six mois et qui ne sera pas moindre de trois mois, pour que les parties arrivent à une solution pacifique. Ce délai expiré sans que les parties soient parvenues à un accord, la controverse sera soumise à la procédure de conciliation prévue dans les conventions interaméricaines existantes ». (Le terme médiateur est utilisé dans ce traité aussi bien pour une mission de bons offices que de médiation).

[101] Sur l'affaire du Chaco, voir *Commission of Inquiry and Conciliation, Bolivia and Paraguay, Report of the Chairman submitted to the Secretary of State of United States of America, September 21, 1929* (United States Government Printing Office: Washington 1929) p. 63, voir aussi Helen Paull Kirkpatrick, *The Chaco Dispute, The League and Panamericanism* (Geneva Research Center: Genève, 1936) p. 23 et Russell Morgan

Particulièrement dans le cadre interaméricain, on est passé quelquefois d'une procédure de bons offices à une procédure de conciliation. Par exemple tel fut le rôle dans la pratique joué par la commission interaméricaine de la paix, créée en 1940, organe subsidiaire du Conseil de l'Organisation des états américains, composée de cinq Etats choisis par le Conseil de l'O.E.A. Les représentants ainsi choisis n'étaient pas des délégués de leurs Etats respectifs, mais ils représentaient la communauté interaméricaine dans son ensemble.[102] En fait, cela rapprochait la commission interaméricaine d'une commission de conciliation, bien que d'après ses statuts, la tâche principale de la commission était d'offrir ses bons offices pour aider au règlement pacifique des différends. Néanmoins la commission pouvait avoir aussi un rôle de conciliation, puisqu'elle était habilitée à préconiser des mesures pour une solution rapide d'un différend. Les bons offices de la Commission dans le conflit entre la République Dominicaine et Haïti en février 1949 permirent une solution temporaire de la crise. Dans le conflit entre Cuba et la République Dominicaine 1951, la Commission rédigea des rapports qui en fait, étaient des solutions. On passa donc de la procédure de bons offices à celle de conciliation[103].

Dans le cadre de la Société des Nations, le rapporteur qui était chargé d'examiner un différend combinait à lui seul les fonctions de bons offices et celles de conciliation. Il était chargé d'entrer en contact avec les parties pour les aider à élaborer une solution, en fait, une fonction de bons offices, puis il rédigeait un rapport quelquefois avec l'aide d'experts, dont le but était d'exposer la situation en vue d'une solution, en fait, une fonction de conciliation.

En revanche, dans le cadre des Nations unies dans la question indonésienne, on passa d'une façon plus rigoureuse des bons offices à la conciliation. Le Conseil de sécurité institua une commission de bons offices pour l'Indonésie par une résolution du 25 août 1947[104]. Chacune des parties désigna un membre, le troisième étant choisi par les deux premiers commissaires. L'Indonésie désigna l'Australie, les Pays-Bas nommèrent la Belgique et les deux Etats choisis désignèrent les Etats Unis. On a pu penser que le fait que les parties pouvaient désigner elles-mêmes un membre de la commission pouvait accroître la confiance des parties dans le travail de la commission[105]. La Commission de bons offices pour l'Indonésie avait commencé par faire des suggestions aux deux parties. Pendant une année, la Commission eut exclusivement un rôle de bons offices. Les Pays-Bas jugèrent ce

Cooper, *The Chaco dispute: the development and phases of the Bolivia-Paraguay conflict and League intervention* (Geneva Research Center: Geneva 1936) p.25, Woolsey, « Commission of Inquiry and Conciliation Bolivia and Paraguay », *American Journal of International Law*, 1929, pp. 110-112.

[102] René-Jean Dupuy, *Le Nouveau Panaméricanisme, l'évolution du système inter-américain vers le fédéralisme* (Editions A.Pédone : Paris 1956), pp. 163-164.

[103] Gilles Fuchs, « La commission interaméricaine de la paix », *Annuaire français de droit international* (1957), pp. 142-149.

[104] CS rés 31 du 25 août 1947

[105] Jean-Pierre Cot, *La Conciliation Internationale* (Editions A. Pedone: Paris, 1968) p 291.

rôle tout à fait adéquat. En revanche, la partie indonésienne voulait que la Commission propose des solutions. Devant un certain enlisement de la situation la Commission se rallia au point de vue indonésien et énonça des propositions en vue d'une solution. Le 28 janvier 1949 le Conseil de sécurité élargit les compétences de la commission pour inclure dans ses tâches une véritable fonction de conciliation[106]. On a aussi envisagé une association des deux procédures pour des questions plus spécifiques. Le Pacte relatif aux droits civils et politiques adopté par Assemblée générale des Nations unies le 16 décembre 1966[107] fait une place importante aux bons offices et à la conciliation. L'article 28 institue un Comité des Droits de l'Homme, composé de personnalités indépendantes. Les Etats parties au Pacte doivent transmettre au Comité des rapports sur l'application du Pacte. Le Comité peut transmettre au Conseil économique et social ses propres rapports. Si un différend survient entre les parties sur la question des droits humains (voir article 41), le Comité offre ses bons offices aux parties et publie un rapport dans lequel il expose les faits et la solution intervenue.

On pourrait citer également quelques autres commissions, dont l'action est limitée à un domaine plus restreint, comme dans le cadre de l'UNESCO. La commission de bons offices et de conciliation, instituée par le Protocole du 10 décembre 1962, dont le but est de faciliter les solutions des différends pouvant advenir entre les Etats parties concernant la convention sur la lutte contre la discrimination dans le domaine de l'enseignement[108].

Souvent les Etats peuvent éprouver quelques réticences à accepter une procédure de conciliation, en raison du fait que le rapport de la commission de conciliation peut placer l'une des parties dans une situation difficile. Il est toujours possible de rejeter la solution préconisée par la commission, mais cela place la partie qui n'a pas accepté cette solution dans une position désagréable envers l'opinion internationale. En revanche, la discrétion de la procédure de bons offices empêche tout effet dommageable pour la position des parties. On a pu penser que pour des différends graves, les Etats voulaient garder une grande indépendance de décision et écarter même la médiation et plus encore la conciliation, qui proposait une solution

[106] CS res 67 du 28 janvier 1949.

[107] Pacte international relatif aux droits civils et politiques, adopté par l'Assemblée générale rés. 2200 A(XXI) du 16 décembre 1996, entré en vigueur le 23 mars 1976 conformément aux dispositions de l'article 49.

[108] Convention concernant la lutte contre la discrimination dans le domaine de l'enseignement, Paris, le 14 décembre 1960, entrée en vigueur, le 22 mai 1962, *Actes de la Conférence Générale, onzième session* (Unesco-Paris, 1961) pp. 123-126 et Protocole instituant une commission de conciliation et de bons offices chargée de rechercher la solution des différends qui naitraient entre Etats parties à la convention concernant la lutte contre la discrimination dans le domaine de l'enseignement, Paris, le 10 décembre 1962, entré en vigueur le 24 octobre 1968, *Actes de la Conférence Générale, douzième session* (Unesco-Paris, 1963) pp. 127-130.

d'une façon indépendante des parties. De plus, la conciliation par son aspect quasi juridictionnel pouvait apparaître comme trop contraignante. Les Etats parties à un différend ne participent pas aux travaux de la commission de conciliation. Ils peuvent éventuellement recevoir des indications sur les travaux de la commission et la commission doit également s'informer et ce sont les agents des gouvernements respectifs, qui seront chargés de cette tâche, mais en fait, les Etats parties ne négocient pas avec la commission. Si la commission comporte des commissaires nationaux des Etats en conflit, un lien indirect s'établira peut être avec la position des gouvernements. Cela peut beaucoup varier suivant le type de commission. Même les commissaires nationaux sont en principe tout à fait indépendants de leurs gouvernements et peuvent exprimer des opinions contradictoires à celles de leurs gouvernements. Le but des conciliateurs est de trouver une solution acceptable pour les parties et non pas de rester figé sur la position rigide initiale des parties.

La conciliation semblait plutôt réservée alors à des problèmes plus mineurs ou plus techniques. De plus, on a même envisagé, par exemple selon l'article 55 et Annexe de la Convention de Vienne sur le droit des traités[109], l'utilisation de la procédure de conciliation en cas de désagrément au sujet de l'interprétation d'une disposition d'un traité, ce qui éloigne de la fonction traditionnelle de conciliation. Cette tendance à donner une fonction plus juridictionnelle à la procédure tend quelque peu à se développer[110]. Exceptionnellement l'on a pu former une commission de bons offices composée d'experts, rapprochant les bons offices de la conciliation, ce qui fut le cas pour l'application du principe de la liberté du commerce dans le bassin du Congo, selon l'article 8 de l'Acte général de la Conférence de Berlin du 26 février 1885[111]. Toutefois, à une époque où l'on a cru que les règles du droit international prévaudraient sur les rapports de force, on a pu envisager le recours à la conciliation même pour des différends graves. De nombreux traités impliquant une procédure de conciliation furent conclus entre 1920 et 1925. Les accords de Locarno (16 octobre 1925)[112] consacrèrent la procédure et jusqu'au déclenchement de la seconde guerre mondiale s'ajoutèrent une

[109] Convention de Vienne sur le droit des traités, Vienne, le 23 mai 1969, entrée en vigueur le 27 janvier 1980, *Nations Unies-Recueil des traités*, No 1155, p. 331.

[110] Ruth Donner, « The Procedure of International Conciliation: Some Historical Aspects », *Journal of History of International Law*, 1999, 1, pp. 103-124, pp. 104-106 et p. 121.

[111] Acte générale de la conférence de Berlin, le 26 février 1885, Georges Frédéric de Martens, *Nouveau recueil général de traités et autres actes relatif aux rapports de droit international*, 2ème série (Dietrich: Leipzig, 1876-1908), tome X, p. 414.

[112] Traité de garantie mutuelle, entre l'Allemagne, la Belgique, la Grande Bretagne et l'Italie (Pacte de Locarno), Locarno, le 16 octobre 1925, entré en vigueur le 14 septembre 1926 (concernant la conciliation, voir article 3 troisième paragraphe), *Société des Nations-Recueil des Traités*, tome LIV, No 289, pp. 291-297. Le pacte fut accompagné de conventions d'arbitrage franco –allemande, belgo-allemande, polono-allemade, tchèque-allemande signées le même jour. (La procédure de conciliation est également envisagé dans ces conventions, voir par exemple articles 2 et 4 à 15 de la Convention d'arbitrage franco-allemande.)

floraison de nouveaux traités. La Commission de conciliation dans la plupart de ces traités comprend cinq commissaires, deux choisis respectivement par chacun des Etats en litige, les trois autres d'un commun accord entre les parties, le but de cette structure étant d'assurer une grande indépendance de la commission envers les parties. Ces traités ne connurent pas d'application.

La différence la plus fondamentale entre bons offices et conciliation provient peut être du fait que l'offre de bons offices, comme celle de médiation, est prise par une initiative exclusive de l'intermédiaire. Il représente généralement une autorité politique et la neutralité d'une autorité politique peut quelquefois être la source de suspicions pour les parties antagonistes. En revanche, le conciliateur en principe n'a pas d'autre autorité que son expertise et devrait écarter toute préoccupation d'intérêt national, afin de participer à l'élaboration du rapport en toute indépendance. Comme le fait remarquer le Professeur Ruth Donner, le conciliateur est une personne indépendante, qui n'est pas enclin à dicter les termes d'une solution. Seul le bien-fondé de son argumentation permettra une solution[113]. Il existe différents modèles de commission de conciliation, mais même lorsque les commissions de conciliation sont composées en partie de commissaires ayant la nationalité des Etats en litige, leur solution ne devrait pas en être affectée. La commission de conciliation bénéficie de la confiance des parties, son pouvoir provenant par ailleurs de leur accord d'instituer une commission.

On a fait remarquer à juste titre que la conciliation tient à la fois de la médiation et de l'enquête[114]. Le médiateur comme le conciliateur offre une solution, mais en fait, la médiation proprement dite exclue la conciliation. La commission de conciliation se doit d'entendre les points de vue des parties et doit estimer les possibilités d'une solution de compromis, mais elle ne peut négocier avec les parties car elle perdrait alors cette indépendance qui lui est nécessaire et qui fait l'essence même de la procédure de conciliation. Dans cette perspective, l'association d'une procédure de bons offices, suivie d'une procédure de conciliation, semble présenter certains avantages. Les bons offices sont une démarche politique. Renouer ou établir le dialogue entre deux parties antagonistes est une étape nécessaire avant d'élaborer une solution. La procédure de bons offices peut tenter d'établir la confiance entre les parties. Les bons offices dans cette éventualité constituent une sorte de phase préparatoire, mais primordiale. Faire suivre les bons offices d'une procédure de conciliation peut permettre, dans une certaine mesure, de donner un aspect moins politique à la solution qui sera envisagée, les membres de la commission n'ayant pas

[113] Donner, « The Procedure of International Conciliation », voir *ci-dessus* note 110, p. 123.

[114] Pour une analyse du lien entre médiation et conciliation voir Jean-Pierre Cot, *La conciliation internationale*, voir *ci-dessus* note 101, pp. 32-42 et J. Efremoff, « La conciliation internationale », *Recueil des cours de l'Académie de droit international de La Haye* (1927-III), vol.28, pp. 5-148, pp. 13-14.

le poids d'un Etat à l'arrière plan de leurs initiatives, surtout si l'élément neutre est prédominant dans la commission.

Ni le droit coutumier, ni les instruments juridiques n'établissent une véritable hiérarchie entre les différentes procédures de règlement. Le choix dépend en premier lieu des parties. Sir Brian Urquhart, ancien Secrétaire général adjoint aux affaires politiques, dans une intervention au Conseil de Sécurité le 13 mai 2003 estimait que « [L]e règlement pacifique n'est pas une science exacte et chaque problème appelle une démarche différente. L'élément actif et la méthode employée varient en fonction de chaque situation »[115]. Le règlement d'un différend peut être une procédure très longue, s'il est vrai que l'article 2 § 3 de la Charte prévoit que tous les différends doivent être réglés d'une façon pacifique. Malheureusement la vie internationale a montré que beaucoup de différends ne pouvaient être résolus sur le fond. Ce qui était possible, en revanche, était de résoudre ou d'empêcher une crise. A chaque crise il est nécessaire de rechercher la procédure adéquate. Ces différentes approches permettent de circonscrire la crise. Finalement c'est probablement l'absence de crises, qui permettra de résoudre les causes profondes du différend. A cette fin plusieurs procédures peuvent être combinées dans un même organe au risque d'entraîner une certaine confusion. La Commission des Nations unies sur la question Inde-Pakistan, créée par la résolution 39 du 20 janvier 1948 du Conseil de Sécurité, en est un exemple. Elle utilisait à la fois les procédures d'enquête et de médiation. La procédure de bons offices n'était cependant pas exclue des procédures utilisées par la commission, la résolution 47 du Conseil de sécurité du 21 avril 1948 faisant une allusion directe aux bons offices.

D'une façon analogue, la possibilité de recours à une commission de bons offices, de médiation et de conciliation tel qu'elle est définie par l'annexe à la décision 44/415 de l'Assemblée générale du 4 décembre 1989 envisage pour les membres de la commission la possibilité de jouer un rôle bons offices, de médiation ou de conciliation et de pouvoir passer d'une forme de procédure à l'autre à la demande des parties. Cette commission pouvant être établie pour chaque cas particulier par accord entre les parties, il ne s'agit alors que d'une possibilité pour les Etats de recourir à cette procédure. Cette alternative est significative d'une certaine tendance qui permet d'envisager les bons offices comme une des procédures dans un ensemble de procédures permettant de trouver une solution à un différend. Pour résoudre un différend de nombreuses procédures sont souvent nécessaires. Les bons offices sont une alternative. Un différend grave traversera plusieurs crises. La question du Chaco en est un exemple, puisqu'on a utilisé d'abord les bons offices puis la conciliation. Ensuite la Société des nations est intervenue et finalement le différend ne devait prendre fin que par une véritable médiation de cinq pays sud-américains en 1935.

---

[115] Conseil de sécurité, Cinquante-huitième année, 4753e séance, mardi 13 mai 2003, NU doc. S/PV.4753, p. 4

Le Protocole de mécanisme de règlement des différends de l'ASEAN du 20 novembre 1996 place bons offices, médiation et conciliation dans le même article (article 3). En revanche, l'enquête bénéficie d'un autre article (article 5)[116]. En apparence cela peut être surprenant, puisque la conciliation est dérivée de l'enquête. Toutefois, il existe une certaine logique à cela, puisque l'enquête suppose une certaine rigidité, les faits devant être incontestables. Par conséquent, l'enquête peut avoir un caractère accusateur que les Etats n'acceptent qu'avec difficulté. Le fait de pouvoir utiliser plusieurs procédures ne signifie pas que ces procédures soient indistinctes les unes des autres. En revanche, chacune constitue une nouvelle approche en vue du règlement d'une crise. L'article 33 de la Charte rappelle que les Etats doivent recourir « avant tout » aux procédures de leurs choix. La volonté des parties est donc essentielle. Toutefois, l'article 36 permet au Conseil de sécurité de « recommander les procédures ou méthodes appropriées ». Les procédures non juridictionnelles peuvent plus facilement obtenir l'assentiment des parties, parce qu'elles laissent une plus grande liberté d'appréciation aux Etats. De toutes les procédures non juridictionnelles, les bons offices sont la procédure la moins contraignante, ce qui présente des atouts et des faiblesses.

***

Les bons offices sont certainement une procédure dont l'importance n'a plus à être démontrée. L'actualité internationale nous donne d'une façon incessante des exemples de bons offices. Les échecs de certaines missions de bons offices pourraient en apparence donner lieu à une certaine critique de cette méthode. Néanmoins il n'y a pas de différend grave qui puisse aboutir à une solution en faisant abstraction de négociations longues et douloureuses. L'intérêt de la procédure de bons offices est sa souplesse et sa discrétion. Bien que la procédure de bons offices ne puisse être assimilée aux autres procédures non juridictionnelles de règlement pacifique des différends et possède des traits qui lui sont propres, toutefois le paradoxe de la procédure de bons offices provient sans doute de la flexibilité de la méthode, qui empêche de caractériser d'une façon rigoureuse cette procédure, mais qui d'autre part en fait sa spécificité. Les bons offices n'impliquent pas les Etats d'une façon trop déterminée et par conséquent, cette procédure apparaît comme indispensable, voire irremplaçable pour amorcer un dialogue. Là où la tension est trop vive pour envisager une médiation, les bons offices peuvent apparaître comme une solution de rechange permettant d'établir les conditions

[116] Protocol on Dispute Settlement Mechanism, Manila, le 20 novembre 1996, entré en vigueur le 26 mai 1998, à <www.aseansec.org/7813.htm>, le 19 août 2004.

d'une négociation, empêcher qu'elle ne soit interrompue et aider indirectement les parties à atteindre un résultat. Cette procédure n'étant d'ailleurs pas exclusive d'autres procédures, les bons offices, souvent d'une façon répétitive, peuvent grandement contribuer à la solution d'un différend.

# The Importance of International Environmental Law in the Arctic

Timo Koivurova*

International Environmental Law (IEL) is a branch of international law that focuses on international environmental protection. Although its place in international law is already quite impressive, it is still a relative newcomer in the field. It was only after the 1972 Stockholm Conference on the Human Environment that international environmental protection efforts really started. In time, these prompted a corresponding development in the academic world, with legal scholars increasingly specializing in IEL, and textbooks being published in the discipline.

IEL norms apply both universally and regionally. Some principles of IEL, such as the principle of due diligence, are part of customary international law; that is, they require a certain kind of behaviour from all the legal subjects of international law, primarily states and their organizations. Principle of due diligence requires the legal subjects to ensure that no damage will occur to the environment of other states, or of areas outside their maritime jurisdiction. But the distinctive feature of IEL - in comparison to many other fields of international law - is that most of its norms are created by international treaties, which are binding only on the parties to those treaties. Many of these are global in scope, such as the UN Framework Convention on Climate Change, but a substantial number also apply in certain regions.

## International Environmental Law in the Arctic

The majority of IEL scholars take the view that there are no specific IEL norms that apply in the Arctic region; the exception is Article 234 of the United Nations Convention of the Law of the Sea, which gives coastal states larger powers to control navigation in ice-covered areas in order to protect the Arctic environment. No one disputes that there are many legally binding international treaties that aim to

* The inauguration speech of Timo Koivurova – research professor of arctic environment and minority law - was given in the University of Lapland on 27 February 2004.

protect the other circumpolar area, the Antarctic. But because the international environmental protection efforts focusing on the Arctic have been codified as declarations, strategies, and the like, the majority of IEL scholars consider them to be non-binding in international law but binding in some other manner, mainly in what is know as soft-law. Although the argument asserting the soft-law status of Arctic co-operation is hard to defend, as I have tried to demonstrate in my dissertation, it has to be accepted that the current consensus regards the co-operation as an example of soft-law co-operation, whatever is meant by the term.

This is not good news for the Arctic environment. The Arctic and its ecosystems are generally regarded as being more vulnerable to human-induced pollution than other areas of the globe. For example, Arctic food chains are short and simple, making it harder for the ecosystem to recover from pollution damage. Many commercial activities are also riskier in the often cold and dark Arctic conditions, increasing the likelihood of environmental accidents, which, if they take place, are hard to control and contain due to the same conditions.

If the general consensus is that the Arctic environment is in many ways more vulnerable to human-induced pollution, should not the generally applicable norms of IEL – those set out in international treaties and customary international law – apply more strictly to the Arctic. Even though this would be a desirable understanding of IEL, it is not the accepted one. The customary law of treaties gives states the power to freely decide such matters, but the Arctic states have not exercised that option.

From the beginning, the main focus in the Arctic co-operation has been international environmental protection. The Declaration and Strategy for the Protection of the Arctic Environment was signed here in Rovaniemi in 1991 by the eight Arctic states (the five Nordic states, the Russian Federation, the United States and Canada). Under this co-operation, known as AEPS, four environmental protection working groups were established: Protection of the Arctic Marine Environment (PAME), Conservation of Arctic Flora and Fauna (CAFF), Emergency Prevention, Preparedness and Response (EPPR) and Arctic Monitoring and Assessment Programme (AMAP). A Task Force on Sustainable Development was also created, which was soon to become one pillar of the Arctic Council, which was established in 1996. The AEPS programmes were soon integrated into the work of the Council, forming the second pillar of its work.

The Arctic Council has also commenced new environmental protection initiatives, such as the Arctic Climate Impact Assessment (ACIA) and the very ambitiously titled Arctic Council Action Plan to Eliminate Pollution in the Arctic (ACAP). Even though environmental protection has maintained its importance in the Arctic Council, the level of ambition of this co-operation has not been too far-reaching. In the Arctic, the focus has been on assessing environmental threats and

damage that has already been incurred, rather than on establishing international treaties to combat these threats, as was done in the Antarctic.

According to AMAP, most of the human-induced pollution in the Arctic is not produced in the region but enters it via rivers and ocean and atmospheric currents. The principal threats to the region, ones already documented, come from outside: global climate change, ozone depletion and persistent organic pollutants. These are dealt with through global environmental protection regimes, to which the Arctic Council can only make a minor contribution, especially in its present modest form.

Yet, there are also various environmental problems originating in the Arctic, whose solution could lie with the Arctic Council. One such threat is the increasing exploitation of the vast natural resources of the region, especially the mining of various minerals and oil and gas exploitation. With the development of technology, the Arctic is becoming an increasingly attractive place for companies interested in exploiting its resources. The threat is real and it is underscored in Globio Report of the United Nations Environment Programme, which observes:

> In the last part of the 20th century, the Arctic has been increasingly exposed to industrial exploration and exploitation as well as tourism. The growth in oil, gas and mineral extraction, transportation networks and non-indigenous settlements are increasingly affecting wildlife and the welfare of indigenous people across the Arctic…A 2050 scenario was made using reduced, stable, or increased rates of infrastructure growth as compared to the growth between 1940 and 1990. The scenario revealed that at even stable growth rates of industrial development, 50-80 % of the Arctic may reach critical levels of anthropogenic disturbance in 2050, rendering most of these areas incompatible with traditional lifestyles of many subsistence-based indigenous communities (p. 2).

The Arctic is already - and is increasingly becoming – integrated into the global market place. All the Arctic states, except Russia, are parties to the international free-trade regime, now operating under the World Trade Organization, and Russia is waiting in line to join the Organization. The WTO exercises enormous influence on how business is done worldwide, including the Arctic. By restricting the power of nation-states to interfere in the operation of market place, international economic law also ensures that all companies have the right to exploit the resources of the Arctic on a non-discriminatory basis. This development can be seen here in Finnish Lapland, where enterprises from all over the world have started to extract various minerals.

But the global market place, whose smooth operation is guaranteed by international economic law, does not operate without any social restraints. IEL has grown rapidly to cover almost all aspects of environmental protection. It has been estimated that at present there are about 1000 treaties that include environmental protection norms; of these treaties, 150 are multilateral. Important factor in establishing social restraints for companies is also international human rights law.

This body of law exercises enormous influence world-wide, is codified in an impressive number of international treaties and aims to guarantee that basic human rights are not violated, for instance, in business activities.

For almost any imaginable situation of exploitation of natural resources in the Arctic, one can find plenty of norms that might be invoked by one group or the other to protect their interests, a situation reflecting the growing complexity of law in general. A good example of this complexity was witnessed here in Finnish Lapland in the Vuotos case. The planned construction by the Kemijoki Company of an artificial lake and a dam on the upper course of the Kemijoki River triggered various legal systems – international human rights law, IEL, European environmental law and national water law.

## Environmental Assessment in the Arctic

The increasing exploitation of the extensive natural resources of the Arctic is thus well regulated, if not in fact excessively so. The most promising method in IEL to manage these situations – before they become legal disputes – is clearly the Environmental assessment procedure (EA). This procedure aims to produce scientific information about the likely damaging effects of a proposed activity before it is constructed. The process involves all of the stakeholders – environmental NGOs, citizen groups, private individuals, companies and environmental administrations. The EA procedure in the Arctic raises issues that lie very much at the interface of environmental law and minority law, the area of expertise of this research professorship. In this presentation, the term 'EA' is used to refer to all environmental assessment procedures; 'EIA' refers to project-level EA procedures and 'SEA' denotes the evaluation of the environmental impacts of plans, programmes and policies.

The EA procedure, or at least EIA, has spread all around the world and is now regulated in most states. If the impacts of an activity are likely to cross state boundaries, there are international treaties, which ensure that the private and public sectors of the potentially affected states can participate in the national EA procedures of the origin state. In addition, many international funding institutions have their own EA rules designed to ensure that the projects they fund also meet environmental protection objectives.

Differences can be found between the national EA procedures, since the idea of EA has been implanted into different national traditions of environmental protection. Yet, certain basic elements of an EA procedure can be identified. The main function of an EA procedure is to produce scientific information on the likely environmental effects of a proposed activity. Another important function is to

involve the public to encourage them to convey their views on what should be studied in impact studies and to comment on the quality of the environmental impact statement, a document describing the results of the impact studies.

Most environmental problems are nowadays regulated in different levels of legal systems, in IEL, in European environmental law and in the national environmental protection systems. This is very much the case also in the Arctic. EA is first of all regulated in IEL. The Arctic states are required under the customary law principle of due diligence to ensure that no damage will occur to the environment of other states, or of areas outside their maritime jurisdiction, as a result of the activities under their jurisdiction and control. This principle clearly requires transboundary procedures between states already in the planning stage of the proposed activity, including assessment of likely transboundary impacts. It should be kept in mind, however, that the generality of the principle of due diligence makes it possible that states will not follow it in practice. It is therefore important that the principle is implemented through international treaties, the main one being the Convention on Environmental Impact Assessment in a Transboundary Context, known as the Espoo Convention.

This Convention implements the principle of due diligence in an ideal manner. It requires the states to notify each other when a significant transboundary impact is likely to follow from a proposed activity – as well as obligates them to make a transboundary impact assessment – and consult the other state. In addition, the public of the potentially affected state has a right to participate in the EIA procedure of the origin state on the same footing as the public of the state of origin. The Espoo Convention is very important in the Arctic since it has been signed by all eight Arctic states, an act that in itself carries some legal effects under the customary law of treaties, and has been ratified by five of them. The Convention has also recently been complemented by the Protocol on Strategic Environmental Assessment, which, when it enters into force, will ensure that the states parties introduce a SEA procedure for governmental plans and programmes, and consult the other states facing possible environmental impacts.

The Arctic EA system seems most complex when national EA procedures are examined. The state of Alaska and the entire Russian Arctic are the least problematic. Alaska has its own EA procedure, modelled after the federal EA procedure, and Russia has federal EA regulations. Canadian provinces and territories have quite extensive autonomous powers in many fields of policy, including environmental policy; the northern territories of Canada have their own kinds of EA procedures, which place more emphasis on the rights and interests of indigenous peoples. Finland, Sweden and Denmark are Member States of the EU, but since Greenland and Faroe Islands chose not to become part of the EU, these home-rule governments have created their own EA procedures. Of all the Arctic states, only Finland and Sweden are required to implement the EIA and SEA directives of the EU. However, because of the European Economic Area agreement

between European Free Trade Association (EFTA) and EU, EFTA states Iceland and Norway are required to implement the directives as well. An exception is the Svalbard Islands, which was excluded from the EEA agreement and now has an EA procedure of its own, enacted by Norway.

The structure of EA regulation seem rather complex, reflecting the general the complexity of Arctic governance. In functional perspective, however, the complexity lessens somewhat. In fact, without distorting things much, one can say that four major federal state legal systems meet at the Arctic Ocean: The Russian Federation, the EU, Canada and the United States. Even though the EU is not a federal state - legal thinking hovers between considering it an inter-governmental organization or a *sui generis* legal system – in functional terms it is much more integrated federal system than its North American counterparts. This is well seen in EA regulation, which requires all Member States – as well as all EFTA states (through the EEA agreement) – to implement the EIA and SEA directives, which set minimum requirements for the kind of EA procedure the Member States and EFTA states must have. The EA system in the EU goes much further than that in Canada or in the US, where the federal government may only apply its EA procedures to its own activities or to activities which it has funded or for those it has issued a permit. As a result, most private economic activities are excluded from the scope of federal EA. In the US and Canada, states and provinces can freely decide whether to even have an EA procedure or not.

Even though there are some pieces of EA legislation that apply particularly to Arctic conditions, such as the EA procedures applicable to the Svalbard Islands and the Nunavut territory in Canada, it is mostly the case that the EA rules in international, European and national law do not take into account the very specific Arctic circumstances. With the exception of Iceland, the capitals of the Arctic states are far away from the states' Arctic territory, and it is thus no wonder that the Arctic perspective does not figure in their EA procedures. This was the reason why Finland initiated a project in 1994 in AEPS co-operation to draw up guidelines on how to do EIA in Arctic circumstances. After intensive preparatory work and international negotiations the Alta Ministerial meeting of 1997 accepted two instruments that both address EA in the Arctic:

> We receive with appreciation the 'Guidelines for Environmental Impact Assessment (EIA) in the Arctic' and the 'Arctic Offshore Oil and Gas Guidelines' developed under the AEPS, and agree that these guidelines be applied (para. 3).

In these EIA Guidelines, the special conditions of the Arctic – the vulnerability of the region's ecosystems and the presence of indigenous peoples – have been taken into account in order to adjust the operation of international and national EA laws.

Even though these guidelines were agreed to be applied by the Arctic states in Alta ministerial and the Arctic Parliamentarians asked their governments to implement these EIA Guidelines in their Salekhard meeting in 1998, studies done at the Arctic Centre reveal that these Guidelines have not made their way into the practice. In fact, only five years after their formal approval in the Alta ministerial meeting, the Arctic Centre conducted a study, commissioned by the Ministry of the Environment, showing that almost none of the Arctic stake-holders – companies, regional environmental administrations, indigenous peoples, etc. – even knew that the Guidelines existed. Several reasons can be outlined for this failure of the EIA Guidelines to attain their desired goal, namely to really influence how Arctic EA is done. One is that EIA Guidelines were left without any real follow-up mechanism; a website was established but this only provides general information about Arctic EA's. This is in direct contrast to the follow-up method devised for the other instrument adopted at the same time as the EIA Guidelines, the Arctic Offshore Oil and Gas Guidelines, which contains some EA recommendations. The Offshore Guidelines are revised periodically, a mechanism which clearly contributes to keeping them a living reality.

## Environmental Assessment and the Arctic Indigenous Peoples

The EIA Guidelines outline quite a number of important recommendations as to how to involve the region's indigenous peoples, but, as mentioned above, these Guidelines have not found their way into practice. From the perspective of the original occupants of the Arctic, the Arctic indigenous peoples, (who live in all the Arctic states with the exception of Iceland), this is very unfortunate, because it is precisely natural resource exploitation projects that many times threaten their traditional livelihoods and culture in general. In most international and national laws regulating the EA procedure indigenous peoples are not treated as special participants.

However, international human rights law can provide some important protection for Arctic indigenous peoples. This body of international law is increasingly used by the indigenous peoples in general, including Arctic indigenous peoples, to protect their interests. ILO Convention No. 169 on Indigenous and Tribal Peoples contains some clauses requiring special participation rights for indigenous peoples in EA procedures as well, but Norway and Denmark are the only Arctic states to have ratified it. The most promising and, in effect, an international treaty already resorted to by Arctic indigenous peoples to protect their interests, is the International Covenant on Civil and Political Rights. The Covenant applies throughout the Arctic since all the eight Arctic states are parties to it. The

Covenant does not contain any express provisions on indigenous peoples but its article 27 does apply to the rights of minorities generally. At the time when the Covenant was adopted, in 1966, the indigenous peoples movement was yet to be born and thus there could not have been any separate provision on their rights. However, international human rights law has evolved with the development of societies, both international and national. The Human Rights Committee, a body that supervises the implementation of the Covenant, has made some important contributions suggesting how the Covenant's provisions should be interpreted, including Article 27.

The Committee receives country reports from its 151 states parties, gives concluding observations on the human rights situation in each state, and on the basis of these country reports issues General Comments. These generalize the experience gathered from examining the country reports and provide an authoritative interpretation of the Covenant provisions, including Article 27. The Covenant is complemented by a Protocol on the basis of which the Committee can hear complaints from individuals under the jurisdiction of state party. There are 104 parties to the Protocol; this number includes all of the Arctic states but the United States. The Arctic indigenous peoples have been active in defending their rights on the basis of Article 27. For instance., the Finnish Saami have brought the Finnish government before the Human Rights Committee in two cases in order to defend their traditional livelihood, reindeer herding, against economic activities in their traditional area for which the state has granted a permit, such as stone quarrying and deforestation.

Of utmost importance is that the Committee has outlined criteria by which Article 27 should be interpreted from the perspective of indigenous peoples. Article 27 reads as follows:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Firstly, the Committee has interpreted the concept of 'culture' very broadly, to include traditional livelihoods of indigenous peoples - such as hunting, fishing and reindeer herding. Secondly, the Committee interprets Article 27 as requiring states to take into account two elements, when they plan or grant permits for economic activities in the traditional territories of indigenous peoples. There has to be a meaningful consultation on the part of the state with the indigenous peoples, one genuinely striving to find a solution to the conflict between different land uses (procedural criterion). In addition, an economic activity proposed to operate in the traditional territories of indigenous peoples may not threaten the economic viability

of the traditional livelihood (material criterion). Also very important is the criterion that the state must constantly ensure that the cumulative impacts of several developments do not pose threats to the economic viability of traditional livelihoods.

The influence of the Covenant and its Article 27 cannot be underestimated in the making of Arctic EA procedures. First of all, the Article 27 binds legally all eight Arctic states. As the Committee has authoritatively interpreted it, the Article requires a special position for the Arctic indigenous peoples in the making of Arctic EAs. If the natural resource exploitation in question threatens their traditional territories, they have to be meaningfully consulted by the state authorities. The Committee cannot specify this general requirement in much detail within the scope of its procedures but in the Arctic setting the requirement would seem to go much further than that set out in the EIA Guidelines. What is needed in Arctic EAs are, according to Article 27, separate consultations with the indigenous peoples, not ones requiring their prior consent but ones obligating the decision-makers to take their perspective on the proposed economic activity seriously into account in all phases of EA procedure. The material criterion of maintaining the economic viability of traditional livelihoods sets out a general standard, which must influence what issues are studied in impact assessment phase; this criterion is, of course, directed more to the permitting authority, who makes the final decision on whether the proposed activity is to proceed and under what conditions.

## Concluding remarks

It can be observed from all of the above that the challenges to Arctic, IEL and general legal research are manifold. These challenges are enormous within legal research alone; they are even greater when we pursue multidisciplinary understandings of the issues. The need for interdisciplinary dialogue is evident, especially in IEL, and the framework for this dialogue is well established for instance, with these three Arctic Centre Research professorships. However, addressing this very complex task is clearly beyond the scope of this presentation.

There are two main challenges to Arctic and IEL legal research. The regulatory environment in almost all aspects of law has become increasingly international and with good reason: most of the problems of human societies nowadays can only be effectively countered by global action. Problems such as global pollution, terrorism, economic instability, and the proliferation of nuclear weapons, to name but a few, require global solutions and universally applicable norms. This situation has manifested itself in international law, which has seen an enormous number of international normative instruments being concluded between states and within inter-governmental organizations in almost all aspects of policy-making. In IEL, the

proliferation of various kinds of international instruments has prompted a general call among those of us involved in international environmental protection to implement existing instruments rather than make any new ones.

This 'move towards implementation' has manifested itself in IEL as a change in focus from general international law to studying how international environmental law is implemented in European law and national legal systems, a development that requires increased understanding of the functioning of European and national legal systems. This is significant in the Arctic since there the interplay between international law, federal legal systems and the law of the relevant provinces and states is at the heart of understanding the functioning of law applicable in the region. This became quite evident in the structure of EA regulation in the Arctic reviewed above.

Another challenge in IEL and Arctic legal research comes from the process of sustainable development, which started from the Brundtland Report, culminated in the Rio Conference on Environment and Development in 1992 and was recently continued by the World Summit on Sustainable Development in Johannesburg in 2002. Here, IEL research, with its strong focus on international environmental protection, has had to come to grips with international policy-making, which includes an ever broader range of issues relating to sustainable development. This holistic international agenda has also reflected itself in international law, with some scholars calling for a new systematic perspective on international law – the law of sustainable development – which would include, for instance, international economic law, international human rights law and IEL. The main challenge for legal research in this development is that specialization in a certain field of law should not prevent the scholar from understanding all the legal disciplines affecting a certain problem, as, for instance, occurs with environmental pollution caused by natural resource exploitation. This was examined above in relation to natural resource exploitation in the Arctic and it seems clear that without a proper understanding of international human rights law, IEL and international economic law as well, the understanding of the regulatory system remains imperfect.

Both these main challenges to IEL and Arctic legal research require expertise, which seems almost impossible to attain by an individual legal scholar. One has enough work to master the field of IEL, with its 1000 international treaties and other norms, let alone familiarize oneself with a very complex system of law, such as European law, and many national environmental protection systems. In addition, one should also have a grasp of neighbouring legal disciplines. Despite the enormous nature of these challenges, this is what is required of law and legal thinking for it to contribute to rather than compromise sustainable development.

Certainly, these challenges should also be met by new theoretical perspectives of law, as the old theories are very much based on the functioning of Western legal systems; these theories confine themselves to national territory, and on the idea that

various legal systems have their separate existence from each other. New theoretical perspectives should reflect the fact that already now the various legal systems are in constant interaction with each other. Another important development would be for the legal scholars of different disciplines to at least take these challenges seriously, and make an effort to open up their own perspective to legal systems of higher generality – international and European law – as well as neighbouring disciplines of law. This would already be quite an accomplishment, making it possible for legal scholars to co-operate across disciplinary boundaries within law, a development which itself would increase the prospects of law to really contributing to sustainable development.

# Book Reviews & Review Articles

AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW by Jan Klabbers, Cambridge University Press, 2002, 399 pages.

Jan Klabbers, professor of international law at the University of Helsinki is known among students as an inspiring and skilful teacher. Given Klabbers' ambition to urge people to think for themselves instead of adopting ready-made solutions, it is not surprising that he has felt the need to write a textbook on the topic of international organizations. It is not that there would not be textbooks around, but rather that they suffer from certain flaws. Many of the available books are either overly descriptive, or alternatively, when dealing with international organizations in more general terms, fail to present a convincing account of what institutional law is all about.[1]

The aim of the book is to provide a comprehensive introduction to the law of international organizations, not so much by focusing on the factual side of things, but through discussing general legal issues relating to the creation, functioning, and termination of organizations. Substantively, the book hereby covers topics over the entire 'lifespan' of organizations. Throughout all of the 16 chapters focus is on 'institutional law', i.e. those questions and problems that international organizations have in common. This does not mean that exactly the same questions would arise for each and every organization (which of course Klabbers recognizes). Nevertheless, the topics dealt with (legal position, foundation of powers, law of treaties, membership, finances, just to mention a few) are likely to concern all organizations in one form or another.

There are two related basic parameters to Klabbers´ approach to institutional law. The first and more general one is that no legal rules are carved in stone. The second is that the law of organizations lacks certainty and is indeterminate (which he, curiously, attributes to an 'immaturity' of institutional law). Klabbers´ image of institutions is hereby rooted in a 'critical' approach to law. The merit of the approach is that it does not lure the reader into thinking that law has any certainties to offer on its own terms. Instead, law is always 'battling it out' between different perceptions of its contents. The one 'battle' which is singled out in particular is the tension between members and the organization (reflecting more broadly the tension between state and community interests). It is the claim of the book that many of the ambiguities of institutional law become understandable against the background of this tension (and better so than through the popular 'functional necessity' thesis). This focus is the red thread of the book. As an illustration of the usefulness of a 'critical' conception of law, the book not only serves as an introduction to institutional law, but also to 'critical' analysis of international organizations.

In practical terms this means that the book does not attempt to provide an exhaustive account of organization or court practices on solving questions of institutional law. Instead it provides the tools, through posing a set of questions and

[1] The former would be true e.g. for H.G. Schermers and N.M. Blokker, *International Institutional Law* (Martinus Nijhoff Publishers: The Hague, 1995), the latter e.g. for C.F. Amerasinghe, *Principles of Institutional Law of International Organizations* (Cambridge University Press, 1996), see preface.

demonstrating contradictions, by which to start analyzing the law. What all the chapters of the book share, despite the wide range of topics discussed, is a kind of problematizing touch. In practically every chapter there are examples of how the seemingly certain façade of legal reasoning in fact diverts attention from underlying views and interests (be they moral convictions, geopolitics, or economic concerns). Klabbers' thinking is captured in a favourite phrase of his - that institutional law can often be surrounded by such uncertainty so as to be determinable 'in the eye of the beholder' (e.g. at 69 and 167). So instead of providing straight-forward answers on questions (such as what powers does the United Nations Security Council have?) the aim of the book is to demonstrate why many questions of institutional law allow a variety of answers, and how the member - organization dichotomy can shed some light on such differences. This does not mean that the member - organization dichotomy would have a similar explanatory role for all the topics discussed. Klabbers admits this both by recognizing that the member - organization dichotomy cannot explain all of institutional law, and by recognizing that there are different ways in which this dichotomy becomes relevant (at 39-41). This is also reflected in how different topics are dealt with. First of all (as in chapters 4 and 8 on competences and on privileges and immunities) the looking glass of the member - organization dichotomy is used for conceptualizing purposes. It is in such contexts that the 'critical' influence makes itself most visible by bringing many of the concepts of institutional law that have seemed hopelessly vague (like implied powers, functional necessity, ultra vires) within intelligible reach. In other cases (like in chapter 9 on institutional structures) the dichotomy is used to shed light on more practical problems.

Although the title includes the word 'introduction', this is not the source in which to look for comprehensive lists of case law, for enumerations of legal instruments of certain organs, or accounts on tasks of different organizations. For someone only interested in the formal side of things, other sources will probably prove more easily accessible. This is an advanced book, which presupposes at least basic knowledge of the topic. As to the textbook format, while making the book comprehensive in its reach, it does however come with the drawback of being, at times, somewhat superficial. While there is no shortage of questions raised, there is not always enough room to support the arguments presented with the space they would require. Sometimes this leaves the reader in conceptual confusion, like when rejecting the 'functional necessity' theory as a unifying theme for organizations (at 36-39). Klabbers builds this critique primarily on the 'emptiness' of the 'functional necessity' concept, and on its bias towards the international. The 'emptiness' is of course something that characterizes legal concepts in general. It is this 'emptiness' that allows the bias towards the international to enter the concept in the first place. This suggests that the actual critique of 'functional necessity', in order to be effective, must target its internationalist assumptions. Put differently, the 'emptiness' of the concept would imply that the internationalist view is merely one possible interpretation of it. But then there would not seem to be any reason why 'functional necessity' could not acquire a more balanced meaning. And if this is the case then the question arises whether the theory really needs to be discarded. It is also at times

difficult to keep track of the sense in which the term 'politics' is used in the book. In 'critical' reasoning a characterization of law as 'political' often expresses the interests and values that are necessarily part of any legal concept. In conceptualizing institutional law this proves useful (e.g. chapter 4). On the other hand, there are occasions where 'power politics' is more apparently what Klabbers has in mind. This seems to be the case especially when discussing the more practical ways that organizations go about their business (e.g. at 332-333). Unfortunately, there are also some instances where the meaning is somewhat unclear (e.g. at 242-243).

Klabbers' discussion on the powers of organizations (chapter 4) illustrates both the usefulness of his approach as well as the critique just raised. In this chapter Klabbers shows how reliance on the doctrines of attributed and implied powers can be used to express differences in the liberty with which the competence of organizations are construed. Again, the emptiness of these abstract doctrines allows the one to serve as a counterargument against the other in the search for a proper balance in the member - organization relationship. Through this insight interest can be turned beyond the question of formal legal justification into one of substance. Later on, basing himself upon recent restrictive applications of the implied powers doctrine, Klabbers argues that the more established organizations seem to have reached their limits (esp. at 78-80). However, this general conclusion is perhaps not as uncontroversial as Klabbers presents it. A short analysis of the diminished practice of using implied powers in EC law and of the *WHA* decision of the ICJ does not necessarily warrant such a general statement.[2] Although these recent examples do suggest that a claim to implied powers is not necessarily automatically valid, the actual reasons for a choice of method for developing the competence of organizations may be diverse. Even if the use of implied powers as a tool for a certain organization would formally diminish, the analysis cannot stop there. It should also be asked whether this is true of the evolution of competence in general. There might perhaps merely be a shift in mechanism used, expressing a desire of improved legitimacy (e.g. by utilizing the express amendment procedure, which in many organizations involves member governments more directly). In order for the premise of a more restrictive implied powers use to warrant the conclusion that established organizations have reached their limits, such arguments would need to be met with.

In fact, the general conclusion that an earlier (over)enthusiasm about organizations is now coming to an end, seems to derive from another source altogether. This becomes clear in the final chapter where Klabbers engages more deeply in theorizing on the future role of organizations and presents a plea for their reappraisal. His argument is that an organized style of politics as a whole is losing out. For organizations this means a loss of attractiveness (esp. at 336). The problem with the substituting forms of cooperation such as 'infranationalism' and 'transgovernmentalism' is that they are hopelessly non-democratic.[3] The proposed

[2] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict,* Advisory Opinion, ICJ Reports (1996) 66.

[3] 'Infranationalism' as used by J.H.H. Weiler, *The Constitution of Europe* (Cambridge University Press, 1999), 'transgovernmentalism' as advocated by Anne-Marie Slaughter, 'The Real New World Order', 76 *Foreign Affairs* (1997) 183.

way to overcome this would be to reinstitute faith in a formalized way of political interaction, and by re-establishing political communities. By this discussion Klabbers demonstrates that, in the end, the member - organization dichotomy is not a zero-sum game, and that there is a role for both in conducting viable national and international politics. The indication is that the member - organization dichotomy is not only useful as a tool for understanding institutional law, but that there is an even more important aspect to be explored here concerning the very justification of organizations. This is a useful reminder to those deeply buried within the niceties of institutional law (be it in the context of EC law, the WTO, or the UN) of the broader issues involved. Balancing member and community interests within the single organization every time a decision is taken is not enough. As there is no automatic assumption on the benefits of 'the international', each institutional arrangement will also have to prove its usefulness as a political forum in order not to lose attractiveness.

Finally, targeting a textbook covering an entire area of law for not being elaborate enough may seem a bit unfair. As any of the topics dealt with could easily fill up a major volume on its own, this is perhaps to ask for a degree of exhaustiveness that the textbook format does not allow. In his own words Klabbers describes the book as 'a textbook with an "attitude"' (at 15). 'Attitudes' are of course what a 'critical' view of law emphasizes and there is no shortage of those. The book is thought-provoking in style and reveals several intriguing contradictions of institutional law. It challenges the reader to engage in the arguments made. And although some of the 'attitudes' put forward could have done with some further elaboration, the emphasis on understanding, the skilful writing, and the vast use of examples and sources will guide any reader in the study of international organizations. For anyone interested either in the more general question on what institutional law is all about, or a more substantive topic concerning the functioning of organizations, the book will certainly serve as a source of inspiration.

Viljam Engström

DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW by Karen Knop. Cambridge University Press, Cambridge, 2002. 381 pages.

Diversity and Self-Determination in International Law by Karen Knop, Associate Law Professor at Toronto, already comes with ribbons attached. It is the winner of a Certificate of Merit by the American Society of International Law in 2003. And there is little doubt that this sensitive and perceptive work stands out from the crowd in what is a burgeoning literature on the right of peoples to self-determination.

What is significant about this study is that it brings real meaning to the idea of self-determination in international law. This is not so much a question of the right's legal status. Indeed, Knop simply accepts that it is part of international law, and in

this regard a reader expecting an enquiry into the sources of the law or the validity of certain rules will be disappointed. But, what emerges is a sense of international law as a medium in which self-determination is interpreted. Knop argues that, 'international legal texts on self-determination, like all legal texts assume and create a world,' (p. 5) and the book is a journey through this legally constructed world. Surveying the law of self-determination as you would a model village, we are not presented with the blotches of colour of an ethnographic map, but a terrain of court decisions, drafting committees and above all legal commentaries.

What the work underlines is a fundamental disconnection between the institutions of international law and the peoples who are expressly considered to be the holders of the right. Knop argues that groups claiming the right of self-determination, '[a]lmost by definition… have had, up to then, no hand in the development of the norm and its standpoint', (at 374). It is not simply the identity of people or peoples but the interpretation of that identity by people with their own backgrounds and perspectives that forms the theme of this work. Knop illustrates this with a UN pamphlet on a local politician from the French-administered trust territory of the Cameroons petitioning the Trusteeship Council. The man, Guillaume Bissek, depicted in the pamphlet as, 'an anthropological curiosity under the delegates' attentive gaze', (at 12) was, in fact, the representative of a political party, *Evolution sociale camerounaise*, with their own agenda and policies. Knop proposes that the characterization of peoples in international law be looked at within a threefold framework of identity, participation and interpretation (at 4). Undoubtedly the lawyers who emerge as the heroes of this work are those like Judge Dillard in *Western Sahara* or Erica-Irene Daes in the drafting of the UN Draft Declaration on the Rights of Indigenous Peoples, who have taken a broad and imaginative perspective to this interpretive role.

One consequence of this detached approach, though, is another kind of detachment. The book sometimes feels overly academic. This is an accusation which might be levelled, in particular, at part I of the book, where Knop squares off various academics on different aspects of self-determination. Thus, in chapter 1 we have James Crawford and Oscar Schachter on the significance of principles and rules. This is followed in chapter 2 by the literature of Charles Chaumant, Daniel Turp, Ian Brownlie and Karl Doehring being examined in terms of a 'categories' or 'coherence' approach to self-determination. Chapter 3 then takes us through the contrast between the supposedly enlightened democratic aspects of self-determination versus the 'pandaemonium' of its ethnic interpretation in the writings of Thomas Franck and Rosalyn Higgins. Part I is, of course, conceptual and therefore it may be argued necessarily has a bit of an academic feel. But, Knop's tendency to delve into the literature to examine concepts continues into other areas of the book, perhaps at the expense of other sources. Much of the analysis of Badinter Opinion No. 2, for example, turns into a reprise of the categories and coherence approach in chapter 2, this time with Matthew Craven and Hurst Hannum supplying the literature.

Part II of the book turns to cases and the drafting of instruments on self-determination. Chapter 4 looks at the ICJ's *Western Sahara* Advisory Opinion, the Badinter Commission's Opinion No. 2 and the *East Timor (Portugal v. Australia)* Case

in terms of interpretation, identity and participation. The common denominator in these decisions is that the population in question did not participate. This was evidently one factor influencing interpretation, and Knop also looks at the interpretation of a number concepts, such as *terra nullius* and trusteeship, in those cases. In particular, Knop focusses on the relationship between international law and European colonialism, and how judges act in relation to the law's Eurocentric heritage.

However, one problem with this focus is that, while it certainly brings out the ingrained historical context of legal concepts, in terms of identity and participation, it might appear a little too fixed on the past to the detriment of the present. Western Sahara and East Timor are textbook examples of colonialism by African and Asian countries, while the context of Opinion No. 2 was the campaign to carve a greater Serbia out of the former Yugoslav republics. While *Western Sahara* and *East Timor* did involve a consideration of the concepts of European colonialism, their underlying context was a non-European brand of imperialism. This context seems missing from Knop's analysis, but it must have had an influence on those deciding the cases. Were the judges in the ICJ really unaware that the General Assembly's request for an advisory opinion also served Morocco's and Mauritania's purpose of delaying the holding of a referendum in the territory?

This is also a question in the *East Timor* case where the court was presented with a former Portugese territory under Indonesian occupation. Knop highlights Judge Vereshchetin's separate opinion in which he criticizes Portugal, which brought the case before the court, for not actually consulting the East Timorese population before doing so. According to Knop, Judge Vereshchetin's comments, 'infused trusteeship with the essence of self-determination as expressed by the court in Western Sahara: "the need to pay regard to the freely expressed will of peoples."' (at 206). However, she also notes that the opinion could also be seen as, 'a double-edged sword for the East Timorese', (at 207) in that the result was to deny judicial consideration of their situation. A glance, though, at the context of East Timor might tell a different story. It seemed that Judge Vereshchetin was requiring Portugal to arrange a popular consultation in a territory which was under the brutal military occupation of another country. How did he propose that Portugal actually do this? Surely he knew that he was setting an impossible task. From this perspective the double-edged sword starts to look decidedly more single-edged and the lack of consultation more a justification for rather than a cause of the rejection of Portugal's case. Knop notes that Vereshchetin began his opinion by recalling that the court dismissed Portugal's claim because of Indonesia's right not to be subjected to the court's jurisdiction without its consent – 'the so-called *Monetary Gold* principle', (at 205) – which he concurred with. Perhaps his opinion was intended to give this rejection a more legitimate basis than a technical legal principle, and Judge Vereshchetin himself seems to have seen his argument as additional to the *Monetary Gold* principle.[1] If so, did his comments really represent 'the essence of self-determination'?

[1] Judge Vereshchetin, Separate Opinion, *East Timor (Portugal v. Australia)*, ICJ Reports (1995) 135.

Another aspect of identity which Knop appears to overlook in her focus on the concepts of European colonialism was the extensive use of tribal identities in the *Western Sahara* opinion. The court made use of a number of such identities at several key points in its considerations. Its characterization of the tribes of the *Bled Siba* areas of southern Morocco as '*de facto* independent powers'[2] was integral to its rejection of Morocco's claim to sovereignty over Western Sahara. The Tekna, which were described by Judge Gros as, 'mere *a posteriori* constructions of a little known epoch',[3] were alternatively used to establish some legal ties to Morocco. At one point the Court identifies the Regheibat as, 'an autonomous and independent people in the region with which these proceedings are concerned.'[4] And finally there is the Court's deconstruction of the Mauritanian 'entity' into the sum of its tribal parts.[5] The Mauritanian 'entity' is one of the identities which Knop considers, but it feels that her analysis of the *Reparation* test, by which this entity was found not to be one that is a source of rights and obligations, did not go as far as it could have done. It has never been clear, at least to me, how the Court could find that the entity was not one that incurred legal rights and obligations without ever specifying and then analysing what its possible rights and obligations might be.

One final criticism of chapter 6 is why does it only include three cases? Knop justifies the lack of a case study on the reports of the commissions of the Jurists and the Rapporteurs in the Åland Islands on the basis that self-determination was not part of international law at that time (at 21-2). This may be fair enough, but it does overlook two interesting cases where the commissions presented notably contrasting interpretations of the identities of Finland and the Åland Islands. Nonetheless, within Knop's own framework it seems hard to explain the omission of a case study on *Re. Secession of Quebec* and its, 'appeal to an inclusive constitutional history' (at 3).

Chapter 5 looks at the drafting of international instruments with a comparison of ILO Convention 169 and the UN Draft Declaration on the Rights of Indigenous Peoples. This chapter really brings out the institutional structure of participation and the role that these institutions see themselves as having. The ILO in producing Convention 169 saw its role as standard-setting by an interested expert and this was reflected in the instrument. However, in the drafting of the UN declaration, Knop highlights the role of Working Group Chairperson Erica-Irene Daes, who, 'shifted the process away from judicious standard-setting by a group of experts with input from interested parties and toward negotiations between the parties as equals mediated by the Chairperson.' (at 253-4). This issue of participation, though, raises a parallel issue of representation. Knop's examination of the Sandra Lovelace case, later on in part III, highlights the different identities that may exist within an indigenous community. Perhaps some consideration of the representation within indigenous communities might have been useful here. Knop noted that reaction to ILO Convention 169 among various indigenous NGOs has been mixed (at 230-1). How were indigenous interests represented by those NGOs?

---

[2] *Western Sahara* Advisory Opinion, ICJ Reports (1975) 44-5, para 96.

[3] *Ibid.,* 76.

[4] *Ibid.,* 67, para 159.

[5] *Ibid.,* 63, para 149.

This chapter was obviously not intended as a comprehensive survey of instruments on self-determination. Nonetheless, a focus on just two instruments does seem slightly limited. A look at the drafting of the Human Rights Covenants of 1966, or the Friendly Relations Declaration, GA Res. 2625(XXV), of 1970 or the Colonial Independence Declaration, GA Res. 1514(XV), of 1960 might have been useful. It might be argued that these instruments did not involve participation with NGO groups, but they do, nonetheless, shed light on many of Knop's themes. The issue of categories and cohesion has notably been seen in the drafting of the Covenants and the Friendly Relations Declaration. The argument of the pandaemonium of ethnic self-determination was again seen in the Covenants, the Friendly Relations Declaration and, in particular, the CSCE's Paris Charter of 1990. The transition of self-determination from within trusteeship to against it can also be clearly seen in the Covenants and the Colonial Independence Declaration.

Part III takes up the issue of women and self-determination, and offers a valuable insight on the right from the perspective of women, who, although about half of a people, have often been marginalized when a 'self' has determined something. Knop underscores this most tellingly in her consideration of self-determination in the Paris Peace Conference of 1919 in chapter 6. Versailles is often used as the starting point for legal commentaries on self-determination, but Knop shows that it was also a turning point in the representation of women. Just as the settlement entitled a number of populations to choose which state they wanted to belong to in a number of plebiscites, so, for the first time, women were entitled to take part in that choice. This was particularly significant as many of the powers in the conference, including France and Italy, would not grant equal suffrage for women for another twenty years. Not only that, Knop also demonstrates the influence of women's organisations in shaping policy in the conference, and how Woodrow Wilson's slogans of 'self-determination' and 'a world made safe for democracy' were used against the unequal representation of women. The chapter is an interesting new account of self-determination at Versailles, which shows that it was a crucial juncture not just for the rights of nations, but also for women, and certainly is required reading on self-determination in this period.

Chapter 7 turns from women and self-determination in the Wilsonian period to that of decolonization, and there are obviously clear analogies between the subordinate position of women and of nations in the colonial system. The chapter focusses on the role of women in the trusteeship system and the change in this role as trusteeship was replaced with self-determination as the guiding principle for colonial territories. The chapter focusses, in particular, on various petitions by women to the UN Trusteeship Council.

I have to say that I took a particular interest in the case study of the Fon of Bikom in the trust territory of the British Cameroons. This was a lurid tale brought by the St. Joan's Social and Political Alliance about a 13 year old girl taken as 'cargo' to be married to an approximately 80 year old tribal king, the Fon of Bikom, with his 600 wives, who according to custom stood around him in a semi-circle completely naked. British colonial authorities tended to downplay this story as a nun, 'using a certain amount of literary licence' (at 336). I have my own perspective

here, having just returned from a village, not in Bikom, but among the LaLa tribe of central Zambia, where girls are indeed married at 13, men are polygamous (though usually only with 2 or 3 not 600 wives) and people can be killed for being witches.

Knop uses this case and other similar ones, to illustrate a clash of cultures, with different interpretations of the position of women. She is also keen to point out that the European colonial perspective did not so much support the equality of indigenous women, as merely promote conformity with a western model of inequality. Nonetheless, she finds that the solution to the case – in which the girl was returned to her father and the Fon ordered that none of his wives should stay against their will – showed that, 'the Fon of Bikom and the United Nations shared an idea of women's consent.' (at 340). Personally, I would be sceptical about this. The colonial encounter was not just about culture but also authority. I wonder whether the Fon saw the British, as the British probably saw the UN, as an intrusive, but also fairly distant authority which it was necessary to remain on good terms with. I also wonder whether he told the UN Visiting Mission, which Knop writes, 'breathlessly' described its strenuous ascent of the mountain where he resided (at 339), simply what they wanted to hear before they marched back down again. Knop notes that there is no evidence that either the Visiting Mission or the British authorities had gone beyond the public assurances offered. It might be added that even in an unequal colonial relationship there is an inherent reciprocity in cultural exchange. Indigenous populations can be highly adept at using a colonizer's culture to support their own traditions. I remember being told how polygamy was, in fact, endorsed by the Bible – Abraham had apparently had four wives. One should not underestimate the ability of colonized populations to turn what appear to be shared values into something quite different. Knop too has her doubts about whether, 'a wife's consent could have been meaningfully ascertained in this patriarchal context', (at 340). I wonder what happened to the girl. Did she escape from the king only to be given away soon afterwards to another man?

However, another thing that struck me in chapter 6 is that the indigenous women who Knop describes using the petition system did not generally seem to come from the Fon of Bikom's world. Knop notes that there were, 'no petitions that relied in substance on traditional culture' (at 352). What instead emerges is a picture of women struggling to live in a colonial society constructed by Europeans. I notice that Rupert Emerson does not appear in Knop's bibliography, which is a shame because most of the other literature on self-determination does and Emerson wrote several good and influential pieces on the subject.[6] She might have well considered Emerson's westernization theory of anticolonial nationalism,[7] and this might have strengthened the idea of women's movements as an integral part of the decolonization process, in the same way that she shows they were at Versailles. Knop quotes Malawian poet Felix Mnthali to underline the how men saw women's position in the liberation struggle: 'When Africa at home and across the seas is truly

[6] See R. Emerson, 'Self-Determination' 65 *American Journal of International Law* (1971) 459-75; *Self-Determination Revisited in the Era of Decolonization* (Harvard University Center for International Affairs, Occasional Papers in International Affairs, No. 9, 1964).

[7] R. Emerson, *From Empire to Nation: The Rise of Self-Assertion of Asian and African Peoples* (Harvard University Press, Cambridge: Massachusetts, 1960).

free there will be time for me and time for you to share the cooking and change the nappies – till then, first things first!' (at 348-9). It is interesting how women's rights seem to tie in with a familiar story about human rights in the decolonization process – put on the back burner during the push for independence only to remain so once independence had been achieved. (This is again recounted well by Emerson).[8]

The use of women's rights as a means of unpicking the collective 'self' seems to shine through chapter 8, which concerns the *Sandra Lovelace* complaint before the Human Rights Committee. According to Knop, the traditional view was that the Human Rights Committee was presented with the rights of Lovelace as a woman or as part of the Maliseet people. However, Knop argues that the identity that Lovelace was challenging was not a traditional Maliseet one, but a legal 'Indian' identity constructed by Canadian colonialism. What I found striking in the *Lovelace* case, though, was how two collective identities, 'people' and 'women' can fragment against each other. It was interesting how Lovelace's complaint exposed divisions within the Maliseet 'self': 'A few chiefs supported us… But most of them are chauvinist. They'd say, 'You're only a woman, so what do you know? Go watch your babies, clean your house.' That's the attitude.' (at 264).

Most of the criticisms of Karen Knop's work made in this review really take the form of testing the edges of her argument rather than anything central to it. This book really is a robust and well-thought out piece of work, and also generally thoroughly researched. Karen Knop has, with great care and insight, produced a sensitive and intelligent analysis of self-determination within the framework of identity, interpretation and participation. It is also an original and pioneering work that rolls back the frontiers in the study of the right, in particular with respect to women, and raises ideas that will no doubt be the topic of academic discussion for many years to come. For those with an interest in the field and also in international law more generally, it is quite simply essential reading.

James J. Summers

[8] R. Emerson, 'The Fate of Human Rights in the Third World' 27 *World Politics* (1974-5) 201-26.

EUROPE IN SEARCH OF MEANING AND PURPOSE. Edited by Kimmo Nuotio. Forum Iuris, Helsinki, 2004. 211 pages.

'Europe needs a sense of meaning and purpose'. [1]

Enlargement *ad infinitum*? Europe of the citizens or of the Member States? More supranational or back to intergovernmental government? It would be much easier to answer those questions, if we had an ideological or philosophical *Überbau* of the process, if we knew where we are heading, if the question of the finality of the European integration was solved.

Part of the opening quote was used as the title of the collection of articles I am going to review and which try to open up new vistas on the topic. The first part of this review will divulge where the idea of the publication stems from, give some kind of a general judgement and provide clarifications on the authors. In the second part, some of the articles will be presented.

## General comments

The book has its roots in the research project 'Legitimacy and Citizenship' at the University of Helsinki. Within the scope of this research project a colloquium was organised in December 2002 by Professor Kimmo Nuotio with the title: '"Like a Bridge...". Rights, Policies, Competencies'. The key focus of the colloquium was on legitimacy of European law and the identity of the European Union itself. Although the content of the book is not exactly the same as the discussed papers of the colloquium, it curls around the same questions reflecting a rich theoretical debate.

This title gives an inkling of the advantages and disadvantages of this volume: It provides a picture of the current debate on the future of European law, presenting different angles from which the development of the European integration is reviewed, casts some light to abstract notions like identity and citizenship and opens windows to critical perspectives of the underlying economic logic of the European Union. The foremost asset of the book, its diversity, is at the same time its Achilles' heel: There is no red line which connects the articles and some of the articles are rather theoretical and revolve feline-like around noble ideas without coming much closer.

The reader will, however, always gain from the countless cross-references and intellectual abundance of the contributors. The largest part of the authors are law professors; two - Oliver Gerstenberg and Scott Veitch - are readers of law. Most of them are either British or from a Nordic country. The editor, Kimmo Nuotio, is a Professor of criminal law with a strong interest in legal theory. Some of the material has been published before; some are revised versions of papers for law conferences.

[1] This is how Romano Prodi put it in a speech on 15th of February 2000 at the European Parliament, 'Shaping the new Europe'. Downloadable at: http://europa.eu.int/comm/external_relations/news/2000/02_00/speech_00_41.htm (last visited 12th of February 2005).

## A Closer Look at Four Articles

Unfortunately, there is not room to discuss every single article in the collection. *Pars pro toto* I will try to cast some light on the contents and styles of some of the articles.

### Ian Ward: 'Europe in Search of Meaning and Purpose'

The article by the British law professor Ian Ward touches upon some of the most important challenges of Europe: Those which relate to the completion of the market, those which relate to enlargement and flexibility, those that speak to the seemingly intractable problem of governance and the citizen, and last those that engage the equally pressing need to discern some kind of European public philosophy. The essay can serve well as an easy accessible introduction to the area under discussion, but does not provide for revolutionary inside views.

Speaking about the completing of the Internal Market, Ward criticizes that formal equality of access was no guarantor of fairness. This is as true as it is obvious - however there seem to be no convincing alternatives, and none is offered by the author. In terms of the enlargement related problems, Wards mainly raises two issues: Firstly the question where Europe ends and secondly the idea of flexibility. Ward does not appear to like the flexibility clauses, inserted into Articles 43-45 of the Union Treaty in 1997, as he thinks that every member state was 'free to pick and choose which bits of European integration they would like to support'[2]. The question of flexibility is certainly an interesting one, but it remains to be noted that the *enhanced cooperation*, as flexibility is called in the EU Treaty, has been very seldom used so far and is bound to some conditions.[3] It might however be of importance in the following years, as the new Member States seem to be quite reluctant to further integration.

The third topic treated by Ward is the civic society. Here the often-discussed problems of the democratic deficit and absence of a European 'demos', that is Greek for people, is mentioned.

Finally the author comes to the European public philosophy, the section in which he states that promoting cosmopolitan humanism is the answer to the quest for meaning and purpose. It would have been nice, however, to know what the author meant by humanism, as the term is, especially understood in an international law context, rather vague for an answer.

### Kaarlo Tuori: The Many Senses of European Citizenship

The European citizenship, introduced by the Maastricht Treaty, is one answer to the legitimacy deficit of the EU - and one of the most discussed, too. In absence of a European *demos*, the whole concept seems questionable. Furthermore, the

[2] Ward, 'Europe in Search of 'Meaning and Purpose', at 9.

[3] Compare for a deeper analysis: Lukas Wasielewski, *Rechtsdifferenzierungen in einer erweiterten Europäischen Union* (Nomos: Baden-Baden, 2003).

citizenship of the European Union can only be gained through the nationality of a Member State. Whereas most authors only scratch the surface when analysing the concept of citizenship, Kaarlo Tuori, who is a professor of jurisprudence at the University of Helsinki, provides a deeper analysis in this article.

In an introductory part, the philosophical and sociological basis for the study on citizenship is laid: Passing by concepts of Weiler and Madura to describe the process of constitutionalism and Europeanization; paying tribute to Grimm and Habermas, when it comes to the European civil society and public sphere; referring to Lockean and Hobbesian model applied to the EU as developed in a doctoral thesis by Zetterquist, the author develops his own idea of European citizenship. According to Tuori, citizenship might be seen in a 'thin' and 'thick' sense. Citizenship in a thin sense covers the rights and duties of an individual to the polity, whereas the thick dimension of citizenship would refer to the whole socio-psychological mechanisms, as well as the bonds of loyalty an individual engages in.

When criticising the coining of the terms 'thin and thick' one has to bear in mind, that those terms are only analytical concepts, not absolute truths - they have their merit in enlightening the different layers of citizenship and pointing out that citizenship is not just a 'vertical' relationship between state and individual but also refers to the horizontal level in which the citizen communicates.

## Scott Veitch: Legal Right and Political Amnesia

Scott Veitch analyses the constitutional dialogue currently going on within the European Union from a critical social-theoretic point of view. He is quite sceptical concerning the constitution process, which he judges to be a failure to engage with the underlying dynamics of the economic constituency amounting to political amnesia. Referring to Habermas, Veitch suggests that a fifth epoch of *juridification* is to be witnessed in the emerging European law. The term refers to the tendency towards an increase in formal or written law. Habermas distinguished the bourgeois state, the constitutional state, the democratic constitutional state and on the fourth state the democratic welfare state, institutionalizing social power relations.

According to Veitch we are at the fifth epoch of *juridification*, as some markers of something new appear: decentralization of power in contrast to the Welfare State model and the constitution of global capitalism. A reconfiguration of power takes place on a supranational level, where more and more formal law is generated. To those like Miguel Poiares Maduro, now an Advocate-General at the ECJ, who think that the process leads to a decline of the role of politics, the author answers that economic organizations are profoundly political. The author detects a silent glorification of exploitation in the EU based on the fact that we fail to engage with the underlying dynamics of the economic constituency to the degree of a political amnesia.

This article differs in style and mission a lot from the first two discussed: Whereas the first want to reconcile, the latter acuminates the conflict, provoking contradiction. Even if one does not agree with the neo-marxist views of Veith, one can profit from the confrontation and question well beloved views.

### Kimmo Nuotio: On the Significance of Criminal Justice for a Europe 'United in Diversity'

Since the Establishing of an Area of Freedom, Security and Justice, criminal policy is becoming more and more important in the European context. Whereas criminal law is to the largest extent an issue of domestic law, criminal policy is increasingly dealt with on the supranational level. After an opulent introduction to the subject, the author lays open the roots of the Third pillar cooperation in criminal matters by reflecting on the nature of penal law itself, passing by German sociological schools of the last two centuries. Why are criminal law instruments needed in the EU context? Partly to deal with the negative consequences of the full exercise of the four freedoms granted in the Rome Treaty, partly to protect the common budget against fraud.

In the next section Nuotio takes a look on how the European Union defines itself as a criminal policy maker, as it can be deducted from a report by the Working Group on 'Freedom, Security and Justice' of the European Convention. Some of the suggestions of the working group illustrate that the matters of the Third pillar are moving to a great amount towards a supranational regime, as for example the proposed introduction of the decision-making process through qualified majority voting. The author depicts an inherent contradiction between the attitude that wishes to avoid commitments to federalist structures in this field and the enhancement of legal integration by waiving the Member States into the fabric of common legislation.

A step to place criminal law in the framework of constitutionalism is undertaken in the following section. There, different sociological theories are discussed and the political dimension of criminal law is adumbrated. Nuotio here observes the recent developments not only from the perspective of a criminal lawyer but more as someone giving an outline of legal theory of the field. From those theoretical heights, the author finds the way to the more practical questions which criminal policy assumptions we find behind common European programs and proposals.

The article presents an abundance of ideas, but cannot due to limited space elaborate on all; therefore it would be interesting to deal with the questions of this fascinating field in depth - maybe a larger publication project might follow?

## Conclusion

All articles deal - in a more or less explicit way - with the question of finality. The concept had been in the background of European debate at certain times and at the front pages at others. In a famous speech, the German Minister of Foreign Affairs, Joschka Fischer, provoked a vivid dispute in Europe on the topic.[4] He held that the

[4] 'From Confederacy to Federation: Thoughts on the Finality of the European Integration', speech by Joschka Fischer at the Humboldt University in Berlin, at 12th of May 2000. Downloadable at: http://www.jeanmonnetprogram.org/papers/00/joschka_fischer_en.rtf (last visited 12th February 2005).

*Monnet method* of small steps towards an indefinite future has come to an end. This gradual process of integration, with no blueprint for the final must in Fischer's opinion be replaced by the vision of a European Federation. Fischer, after carefully repeating that he was not acting on behalf of the German government but rather as a private citizen, claimed that Europe should face the transition from a union of states to full parliamentarisation as a European Federation, with a European government and Parliament which would deserve the name.

This vision has been objected by many, pointing to the success of unification by small steps. The problems with a European federal State seem too difficult to overcome, the nation states still too strong to cede power to European institutions. Incontestably, Europe will play a more and more important role in national politics and legislation and there must be new answers to the questions of integration after enlargement and the ability of the institutions to act. On the way to an ever closer Europe - whether we accept Fischer's vision or not - there will be many discussions which road to take. This collection of essays might not give any definite answers. But it poses the right questions.

Tobias Bräutigam

HUMAN RIGHTS. AN INTERDISCIPLINARY APPROACH. By Michael Freeman. Polity Press, Cambridge, 2002. 201 pages.

Michael Freeman's[1] latest book is an ambitious venture aiming to offer a comprehensive overview of the extensive field of human rights. The book covers the philosophical foundation and historical background of human rights, as well as their role in global and local politics. It discusses the UN network, indigenous and minority rights as well as women's rights through feminist insights, expressing also concern over rights inflation. It addresses the universalism-particularism debate, discusses the concept of relativism - whatever it means - and considers the role of social sciences in the study of human rights. In all, the book provides an exhaustive list of topics in a mere 178 pages. Although offering many interesting insights, the book aims to say too much, leaving analysis superficial. However, before concluding remarks, a more detailed analysis is required, connecting the book to the various debates addressed.

As is appropriate, the book begins at the beginning. More concretely, this means discussion of the historical development and the philosophical premises on which the Universal Declaration of Human Rights was drafted. The path leads to the end of 19th century, and is picked up again from the end of World War II; practically no

[1] Michael Freeman BA (Cambridge), LLB (Stanford), PhD (Essex), Reader (part-time) Department of Government of the United Kingdom. His other publications include *Edmund Burke and the Critique of Political Radicalism* (University of Chicago Press, 1980); his co-edited works include *Frontiers of Political Theory* (Palgrave Macmillan: New York, 1980), and *The Ideologies of Children's Rights* (Martinus Nijhoff Publishers: Dordrecht, 1992). Brief biography available at <www2.essex.ac.uk/human_rights_centre people/staff/freeman .shtm> (visited 20 March 2004).

attention is paid to the intermittent decades.[2] Even though this follows the established genealogy of human rights, the omission is disappointing: it gives the impression that human rights emerged from thin air and exist today beyond such mundane things as politics. This, however, cannot be the case, as all phenomena have a context, which undeniably also affects their content. The period preceding the Universal Declaration entails various interesting developments particularly in the United States that likely had an important impact on the international rights movement.[3] Thus it would be of considerable interest to learn more of internal US politics of the 1920's and 1930's - the New Deal, the American Civil Liberties Movements and Franklin D. Roosevelt's speech '4 Freedoms' among others. Such detailed micro-analysis could also offer fruitful angles to the study of the philosophical foundations of human rights, particularly their ethnocentricity.[4]

Freeman's considerations do, however, not pursue such avenues but instead remain conventual: he goes through the familiar questions of what human rights are and on what philosophical foundations rights claims can be made. For reasons discussed later, it is difficult to discover Freeman's own sentiments on these issues; a rough characterization is, nevertheless, attempted. According to Freeman, the philosophical foundations of human rights, often stated to be problematic, are logically so as 'the philosophical foundations of all beliefs are problematic.' (at 110) He considers a characterization by Jack Donnelly according to which 'human rights are the rights one has simply because one is a human being,' calling this 'a very common and very unsatisfactory formulation.'[5] Further, he states it to be a common misunderstanding that 'human rights are "things" that we could have as we have arms and legs.' Instead, rights are '*just claims* or *entitlements* that derive from moral and/or legal rules.'(at 6) The normativity of human rights is approached through

---

[2] Freeman covers the aforementioned period with one paragraph, concluding: 'Certain practical political questions ... were sometimes discussed on the language of the rights of man ... and some predecessors of modern human-rights non-governmental organizations ... were set up. However, when the Covenant of the League of Nations was adopted in 1919 ..., it made no mention of the rights of man. It took the horrors of Nazism to revive the concept of the Rights of Man as human rights.' Freeman at 31.

[3] That particularly the events in the US were of importance for the declaration gains support from the fact that during the drafting stage, the Universal Declaration was often referred to as the 'International Bill of Rights.' Some authors also deduce US influence on human rights from the prevailing heavy emphasis on civil and political rights over economic, cultural and social rights. See Tony Evans, 'Introduction: Power, Hegemony and the Universalization of Human Rights' in Tony Evans (ed.), *Human Rights Fifty Years on: A Reappraisal* (Manchester University Press: Manchester, 1998) at 2-23.

[4] Such angles include the connection human rights claims have to property rights, as well as the linguistic particularity of the rights discourse: for example the concept of the individual is not found in all languages in the sense used in human rights. For an introduction to the discussion, see Parker Shipton, 'Legalism and Loyalism: European, African, and Human "Rights"' in Barthalomew Dean & Jerome M. Levi (Eds.), *At the Risk of Being Heard: Identity, Indigenous Rights, and Postcolonial States* (The University of Michigan: Ann Arbor, 2003) 45-79.

[5] Freeman quotes Jack Donnelly, *The Concept of Human Rights* (Croom Helm: London, 1985) at 1. In Freeman at 60.

'philosophical questions' about the relationship of 'human rights and other values.'(at 11) Freeman disagrees with the influential suggestion by Ronald Dworkin, according to which rights are 'trumps' that always defeat other moral and political considerations. Rather, '[h]uman rights may be trumps in a stronger sense, in that they override more than routine political policies, but it is not plausible to claim that they override all other considerations.'[6] To summarize, Freeman favours the much employed formulation according to which human rights establish '*minimum standards* of good government,' emphasizing that '[c]laiming too much for human rights may make it harder to defend them against their critics, and thereby weaken their appeal and effects.' (at 11, emphasis in original. )

Questions on the relationship of human rights and other values lead to the familiar terrain of universalism-particularism - a debate many already thought extinct - and to the buzzword 'relativism'. There are few concepts that have generated as much passion and confusion; as is pointed out by leading anthropologist Clifford Geertz, it is associated with such 'moral and intellectual consequences' as 'subjectivism, nihilism, incoherence, Machiavellianism, ethical idiocy, esthetic blindness, and so on'.[7] Such attitudes are easily found in human rights and 'multiculturalist' writings which consider relativism to be something that should be 'avoided' or 'steered clear from'.[8] Similar tone is also found in Freeman's text as he concludes that 'the scientific philosophy of positivism can lead down the path of moral indifference, while the "interpretive" social sciences, such as anthropology, can lead to moral relativism.[9] He also states that '[c]ultural relativists find it difficult to avoid the temptation of deriving relativism from universal principles.' The significance of relativism appears somewhat obscure to Freeman, reflected in his statement that 'cultural relativism appears to be attractive, but in fact does not make sense. The principle that we should respect *all* cultures is self-contradictory, because some cultures do not respect other cultures.'[10] (at 109, emphasis in original)

---

[6] See Ronald Dworkin, *Taking Rights Seriously* (Duckworth: London, 1978) at 92. In Freeman at 61.

[7] Clifford Geertz, 'Anti Anti-Relativism' 86 *American Anthropologist 2* (1982) 263-278, at 263.

[8] See for example Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press: Princeton, 2002) at 29: 'Walzer is not a relativist, though at times it is hard to see how he can *avoid relativism*'; 'Multicultural theorists of both genders are in turn *charged with cultural relativism*, moral callousness, the defence of patriarchy, and compromising women's rights in order to preserve the plurality of traditions.' Benhabib at 101 quoting Alan Wolfe, 'Alien Nation', *New Republic*, 26 March, 2001. (Emphasis added.) A radically different significance to relativism - increasing confusion - is given by Noam Chomsky who uses the term to refer to the double-standard that the US employs in regards to human rights. See Noam Chomsky, 'The United States and the challenge of relativity' in Tony Evans (ed.), *Human Rights Fifty Years on, supra* note 3, at 24-56.

[9] Freeman is quoting R. N. Bellah, N. Haan, P. Rabinow and W. M. Sullivan (Eds.), *Social Science as Moral Inquiry* (Columbia University Press: New York, 1983) at 1-6. In Freeman at 99. See end of review for commentaries on Freeman's use of quotations.

[10] It should again be emphasized that Freeman is by no means alone with such confusion. Again quoting Geertz: 'Whatever cultural relativism may be or originally have been (and there is not one of its critics in a hundred who has got it right), it serves these days largely as a specter to scare us away from certain ways of thinking and toward others.' Geertz, *supra* see note 7, at 263.

Further confusion is created by the term 'compossible' that Freeman employs in various instances. It is interesting to devote the term a moment's attention. As such, it is unfamiliar from human rights or international law literature, and it is not found in a standard dictionary.[11] When examined further, Westlaw offers 16 articles using the term, and it appears to be connected to discussions over group and individual rights, as well as legal pluralism.[12] Thus it can be connected to more general attempts of various mainstream authors, particularly 'multi-culturalists', to 'meet the challenge of relativism' by incorporating some aspects of leniency into their theoretical constructions.[13] Such attempts entail, however, deep theoretical contradictions as they remain blind to their own implicit assumptions, namely what is and is not culture. As Freeman does not engage in these theoretical debates to any great extent, they will not be pursued, and attention shall instead be returned to the normative force Freeman gives to human rights.

All the above makes it difficult to discover Freeman's ultimate view of human rights: is he a universalist according to whom human rights ultimately defeat all other claims of conduct, or a relativist who sees variation of human conduct too great for any single set of standards? On the surface it appears appropriate to call him a relativist: the term 'compossible' and his other comments appear to suggest that he accepts the importance of other values in addition to human rights, and in this sense, does not treat human rights as absolute 'trumps'. When examined closer, his tone, nevertheless, alters. Of the relationship of individual and collective rights, he states that '(c)ollective rights may be necessary to protect human dignity, and therefore may be compatible with human rights, but, in the event of conflict between collective rights and human rights, the latter should generally prevail.'(at 121) Even more directly, '(c)ultures that are incompatible with universal human rights in some respects may have some value, but cultural relativism fails to provide a general objection to human-rights universalism.' (at 109) Any remaining ambiguity is clarified by his statement 'cultural relativism is biassed against the weak.'(at 106) His position becomes finally settled as he relies extensive on Martha Nussbaum, a universalistic and liberal feminist whose writings some consider with good cause to reflect 'Eurocentrism, imperialism, patriarchal feminism, or simply arrogance, ignorance, and insensitivity vis-à-vis other cultures.'[14] Without pursuing the

---

[11] The New International Webster's Comprehensive Dictionary of the English Language. Encyclopaedic Edition (Trident Press International: Florida, 1999 Edition).

[12] Various sources point to an article by Hillel Steiner from 1977 as the source of the term. Hillel Steiner, 'The structure of a Set of Compossible Rights,' *74 Journal of Philosophy* (1977). However, it appears that the term has not become an established one and has instead lost its wind, as it has enjoyed only 2 mentions after year 2000. <http://international.westlaw.com> (visited 25 February 2004).

[13] For two recent examples, see the already mentioned Benhabib, *supra* note 8; and Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge University Press: Cambridge, 2001).

[14] Susan Okin, 'Is Multiculturalism Bad for Women.' (Eds. Joshua Cohen, Matthew Howard, and Martha C. Nussbaum. (Princeton University Press: Princeton, 1999.) See discussion in Benhabib, *supra* note 8, 101.

discussion on the points Freeman highlights from Nussbaum,[15] it could merely be concluded that Freeman comes out very much as a universalist, who fails to make the final analytic task missing from most human rights writings: he overlooks that a dichotomy 'culture-universality' does not exist in reality, and that universal rights claims are instead a very particular culture in themselves. He fails to see that human rights entail cultural elements - call it their 'western ethnocentrism' for lack of a better expression - that human rights are culture.[16]

However, this analytic shortcoming notwithstanding, it is evident that Freeman has devoted the question concerning the universality of human rights considerable attention. The same can unfortunately not be said on the book in its entirety: where most topics are concerned, his writing remains introductory and rarely offers any serious analysis of his own. This characterizes also the treatment he gives to other disciplines - Freeman mentions philosophy, theology, sociology, anthropology, psychology and international relations - and their contributions to human rights. The introductory tone arouses occasional irritation: for example, he discusses the compatibility of Islam and human rights with the same astonishing ease that is found in so many writings in the field of human rights; the fact that some scholars spend an entire lifetime in the study of the doctrine of Islam seems not to inhibit him from drawing rather firm conclusions in the course of two pages. (at 111-114) His discussion on psychology creates an additional source of irritation: as he talks 'murderous desires,' the 'scapegoat theory' and experimental psychology, one gets an unwelcome feeling of being offered the 'best hits' of the discipline; it becomes increasingly difficult to see the full relevance of the mentioned factors to human rights research. (at 91)

The discussion over psychology offers also some references that puzzle the reader,[17] continuing the trend that dominates the book in its entirety. In all,

---

[15] 'The most difficult case is that in which those who are victims of human-rights violations support the culture that legitimates those violations. Women who are malnourished or uneducated, for example, sometimes support the cultures that place them in this condition. Nussbaum argues that the expressed opinions of the victims cannot be morally decisive, because the very injustice that denies them food and education denies them the ability to imagine alternative ways of life and therefore to express alternative desires. Their apparent satisfaction with their condition, far from justifying it, is part of what is wrong with it. In Martha Nussbaum, "Commentary on Onora O'Neill: justice, gender, and international boundaries"', in Martha Nussbaum and A. Sen (Eds.), *The Quality of Life* (Clarendon Press: Oxford, 1993); quoted in Freeman at 106. Without pursuing the discussion, it should briefly be noted that such victimization is extremely dangerous as it ultimately deprives its targets of autonomy, reducing them to mere objects, while investing the subject, the interpreter, with absolute knowledge of their well-being.

[16] For further discussion, see Miia Halme, 'Review Article: Culture and Rights - Beyond Relativism?' Forthcoming in 27 *Polar: The Political and Legal Anthropology Review 2* (2004). For the proper understanding for the analytic mode of thinking that could be called 'relativism' in the anthropological sense, here yet another quote from Geertz: 'It has not been anthropological theory, such as it is, that has made our field seem to be a massive argument against absolutism in thought, morals, and esthetic judgment; it has been anthropological data: customs, crania, living floors, and lexicons.' See Geertz, *supra* note 7, at 264.

[17] For the psychological examples, a reference is given to Glover, whom he relies extensively in regards to legal philosophers but who appears not to be a psychologist, along side a more standard appearing

Freeman's use of quotation gives rise to the greatest criticism in the entire book: they simply fall outside of the academic ideal. One reflection of this is the absence of potentially interesting references.[18] However, an even more disturbing feature is Freeman's habit to offer footnotes in places where none appear necessary, making it considerably difficult to discover his own voice. This tendency becomes apparent particularly in regards to critical views, which are either accompanied by such vague disclaimers as 'according to some'[19], or coupled with references to his peers.[20] These tendencies give rise to the question: what exactly is the purpose of the book? What did Freeman wish to say when writing it? One possibility is that he intended the book to offer an introduction for novel students of the field. Based on its vast substance matter and introductory tone, such a classification might initially appear appropriate. The third aspect of quotational shortcomings makes such a recommendation, nevertheless, inappropriate: where classics are concerned, it is a great disappointment.

Here the most disturbing feature is Freeman's habit to rely on the works of others for direct quotations. The examples are countless. 'Nietzsche called ethical idealists "emigrants from reality" (Glover 1999: 29)'[21]; 'The French historian Michel Villey initiated a debate on the distinction between *objective right* ... and *subjective rights*... (Tuck 1979: 7-9; Tierney 1988: 4-6, 15).'[22] In the course of the entire book, Freeman mentions Aristotle, Bentham, Burke, Durkheim, Grotius, Hegel, Hobbes, Kant, Locke, Marx, Mill, Nietzsche, Paine, Saint-Simon, de Tocqueville, Weber - yet, the only works to be found in the bibliography are those of Locke and Paine; he has in fact not even included his own book on Burke in the bibliography.[23] Freeman

psychology book (although as the author holds no knowledge of this particular strand of psychology, there remains no means for assessing the merits of the given reference). J. Glover, *Humanity: a moral history of the twentieth century* (Jonathan Cape: London, 1999). Such a reference is a disturbing one, as it raises the question of the authority of the citation, as well as the value of the other sources offered in the discussion over social sciences; also, one cannot but wonder how thorough Freeman's knowledge is on the matters under discussion.

[18] For example: 'Islamic scholars who derive human rights from our obligations to God are employing an argument similar to Locke's. Islam may be reluctant to recognize that Muslims and non-Muslims are equal in rights, but Locke was reluctant to recognize equality between Protestants, on the one hand, and Roman Catholics, atheists and heathens on the other.' No reference offered. Freeman at 103.

[19] 'According to some critics of human rights the claim that human rights are universal ignores the fact that human beings are different. Universality, they say, is an illusion produced by the dominance of Western states over human-rights discourse since the Second World War.' Freeman at 102.

[20] 'The declaration has a certain Western bias in its emphasis on rights rather than duties, on individual rather than collective rights, on civil and political rather than economic, social and cultural rights, and its lack of explicit concern with the problem of imperialism (Caesius 1992: 31).' Freeman at 36; 'The concept of human rights is, however, sufficiently similar to the Lockean concept of natural rights that it is located in the Western liberal tradition. This makes it doubly controversial: because it is Western, and because it is liberal. (Waldron 1987: 151, 166-209).' Freeman at 36.

[21] Freeman at 99.

[22] Freeman at 17.

[23] *Supra* note 1.

relies extensively on Tuck and Glover, neither of which are particularly familiar names.[24] One cannot help but being reminded of Umberto Eco's advice for thesis writing: 'Summaries written by others, even if they include extensive quotes, are not sources. They are at most secondary sources.'[25] However, Freeman is by no means alone in this reproached treatment of classics, as reliance on secondary sources is spreading like a virus both in the field of human rights and academic texts more generally. It should further be noted that as far as contemporary scholars are concerned, the bibliography is a recommendable one, offering a balanced view of the contemporary discussion through various interesting references.

To conclude in a more positive note, it should be emphasized that the criticism raised in the course of this review should not be considered to point exclusively to the book at hand, but more generally to various tendencies prevailing in the field of human rights. Also, the criticism offers a demonstration of the challenges the study of human rights offers a researcher: the field is vast, expands to various disciplines, and is filled with 'truths' the questioning of which does not meet a warm welcome. Consequently, a meaningful analysis covering all these angles is a challenging task requiring a very broad competence indeed. In this light Freeman's book serves a valid purpose: it maps out potential and important analytic avenues that could offer new vigour to human rights research - not a venture to be completed by any single scholar, but rather an ongoing project requiring the dedicated efforts of the entire field.

Miia Halme

---

[24] R. Tuck, *Natural Rights Theories: their origin and development* (Cambridge University Press: Cambridge, 1979); J. Glover, *supra* note 17. An additional problem is created by Freeman's reference to first initial of author only; the Helsinki University database offers 7 J. Glovers. < helka.linneanet.fi > (visited 20 February 2003).

[25] Umberto Eco, *Oppineisuuden osoittaminen eli miten tutkielma tehdään* (Vastapaino: Tampere, 1989[1977]). (Suom. Pia Mänttäri. In English roughly: 'How to Prove your Academic Knowledge or How to Write a Thesis'), at 66. It should, however, be noted that according to Eco, '*A translation is not a source*. It is a protease, little like dentures or eye-glasses, with the help of which one can imperfectly reach something, that is otherwise beyond reach,' at 66 (emphasis in original). As neither an Italian or English copy of the book has been available, it has been necessary to resort to this translation by the author of this article.

# GENERAL INFORMATION FOR AUTHORS

The editors of the *Finnish Yearbook of International Law* welcome unsolicited and unpublished contributions of articles, notes and book reviews related to international law. Please send an electronic version of your manuscript to the *Yearbook* at fybil-editors@helsinki.fi. If this is not possible, the editors will consider a hard copy; the response, however, will take longer. In such cases, please send one paper copy of your manuscript together with a diskette to:

Executive Editor
Finnish Yearbook of International Law
Faculty of Law
P.O. Box 4 (Yliopistonkatu 3)
FIN-00014 University of Helsinki
Finland

Manuscripts should be submitted in Microsoft Word for Windows or a later version of Microsoft Word. As to style and formatting, authors are invited to follow the *Yearbook*'s house style as set below; a style sheet may also be obtained from the editors at fybil-editors@helsinki.fi.

Individual manuscripts will often have features not dealt with in these notes, and in such cases authors are urged to consult the *Yearbook* editors at the earliest possible stage. Please remember that consistency will increase the speed with which the articles are edited as well as the overall efficiency of the production process.

## Spelling, Punctuation and General Style

(a) We prefer British spelling and hope that you follow the *Oxford English Dictionary* or the *Concise Oxford Dictionary* in your manuscript. Where there is a choice we prefer the endings -ize and -ization to -ise and -isation. (For guidance on French-language manuscripts, please contact the *Yearbook*.)

(b) As for punctuation, we would encourage you to use single quotation marks. Double quotation marks are to be used inside single quotation marks for a quote within a quote.

(c) Capitalization. We prefer lower case wherever possible, and use capitals only where essential. The word 'Act' should always be capitalized, even in non-specific references, to avoid ambiguity, but 'bill' can be lower case. Unless a specific court is referred to by name, 'court' is normally lower case, as is 'judge' and similar generic terms. (In headings we prefer the use of initial capitals, see below.)

(d) Italicization. Please keep italics to a sensible minimum. Set in italics the names of cases (*Missouri* v. *Holland*, *ERTA* judgment, *LaGrand* case); the titles of published books (Koskenniemi's book *From Apology to Utopia*); and the titles of periodicals (*European Journal of International Law*). Short foreign phrases or individual words (*Cour de Cassation*) should also be set in italic. However, Latin words and all familiar and 'Anglicized' words should be set in Roman. Thus, we prefer not to italicize the following words and phrases: ad hoc, bona fide, caveat, de facto, de jure, dicta, dictum, ex officio, gratis, habeas corpus, intra vires, mala fides, mandamus, per se, prima facie, sui generis and ultra vires.

(e) Generally, abbreviations should be followed by a full stop (Doc., No., para., ed.) unless the abbreviation includes the last letter of the word (paras, eds). Where a shortened form is an acronym in capital letters, no full stops are required (UN, WHO, EEC, ECHR). Acronyms should be introduced when first appearing (e.g., 'Global Environment Facility (GEF)' or 'Community Charter of the Fundamental Social Rights of Workers (hereinafter the 'Social Charter')'). While the titles of periodicals should not be abbreviated but given in full, the titles of certain law reports and official journals may be abbreviated (ECR, CMLR, ECHR, OJ).

(f) Figures and numerals are to be spelled out from one to ten (except in page and other similar references); use numerals for 11 and greater numbers. Also use numerals throughout for dates, times and ages of people. Spell out all figures beginning a sentence. Spell out fractions, e.g. 'two-thirds', 'three-quarters'.

## General Layout and Pagination

(a) All copies should be typed in the style of the *Yearbook* on one side of the paper only (preferably A4).

(b) Please double-space all copy, including footnotes.

(c) You should leave generous margins at top, bottom, left and right: a margin of at least 2,5 cm on the left hand side. Remember that the editors will need to make marks in these margins.

(d) The first page should contain the full title of the article; author's full name; affiliation; address; telephone and fax numbers; and e-mail address.

## Notes and Reference Systems

(a) Please keep notes brief, giving source references with as little additional matter as possible. Discursive notes should be avoided by incorporating the material into the main text where possible, or omitting it altogether.

(b) Be clear and consistent from note to note. Make sure that every reference corresponds with the details such as the form and spelling of the author's name; the date of publication; the wording, spelling, punctuation and capitalization of the title; etc. You are responsible for the accuracy of all citations.

(c) For cross-references in the notes, we use '*supra*' and '*infra*'. Op. cit., loc. cit. and idem should not be used as forms of reference. *Ibid.* may be used if desired: it must always refer to the immediately preceding reference only.

e.g. See *supra* text accompanying notes 3-5.
e.g. See *infra* notes 100-102 and accompanying text.
e.g.: Cf. Locke, *Two Treatises*, *supra* note 8, at 35

(d) Footnote indicators should follow all punctuation.

e.g.: The Court first formulated the notion in the *Barcelona Traction* case of 1970.[1]

## The Reference System

Please use the following system as a model for laying out references. A source should be given a full reference the first time a work is mentioned. The full note reference should include the following information:

### Full References to Books

- author's/editor's first name(s) or initials
- author's surname
- complete title (including subtitle, if any, which is to be separated from the main title by a colon)
- editor, compiler or translator, if any
- series title, if any
- edition, if not the original
- number of volumes, if applicable
- publisher's name
- place of publication (but not essential if place of publication is also part of publisher's name)
- date of publication
- volume number (preferably in roman numbers)
- page number(s) (without p. or pp.)

e.g. Ian MacLeod, I.D. Hendry and Stephen Hyett, *The External Relations of the European Communities: a manual of law and practice* (Clarendon Press: Oxford, 1996) at 231.

e.g. Jean Combacau, *Le pouvoir de sanction de l'ONU: étude théorique de la coercition non militaire* (Pedone: Paris, 1974) at 9.

e.g. Karl Zemanek, 'What is "State Practice" and Who Makes It?' in Ulrich Beyerlin, Michael Bothe, Rainer Hofmann and Ernst-Ulrich Petersmann (eds.), *Recht zwischen Umbruch und Bewahrung – Festschrift für Rudolf Bernhardt* (2nd edn, 3 vols, Springer: Berlin, 1995), vol. II, 289–306 at 294.

e.g. Gregory H. Fox and Brad Roth (eds.), *Democratic Governance and International Law* (Cambridge University Press, 1996) at 96.

e.g. Carl Schmitt, *The Concept of the Political* (first published 1932) (translated and with an introduction by George Schwab, University of Chicago Press, 1996) at 79.

e.g. John Locke, *Two Treatises of Government* (first published 1690) (Peter Laslett ed., 2nd edn, Cambridge University Press, 1967) at 137-39.

e.g. D. Dyzenhaus (ed.), *Law as Politics: Carl Schmitt's Critique of Liberalism* (Duke University Press: Durham and London, 1998) at 6.

### Full References to Journal Articles

- author's first name(s) or initials
- author's surname
- title of the article (with inverted commas)
- volume number (in arabic numerals)
- title of the journal
- date of volume

- page number(s), if available (without p. or pp.)
- Note also:
  (1) the title of the journal should be given in full and be italicized;
  (2) French and Italian article titles and journal titles often have the first word beginning upper case, but thereafter lower case (see the second example below).

e.g. Hilary Charlesworth, 'Feminist Methods in International Law', 93 *American Journal of International Law* (1999) 379-94.

e.g. Olivier Corten and François Duboisson, 'L'hypothèse d'une règle émergente fondant une intervention militaire sur une "autorisation implicite" du Conseil de sécurité', 104 *Revue générale de droit international public* (2000) 873-910 at 888.

e.g. Jan Klabbers, 'Cat on a Hot Tin Roof: The World Court, State Succession, and the Gabčikovo-Nagymaros Case', 11 *Leiden Journal of International Law* (1998) 345-55 at 348.

e.g. Gerry Simpson, 'On the Magic Mountain: Teaching Public International Law', 10 *European Journal of International Law* (1999) 70.

e.g. D. Z. Cass, 'Navigating the Mainstream: Recent Critical Scholarship in International Law', 65 *Nordic Journal of International Law* (1996) 337 at 380.

### Newspapers, Bulletins, Newsletters, etc.

Articles from newspapers, bulletins, newsletters etc. should be in the form:

> e.g. John Dainton, 'The World: Intervening with Elan and No Regrets', *New York Times*, 26 June 1994, at D3.

### Full References to Unpublished Material (including unpublished theses or dissertations)

- author's first name(s) or initials
- author's surname
- title of document (with inverted commas)
- volume or batch number, where applicable
- name of collection, if known
- folio number, or call number, if known
- depositary and where located (or academic institution with date for PhD theses and dissertations)

> e.g. S. Marks, 'The Riddle of All Constitutions: A Study of Democratic Ideas in International Law', PhD thesis, University of Cambridge (1996) at 117.

### Website/Internet References

The Website/Internet reference should give the full title of the material referred to, following book/journal/document citation style (see above). The website address is to be surrounded by chevrons and the URL address omitting 'http://'. The date of the material referred to on the website should also be given. For example:

> Maria Urruzola, 'In the name of Human Rights Big Brother's name was NATO', <www.lolapress.org/artenglish/urrue11.html> (accessed 10 May 2001).

### Short Titles

Subsequent citations in the notes to a source already given in full should take a shortened form. A shortened reference includes only the last name of the author and the short title of the book (containing the key word or words from the main title, so as to make the reference easily recognizable and not to be confused with any other work), followed by a cross-reference *supra* or *infra* to the location of the full reference and the page number of the reference.

### Shortened References to Books

- author's surname
- short title of the book
- volume number, if applicable
- page number(s) (without p. or pp.)

Short titles for the examples given above would be:

e.g. MacLeod, Hendry and Hyett, *External Relations*, *supra* note 6.

e.g. Combacau, *Le pouvoir de sanction*, *infra* note 100, at 900.

e.g. Zemanek, 'State Practice', *supra* note 3, at 297.

e.g. Fox and Roth, *Democratic Governance*, *infra* note 60, at 18–23.

e.g. Schmitt, *Political Theology*, *supra* note 41.

e.g. Locke, *Two Treatises*, *supra* note 20, at 36.

e.g. Dyzenhaus, *Law as Politics*, *supra* note 12, at 56.

### Shortened References to Journal Articles

- author's surname
- short title of the article
- page number(s) (without p. or pp.)

e.g. Charlesworth, 'Feminist Methods', *supra* note 7, at 380.

e.g. Corten and Duboisson, 'L'hypothèse', *supra* note 6.

e.g. Klabbers, 'Hot Tin Roof', *infra* note 126, at 350.

e.g. Simpson, 'Magic Mountain', *supra* note 60, at 76.

e.g. Cass, 'Navigating the Mainstream', *supra* note 1, at 79.

### Shortened References to Unpublished Material (including unpublished theses or dissertations)

- author's surname
- short title
- page number(s)

e.g. Marks, 'The Riddle', *infra* note 99, at 72.

## Headings

We do not normally expect more than three levels of heading within an article. Headings should not be numbered, and will instead be distinguished typographically by typeface size and the use of bold, italics, etc. In headings we prefer the use of initial capitals for all words except prepositions and articles, and all words that contain five letters or more.

## Quotations

(a) As a guideline, quotations of more than about fifty words should be set off (i.e. indented, no inverted commas, with an extra space above and below) from the main text; those of fewer than fifty words should run on in the text inside inverted commas. For quotes within the displayed quote, use double quote marks.

(b) Quotations should be kept to a minimum, except where length is indispensable for a close analysis.

(c) Omission points should be styled as three spaced points (i.e. three periods separated by spaces and set off by a space before the first and after the last period). Omission points should not be included at the beginning or end of quotations. When used within quotations, omit all punctuation (including full points) immediately prior to the omission points.

(d) When a letter must be changed from upper to lower case, or vice versa, enclose it in brackets. Substituted words or letters and other inserted material should also be bracketed.

> Example: '[T]he Court cannot remedy a deficiency if, in order to do so, it has to exceed the bounds of [normal judicial activity].'

(e) Quotations must be verbatim from the original source, even if the original contains an error; this can be identified by the use of '[sic]'. Authors are responsible for the accuracy of all quotations and are requested to check them with particular care.

(f) Authors are responsible for obtaining permission where needed to cite another author's material.

(g) Emphasis by the author (in italics) in a quoted passage should be explained in the footnote: '(emphasis added)'. Emphasizing by the use of bold is to be avoided. An exception, however, applies to quoted passages where the original already contains certain emphasized passages in italics and the author wishes to add (other) emphasis. The corresponding footnote should then contain the following explanation: '(italic emphasis in the original, bold emphasis added)'. Where the author wishes to omit an emphasis in a quoted passage, this should be explained in the appropriate footnote: '(emphasis omitted)'.

(h) When quotation in foreign languages is essential, it is preferable in most cases to quote in the original and follow this directly with an English translation in brackets. If in doubt, consult the *Yearbook* editors. Remember to specify whether the material was translated by you or someone else.

## Citation of International Treaties

Whenever a treaty is referred to, the first citation ought to give (as a footnote) its full title, its place of signature, its date of signature, the date (where applicable) it came into force, and a citation for where the material can be consulted (e.g., *International Legal Materials*, *United Nations Treaty Series*, *European Treaty Series*, etc.).

Example

> Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 *United Nations Treaty Series* 331; (1969) 8 *International Legal Materials* 679.

Subsequently, this can be referred to simply as: Article 2 of the Vienna Convention

Use the full word 'Article' in the text, but you can abbreviate it to 'Art.' (plural 'Arts') in the footnotes. An 'Article' of an international treaty will conventionally have a capital 'A'.

Where Articles are divided into numbered paragraphs, we prefer to cite these as, for example:

> Article 25(3); and Article VI(5)

rather than as:

> Article 25, para. 3; or Article VI, para. 5

Where Articles are divided into unnumbered paragraphs, these will need to be cited as, for example:

> Article 8, second paragraph

(Note that it is 'second paragraph' rather than 'paragraph 2'.)

Use the full word 'paragraph' in the text, but you can abbreviate it to 'para.' (plural 'paras') in the footnotes.

## Citation of EC Documents and Texts

### Court of Justice

European Community cases are numbered as they are registered at one of the two Community courts – the European Court of Justice (ECJ) and the Court of First Instance (CFI, established in 1989). Since that date, ECJ cases are prefixed by 'C-' and CFI cases are prefixed by 'T-'. Before the establishment of the CFI, ECJ numbers had no prefix. Cite a case before the ECJ or the CFI to the *European Court Reports* (ECR); it is advisable to cite also to *Common Market Law Reports* (CMLR), if CMLR has reported the case.

Where a particular year of the ECR report is divided into more than one volume, the volume number is given in upper case roman before the page number, e.g. [1988] ECR II-1234. (See the last two examples below.) Volume I contains ECJ cases and volume II contains CFI cases.

Where a particular year of the CMLR report is divided into more than one volume, the volume number is given as an arabic number before the 'CMLR', e.g. [1988] 2 CMLR 1234.

Examples

> Case 6/64, *Flaminio Costa* v. *ENEL* [1964] ECR 585

Case 314/85, *Firma Foto Frost* v. *Hauptzollamt Lubeck-Ost* [1987] ECR 4199

Case 257/87, *Commission of the European Communities* v. *Council of the European Communities* [1989] ECR 259

Joined Cases 142/80 and 143/80, *Amministrazione Delle Finanze Dellostato* v. *Essevi* [1981] ECR 1413 at 1431

Case C-159/90, *Society for the Protection of Unborn Children Ireland Ltd* v. *Stephen Grogan* [1991] ECR I-4685

Case T-194/94, *Carvel and Guardian Newspaper* v. *Council* [1995] ECR II-2765, [1995] 3 CMLR 359.

### Council, Commission and European Parliament Documents

Official Journal references should be (in an English-language manuscript) to the English-language version of the Official Journal (OJ) and should always be given whenever EC material (Directives, Regulations, Commission Decisions and Commission Notices) is first referred to (subsequent references within the same chapter to the same material need not be referenced again).

Official Journal references can be in the form of either:

OJ 1985 No. L372, 31 December 1985, at 5

or:

OJ 1985 No. L372/5

Whichever style is used, it should be used consistently.

Examples

Article 8(2) of the Merger Control Regulation, Council Regulation 4064/89, OJ 1989 No. L395, at 21

Council Directive 89/622/EEC of 13 November 1989 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products, OJ 1989 No. L359, 8 December 1989.

Council Directive 87/102/EEC of 22 December 1986 on consumer credit, OJ 1987 No. L42, 12 February 1987

Note that the substantive description of the Directive (e.g., 'on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products') is in lower case.

## Citation of ECHR Documents and Texts

### European Court of Human Rights

Cite a case before the European Court to *European Court of Human Rights, Reports of Judgments and Decisions* (ECHR). For older decisions, the cases may also be cited to *European Court of Human Rights, Series A* or *B* (e.g., ECHR Series B). You may also cite a case to the *European Human Rights Reports* (EHRR). As some earlier volumes of ECHR contain only one case, citation to a beginning page is unnecessary, and all pertinent page numbers may be indicated directly 'at'. Cite cases by case name, volume number, reporter, page number where applicable and year.

*Kampanis* v. *Greece*, ECHR (1995), No. 318, 29, at 35.

*Handyside* v. *United Kingdom*, ECHR Series A (1976), No. 24, at 21-23.

*Tyrer* v. *United Kingdom,* ECHR Series A (1976), No. 26; 2 EHRR 1.

In cases where the applicant's name is not disclosed it is indispensable that the application number or at least the year be quoted in all references.

*X and Y* v. *The Netherlands* (Application 8978/80), 8 EHRR (1985) 235.

If an official report of a recent case before the Court is not available, materials may be cited to the Court's official website <www.echr.coe.int>.

### European Commission of Human Rights

Before 1999, cases were also heard before the now-defunct European Commission on Human Rights. These cases should be cited to *Decisions and Reports of the European Commission of Human Rights* (*Decisions & Reports*) or to the *Yearbook of the European Convention on Human Rights* or to the *European Human Rights Reports* (EHRR):

*Kröcher and Möller* v. *Switzerland* (Application No. 8463/78), 26 *Decisions & Reports* (1982) 24.

*Iversen* v. *Norway*, 7 *Yearbook of the European Convention on Human Rights* (1963) 278, at 280.

## Citation of United Nations and League of Nations Documents and Texts

### Resolutions

General Assembly

GA Res. 832 (IX), 18 December 1954

Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the UN, GA Res. 2625 (XXV), 24 October 1970.

From the 31st session the session number is cited in arabic numerals:

GA Res. 41/133, 4 December 1986

Security Council

SC Res. 181, 7 August 1963

Or

SC Res. 181 (1963)

ECOSOC

First and second session:

ECOSOC Res. 1/8, 15 February 1946
ECOSOC Res. 2/24

Afterwards until 1978 (63rd session):

ECOSOC Res. 801 (XXX), 21 December 1966

From 1978:

ECOSOC Res. 3, 4 May 1981
Or, if no date is indicated, ECOSOC Res. 1981/3

### Documents

UN documents (including documents of all the UN subsidiary bodies) should be given their full UN Doc. reference number on first citation.

> Annual Report of the Secretary-General on the Work of the Organization, UN Doc. A/45/870 (1990), Annex, at 10.
>
> *Renewing the United Nations: A Programme for Reform*, Report of the Secretary-General, UN Doc. A/51/950 (14 July 1997), paras 170 and 172.
>
> Report of the International Law Commission on the Work of Its Fifty-second Session, UN GAOR, 55th Sess., Supp. No. 10, ch. IV, UN Doc. A/55/10 (2000).
>
> Alain Pellet, *First Report on the Law and Practice Relating to Reservations to Treaties*, UN Doc., A/CN.4/470 (30 May 1995), para. 109.
>
> *Mpandanjila* v. *Zaire* (No. 138/83), Selected Decisions of the Human Rights Committee under the Optional Protocol, UN Doc. CCPR/C/OP/2 (1983) Vol. II, at 164.

### Cases

Cite a case before the International Court of Justice (ICJ) or the Permanent Court of International Justice (PCIJ) or the Permanent Court of Arbitration by the case name; the names of the parties; the name and the year of the publication in which the decision is found; the page on which the case begins and the page you are referring to. Give the case name as found on the first pages of the report.

If an official report of a recent case before the ICJ is not available, materials may be cited to the Court's official website <www.icj-cij.org>.

Examples:

> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports (1971) 16, (dissenting opinion of Judge Fitzmaurice) 220, at 294.
>
> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States) (Provisional Measures),* ICJ Reports (1984) 169, at 433-34, para. 93.
>
> *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Reports (1997) 7, (separate opinion of Vice-President Weeramantry) 88, at 102.
>
> *Nationality Decrees in Tunis and Morocco*, Advisory Opinion, PCIJ Series B, No. 4 (1923) 8.
>
> *The Case of the SS Lotus (France/Turkey)*, PCIJ Series A, No. 10 (1927) 4, at 23.
>
> *Rights of Minorities in Upper Silesia (Minority Schools) (Germany* v. *Poland)*, PCIJ Series A, No. 15 (1928) 54, (dissenting opinion of Judge Huber) 48, at 53.
>
> *Case Concerning the Air Service Agreement of 27 March 1946 between the United States of America and France (France/United States)*, 18 *Reports of International Arbitral Awards* (1978) 417, at 428.

The cases before the International Criminal Tribunal for the former Yugoslavia (ICTY) are to be cited as follows:

> *Prosecutor* v. *Duško Tadić*, Case No. IT-94-I-A, ICTY Appeals Chamber, Judgment (15 July 1999) para. 84.

*Prosecutor* v. *Goran Jelisic*, Case No. IT-95-10-A, ICTY Appeals Chamber, Judgment (5 July 2001) (separate opinion of Judge Nieto-Navia) para 5.

*Prosecutor* v. *Slavko Dokmanovic et al.*, Case No. IT-95-13a-PT, ICTY Trial Chamber, Decision on the Motion for Release by the Accused Slavko Dokmanovic (22 October 1997) para 34.

### Domestic Case Law

For domestic case law, use a style of citation of cases that is common in the particular country and be consistent in using that style. If the case has been reported in *International Law Reports*, the reference should be added: the readers are more likely to have access to these than national reports. For further guidance, please contact the *Yearbook*.

## On the Editing Process

Once you have submitted your manuscript as described above, and once it has been approved by the *Yearbook* and any referee the *Yearbook* may want to consult, editing can begin. A group of editors will be assigned to your article. They will work through the manuscript, reading it for sense and consistency in presentation and argument as well as checking that such things as notes are all complete and clearly presented. If material is found still to be missing or the manuscript falls short of the standards outlined in these notes, we may have to return the manuscript to you for amendment. We reserve the right to make alterations and corrections to conform with both the general style of the *Yearbook* and accepted rules of grammar and syntax. Nothing of substance will be changed on your manuscript without your knowledge.

Eventually, you will receive proofs for correction. You will kindly be asked to keep corrections to a minimum. The only corrections that should normally be necessary at this point are those relating to type-set errors or those which take account of important material or references not previously available, or subsequent development of notes. Substantial modifications to the text or footnotes can be made only in consultation with and with the consent of the editors.

In the end, you will be provided with one free copy of the *Finnish Yearbook of International Law* containing your contribution, together with 25 offprints.

Any queries regarding submission, house style and formatting should be directed to the Executive Editor of the *Yearbook*, fybil-editors@helsinki.fi.

The editors of the *Finnish Yearbook of International Law* look forward to hearing from you!

# Ius Gentium Association

Ius Gentium International Law Association (est. 1983) provides a lively, active and easily accessible forum for all interested in international law and related issues. Ius Gentium organizes events and encourages its members to take part in international legal discussion and activities, in studying, teaching and researching international law.

The Association is an active publisher, the main publication being the *Finnish Yearbook of International Law* by Kluwer Law International/Martinus Nijhoff Publishers. The Association conducts seminars and discussion groups concentrating on questions of recent interest in international law and related fields. Through its members and activities, Ius Gentium converses with several international legal scholars, research institutes and legal bodies.

The members represent a great variety of professions; among them there are diplomats, university professors, lawyers, researchers and students. The members share an interest in global matters in general and in international law in particular. The majority of the members are Finnish citizens. Although most of the members have a legal background, other academic fields, in particular political and social sciences are also represented.

Should you have any questions concerning the Ius Gentium Association, please contact the Secretary of the Association via the Erik Castrén Institute of International Law and Human Rights, P.O. Box 4 (Yliopistonkatu 3), FIN-00014 University of Helsinki, Finland.

# European Society of International Law
# Société Européenne de Droit International

**Inaugurated**

The Inaugural Conference in Florence (Italy) on 13 – 15 May 2004:
"International Law in Europe: Between Traditional and Renewal".

**The Society**

is an impartial, professional, and inclusive organisation open on equal terms to all who are interested in the promotion of international law and the contribution to the rule of law in international relations, in a spirit of co-operation with other relevant international and national associations.




**Secretariat:** Gillian Walker

**Office:** http://www.esil-sedi.org
info@esil-sedi.org


**Joining ESIL:**
For further information about ESIL and for membership registration forms, please visit our website at www.esil-sedi.org or contact us at info@esil-sedi.org