Social, Economic, and Cultural Human Rights within the Legal System of the International Economic and Trade Order

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I - Introduction

There is hardly another area in social relations where the discrepancy between legal norms and political reality is as great as it is in the field of human rights. Only in times of war is there an even wider rift between the rules, principles, and standards which states have imposed upon themselves in the past few centuries to humanise the practice of war on the one hand and the reality of war on the other, increasingly uncontrollable because of the ever more rapid development of weapons technologies and the general relapse into primitive forms of civil war that even include genocide. There has been no change in so far as human rights have even fewer chances of being respected and implemented in times of war than in times of peace. But that it is difficult even in times of peace to uphold and enforce human rights is not only astonishing but greatly worrying in view of the general material development of humankind. After all, the enormous progress made in science and production has provided particularly the highly industrialised societies with the means required to ensure that human rights are enforced and respected not only in their own, but also in societies that are less developed industrially. This applies not so much to traditional political and civil human rights, which are less dependent on prosperity and the wealth of a state than on its democratic and constitutional system. Rather, it applies to economic, social, and cultural rights which, having only emerged comparatively recently, demand the positive involvement of the state.

Although prosperity and wealth are conditions that may serve to bring about a guarantee of human rights, they are inadequate to safeguard their existence, as we can see from the example of many wealthy states. Conversely, the existence of a formally democratic society equipped with constitutional institutions does not necessarily constitute a guarantee of human rights either, as we can unfortunately see from many other examples. Even those societies which gave birth to the idea of human rights more than two centuries ago and have since been mainly responsible for its development, clarification, and amendment all have their own deficits and problems in dealing with these rights. While they actively attempt to give them universal validity even in the remotest corners of the earth, they refuse to accept them as binding for themselves without limitation or exception. On the one hand, they wage war in the name of human rights, while on the other, their interventions, camouflaged as 'humanitarian', contravene the prohibition of aggression established so laboriously before. In more than fifty years of negotiations, a permanent international criminal court has now finally been established, empowered to try even the most severe cases of crimes against human rights. On the other hand, the creation of a permanent international court of human rights to strengthen and monitor individual human rights is still not in sight. Any breach of bilateral or multilateral trade agreements may become the subject of an arbitration process before a WTO panel, with possibly far-reaching consequences in terms of restitution. There is, however, no court to defend the human-rights situation in any given country against the negative effects of such agreements, or to adjudicate claims for damages.[1]

Despite the many contradictions in the image still presented by the validity and enforceability of human rights today, there is no gainsaying the fact that the codification of human rights is one of the UN's most successful activities. There is hardly another UN code that is quite as comprehensive, as widely varied, and accepted by as many states as the code of human rights with its numerous agreements, declarations, and resolutions. In this context, we must keep in

[1] However, there are human-rights cases now pending against US corporations which are based on the Alien Tort Claims Act of 1789, in which corporations are accused of apartheid crimes in South Africa as well as aiding and abetting murder, rape, and forced labour in Burma. L. Girion, The Los Angeles Times, 2002; A. Mink, NZZ, 2002, p. 27; S. Mertins, Financial Times Deutschland, 2002, p. 28.

mind that human rights are embodied in international treaty law and are therefore basically on par with any other right under international law. They cannot *per se* claim any greater legitimacy than any other item of international law, be it treaty law or customary law. In the hierarchy of international law, their gradation from *ius simplex* and *ius cogens* follows the same principles as that of other rights. This implies, for instance, that simple human rights that are not compelling in character range below peremptory provisions like the prohibition of aggression laid down in Art. 2.4 of the UN Charter. Consequently, there can be no such thing as a 'humanitarian intervention' constituting another exception from the prohibition of aggression besides those laid down in Art. 39/42 or 51 of the UN Charter. Conversely, other rights, such as those emanating from international trade and business treaties, must be subordinated to peremptory human rights such as, for instance, the ban on child and forced labour. Although these principles are basically straightforward, their application and enforcement in practice is often controversial, to say nothing of the many instances in which social reality is characterised by infringements of human rights that are entirely obvious but not immediately repairable.

Following the old law of concentration and centralisation on the market, the forces of economic development have not only given business enterprises a much greater clout vis-à-vis the political power of the state, they now reach out to every corner of the globe, where they impose their own conditions. Although opinions about the results of this globalisation process are sharply divided, there is widespread agreement on a number of points.[2] One of these points is that while this process appears inevitable and even axiomatic, it is nevertheless basically governable by political rules and regulations. It is not globalisation as such, i.e. the transnational exchange of goods, funds, and technologies, that is responsible for the economic and social disasters suffered by its victims, but the fact that the process is speeded up by the neoliberal dogma of the so-called 'Washington Consensus', which urges open markets and trade deregulation. This, too, is widely accepted. At the same time, controversies still rage about the scope and objectives of economic regulation. Countries like China, Korea, Malaysia, Vietnam, India, and Singapore, which opened their markets to global trade under the premises of free trade and privatisation, were only able to achieve their top growth rates by simultaneously imposing regulations to limit imports, control the markets, and protect their young industries. Only a few countries, however, are permitted to go this way.[3]

Then again, there is no dispute that large segments of economic power can no longer be controlled by government, as that power operates transnationally and, therefore, is beyond the reach of national legislation. However, being subject to the only law they cannot escape, competition, enterprises have no choice but to play off one state against another and to evade their attempts at regulation whenever these restrict their economic freedom of movement for any reason – fiscal policy, structural policy, ecology, or human rights. Where regulation is least intense, namely on the financial market, weaker states are helpless in the face of currency speculations and financial transactions, whose impact on the population can be every bit as disastrous as it was in the most recent example, Argentina. In other words: The process of globalisation has advanced the shift of power from politics to the economy, digging even more ground from under the feet of governmental regulation policies.

Even apologists of globalisation are prepared to admit that its benefits materialise mainly in highly industrialised countries, whereas countries that were not so well developed to start with continue losing ground, and any benefits are reaped only by small groups of profiteers. At all

[2] For more detail, see W. Sengenberg, 2002, pp. 12ff.: The Ambivalence of Globalisation.
[3] See J. Jeter, 2002, on the destructive consequences of market deregulation demanded by the IMF on the textile industry of Zambia.

events, economic, social, and cultural human rights in particular will not evolve as naturally and inevitably as economic globalisation. There are no links between their mutual progress that would be strong enough to ensure that the dynamism of globalisation carries human rights along with it. The facts rather point in the opposite direction: In the process of technological revolution and job rationalisation, providing food, health care, shelter, education, and work for all is no longer indispensable in the accumulation and calculation of profit. In its report on globalisation, growth, and poverty,[4] the World Bank was constrained to devote more attention to the last-named aspect than to issues of wealth, as it tends to enhance inequality, thus determining the fate of most people in the world in the neoliberal context of the global market. The pictures drawn in empirical reports documenting the rift between the wealth of the industrialised nations and the poverty of those states that depend largely on agricultural subsistence economy grow more dramatic year by year, while reports focusing on starvation, malnutrition, diseases, homelessness, illiteracy, and unemployment only document their spread and escalation. Even those countries which, being rated as emerging countries so called, are said to be on the way towards economic development and stabilisation, having left the threshold of industrialisation behind a long time ago, are defenceless in the face of financial crises that plunge most of their population into the depths of poverty.

Viewed from the angle of human rights, this means that the effects of globalisation include numerous gross infringements of human dignity and other individual rights that can be neither excused nor tolerated.[5] Appointed by the Human Rights Commission in 1998, special rapporteurs on the rights of education, food, and shelter keep calling with increasing urgency for the legal implementation of human rights through special programmes and specific agreements, the establishment of institutions for national implementation and control, and the application of obligations relating to human rights to non-governmental actors, such as transnational enterprises and international trade and finance institutions.[6]

If we assume, however, that because of a lack of internal resources or the prevalence of external influences, the options of actively implementing human-rights policies in nation states are too restricted to guarantee an adequate standard of human rights, the question arises whether this political deficit can be remedied by international norms and institutions. After all, what is there to underpin the assumption that the growing imbalance between economic and political power which restricts the policy remit of nation states does not similarly impair the chances of enforcing human rights on the international plane, thus practically nullifying any opportunity. The human-rights balances drawn up by the IMF and the World Bank have a rather negative look,[7] and the political effectiveness of UN institutions like the ILO or the Human Rights Commission is traditionally regarded with scepticism.[8] Or, to put the question more directly: What reason is there to hope that the same interests that have already gained the upper hand against effective human-rights policy on the national level should not be just as influential on the international plane, thus reversing the precarious balance between economic power and political impotence?

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[4] World Bank Group, (2001).
[5] See Cl. J. Dias (2001) pp. 143ff.; M. Windfuhr (2001) pp. 155ff.
[6] Further on the right to education, see the reports by Katarina Tomasevski: UN DOC. E/CN.4/1999/49, UN DOC. E/CN.4/2000/6 + Add. 1 and 2. On the right to food, see the reports by Jean Ziegler: UN DOC. E/CN.4/2001/53; UN DOC. E/CN.4/2002/58 + Add.1. On the right to shelter, see the reports by Miloon Kothari: UN DOC. E/CN.4/2001/51; UN DOC. E/CN.4/2002/59.
[7] See, for instance, K. Horta (2002), pp. 167ff.; R. Falk, 1998.
[8] See, for instance Ch. Hainzl, N. Marschick (2002), pp. 239ff.; H.G. Bartolomei de la Cruz (1994).

A positive answer to this question, which may ultimately be given despite many reservations, calls for some basic considerations on the dogma of human rights and their validity and enforcement as well as the construction and function of international institutions. Merely citing the European example with its detailed Charter of Human Rights and the hitherto-unparalleled facility of having these rights adjudicated by an international court would not be enough, as the political and socio-economic framework of this model is specifically European, and transplanting these institutions to other regions of the world would be highly problematic (see, for instance, the planned creation of an African court of justice for human rights), for the serviceability and benefits of a legal system will emerge only in a hostile political and economic environment that obstructs its implementation.

For the purposes of this study, it is important to note that pressure on human rights is being exerted by a societal constitution which claims for itself a legal basis that evolved in the years after the war in parallel with human rights, and is based on international consensus and a multitude of conventions generally accepted as binding: the global economic and trade order. Not only has this order evolved in the course of decades into a highly complex legal system that is consistent and effective in itself, it is legally underpinned and morally legitimised by the human rights themselves. Consequently, human rights are to be found on both sides of the struggle: On the side of the forces that power globalisation together with all those rights of freedom and property which traders, investors, enterprises, and economic associations may invoke in their support, as well as on the side of the victims of globalisation who, while they cannot live without freedom rights, need the support and protection of social, economic, and cultural rights to put their freedom into practice. This being so, it is not without justification that Philip Alston holds that the relationship between human rights and trade is one of the essential issues challenging international jurists early in the 21st century.[9]

However, the two sides in this dispute are not equally strong. For quite some time, we have been seeing human rights, democracy, and the capitalist economic regime being lumped together under the moral principle of total freedom and property. We might just as well read this as a totalitarian message advocating a global order that is tailor-made for the imperial ambitions of the dominant capitalist states. However, if human rights and democracy are pared down in a process of increasing frankness until only the freedoms of capitalist exchange remain, both will lose the power of promoting emancipation, and the contradictions in their political and social content which characterise the historic disputes about their implementation will be denied. They will serve to legitimise institutions that claim to impose global order, such as the WTO, the IMF, and the World Bank, setting those central institutions of a global economic and commercial order up as irreproachable guardians of freedom and promoters of economic development and democracy. All the disasters of poverty, underdevelopment, unemployment, exploitation, state bankruptcies, wars, and refugee migrations will, consequently, have to be meekly accepted as largely inevitable collateral damage, as the price of freedom and progress under the motto *per aspera ad astra*.

Ultimately – and this is one of the most dangerous developments in recent times – the conglomerate of human rights and values is being compressed between market and democratic forces into an aggressive formula designed to overthrow the order of international law as well as the constitutions of the states under the heading of either 'western community of values' or 'national security'. States of emergency and human-rights disasters are being declared in the name of human rights and democracy, of which it is claimed that only military intervention can

[9] Philip Alston (2002), p. 5.

restore order. Not only are such interventions more and more undertaken without the only legitimation which a warlike mission can possibly have, that embodied in the UN Charter and in international law; the extent to which they destroy material goods and human lives is less and less commensurable with the values they claim to save. Apart from the casualties and damage caused by any war, the fact that the formal order of international law is being eroded by a code of values that has never been laid down anywhere constitutes a considerable danger to international peace and order.

One of the old laws of dialectics says that the contradictions inherent in such a system themselves produce the forces that turn against them. However, the law does not say that these forces should be equal in strength. Thus, the task of criticising the extension of the neoliberal concept on human rights and the identification of these rights with the freedoms of the market as well as the task of organising resistance against the effects of globalisation in general is mostly left to unaffiliated research institutions, trade unions, and NGOs. However, their impact on the public should not be confused with their actual political influence.[10] What is more, their theoretical potential is much greater than the actual chances of implementing their demands, as can be seen from the confrontation between human rights and the dynamism of the global trade order over the distribution of wealth.

Any criticism should begin by demanding that human rights should no longer be exclusively identified with the freedoms postulated in the world trade order. Only if we focus on their civil and liberal origins can we find a reason for this connection, but in this instance we would negate the entire development towards future generations of social and collective human rights as well as the profound disputes that characterise it.

Therefore, the first question we must ask is about exactly what human rights can be cited in support of correcting the world trade order and remedying its disastrous effects in numerous countries of Africa, Asia, and Latin America. Are there rights that guarantee adequate employment for the 160 million unemployed and the 310 million underemployed, that demand education for 130 million children aged between 6 and 12 who are currently not attending school, that provide for cheap medication for 25 million AIDS victims in Africa or for the treatment of those 35,000 children that die of curable diseases every day, or that guarantee the right to food and an adequate standard of living for those 1.2 billion people who can spend less than a dollar a day?[11] With the next question, we would need to clarify the normative status as well as the legal validity of these social and economic rights before we begin discussing their influence on the institutions of the world trade order and the possibilities of implementing them.

[10] On the structural imbalance between governments and transnational groups of companies on the one hand and their critics on the other, as exemplified by the resistance against the far-reaching demands for liberalisation made by WTO, GATS and TRIPS, see S. George (2002).

[11] The Human Development Reports, Trade and Development Reports, World Development Reports, World Employment Reports, and World Labour Reports periodically published by the UNDP, UNCTAD, the World Bank, and the ILO, respectively, provide us with a wealth of statistical material on the social and economic deficits and the gradient of poverty in the so-called Third World. For a partial selection and summary, see W. Sengenberg (2002), p.

II - The Body and System of Human Rights

1 – The United Nations

The UN Charter of 1945 largely refrains from defining human rights in concrete terms because the Allies were unable to find a compromise formula to reconcile their fundamentally different ideas about their content and normative substance.[12] Because of this, the Charter merely calls in general terms for 'respect for and implementation of human rights and fundamental freedoms for all, without regard to race, gender, language, or religion' (Art. 55c, 2, Sub-par. 3, 76c). On the other hand, it was also by virtue of the consensus among the anti-Hitler Coalition on joint efforts to reconstruct the European economy that the United Nations were asked to promote 'improvements in living standards, full employment, and the prerequisites of economic and social progress and development' (Art. 55a of the UN Charter). Accordingly, economic and social rights are equally weakly represented in the Universal Declaration of Human Rights of December 10, 1948, which was drafted by the Human Rights Commission by order of the Economic and Social Council (Art. 68 of the UN Charter). Critics have pointed out, and rightly so, that the Declaration largely follows the classical, i.e. bourgeois idea of human rights which then as now prevail in the states that belong to the Western cultural sphere.[13] And indeed, this sphere harbours all traditional, liberal fundamental rights, including the hard core of civil freedom rights. It is only in the second part (which nevertheless should not be overlooked) that we find a number of economic, social, and cultural human rights: the right to social security (Art. 22), the right to work, equal pay, and freedom of coalition (Art. 23), the right to recreation and leisure (Art. 24), the right to social care, meaning an adequate standard of living with regard to clothing, accommodation, medical services, etc. (Art. 25), and the right to education and cultural support (Art. 26) and freedom of cultural life (Art. 27).

Although the list of economic and social rights contained in the Declaration is very sparse, the fact that they are mentioned at all is the result of a compromise with the socialist countries, who had wanted a much larger catalogue.[14] The capitalist states of the West had only submitted to this compromise because everyone was agreed that the Declaration should not be legally binding but merely programmatic in character. Resistance against social demands and the collective rights required to assert them has been part of the dispute about the social question ever since it began in the 19th century. It is true that as early as 1919, the Labour Movement and its organisations were able to integrate fundamental social rights in the Constitution of Weimar, and that the 1917 Constitution of the United States of Mexico contained a catalogue of fundamental social rights. It is equally true, however, that except for the Spanish Constitution of 1931 and the constitutions of Italy and France after 1945, social and economic demands have never been successfully encoded in any national constitution on the same level of legal validity as that of political freedom rights.

Yet the coalition formed by socialist states and developing countries had enough votes on the international plane to ensure more consideration for social and economic rights in the deliberations about a Human Rights Convention that followed. It took 18 years for two separate draft agreements to be submitted to the UN General Assembly, the International Covenant on

[12] Cf. N. Paech, G. Stuby (2001), pp. 524, 644ff.
[13] Cf. e.g. M. Bedjaoui (1987), pp. 123ff.
[14] The socialist countries abstained from the vote on the Declaration because they considered the compromise inadequate. The situation becomes clearer if we remember that the debate on the UN Charter and the Declaration of Human Rights was taking place at the same time as that on the fundamental documents in which market and trade freedoms were defined: the Bretton Woods agreements of 1944, the General Agreement on Tariffs and Trade (GATT) of 1947, and the Havana Charter for an International Trade Organisation of 1948.

Civil and Political Rights[15] and the International Covenant on Economic, Social, and Cultural Rights,[16] which were both passed by the UN General Assembly on November 19, 1966. Human rights were spread over two covenants following a proposal made by India, in which it was suggested that economic, social, and cultural rights needed an implementation system different from civil and political rights.[17] The fact that social rights were dealt with in a separate Social Covenant (International Covenant on Economic, Social, and Cultural Rights) provided the capitalist states, unwilling to begin with, with an opportunity to accord legal validity only to the Social Covenant[18] - assuming that they were prepared to consider ratifying the Covenants in the first place.[19]

While all classical civil political rights are laid down in the Political Covenant, there is no guarantee of ownership as it was contained in Art. 17 of the Universal Declaration of 1948. It is more voluminous than the Social Covenant, because Part IV contains detailed regulations on the establishment, procedural rules, and duties of a Committee on Human Rights which receives and reviews messages and reports from state governments. It was only in 1987 that an Expert Committee on Economic, Social, and Cultural Rights comparable to the Human Rights Commission was created to review national reports (Art. 16 Par. I of the Social Covenant), although this Committee is not mentioned in the Social Covenant.

Dealing with the material security of mankind at great length and in great detail, the provisions of the Social Covenant largely resemble those of the European Social Charter[20]. Weaving together the right to work (Art. 6) and just working conditions (Art. 7), the right to form trade unions (Art. 8), the right to social security (Art. 9), to adequate food, clothing, and housing (Art. 11), to governmental health care (Art. 12), education (Art. 13), and the right to take part in cultural life (Art. 15), the Social Covenant produces a network of human rights to safeguard people's existence and provide a material foundation for the notion of human dignity. In the Social and Civil Covenants, there are many articles which overlap, documenting that political and social human rights are identical in substance. In both Covenants, the people's right to determine their own fate is raised to the status of a human right in Art. 1, which goes on to say in Par. 1 that 'by virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.' That both Covenants begin identically underlines not only the fact that their contents are closely linked but also that the rights laid down in them are indivisible and inseparable for purposes of societal development.

To be sure, the scope of the obligation involved naturally differs in both cases. While the Civil Covenant demands in Art. 2.1 that each state party should guarantee 'to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant,' the states parties to the Social Covenant undertake 'to take steps,..., to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.' (Art. 2.1 of the Social Covenant). The main bone of contention is Art. 2 Par. 3 of the Social Covenant, which constitutes an exception from the commercial dogma that nationals and non-nationals must be treated alike. According to the article, developing countries

[15] Federal Gazette, 1973 II, p. 1534. In force since March 23, 1976.
[16] Federal Gazette, 1973 II, p. 1570. In force since January 3, 1976.
[17] Cf. P. A. Köhler (1987), pp. 916ff.
[18] The Civil Covenant has been ratified by 147 states, and the Social Convention by 145. While the People's Republic of China finally ratified the Social Covenant in February 2001, it has not yet ratified the Civil Covenant. Conversely, the United States have ratified the Civil, but not the Social Covenant.
[19] N. Paech, G. Stuby (2001), p. 659.
[20] European Social Charter of October 18, 1961, in force since February 26, 1965, Federal Gazette, 1964 II, p. 1262.

may, with due regard to human rights and their national economy, decide to guarantee the economic rights recognised in the Covenant only to their own nationals, thus barring non-nationals from enjoying their benefits.[21]

This core body of human rights is surrounded by a normative network of numerous conventions which meanwhile amounts to a respectable code on the protection of human rights within the UN system. Almost all areas that involve particularly grave hazards (genocide, torture), threats to particularly weak and vulnerable groups (child and forced labour, trafficking in girls and women, refugees), or general discrimination (women, races) have meanwhile been codified in dedicated agreements.[22] The International Convention on the Elimination of all Forms of Racial Discrimination of March 7, 1966,[23] the Convention on the Elimination of any Form of Discrimination against Women of December 18, 1979,[24] the Convention against Torture and other Cruel, Inhuman, or Degrading Forms of Treatment or Punishment of December 10, 1984,[25] and the Convention on the Rights of the Child of November 20, 1989[26] have all been equipped with their own watchdogs to monitor implementation on the national plane, unlike other important human-rights conventions such as the Convention on the Prevention and Punishment of Genocide of December 9, 1948,[27] the Convention on the Suppression and Punishment of the Crime of Apartheid of November 30, 1973,[28] the Convention on Slavery in the version of December 7, 1947,[29] the International Convention on the Suppression of the Traffic in Women and Children of November 12, 1947,[30] the International Convention on Effective Protection against the Traffic in White Slaves in the version of May 4, 1949,[31] and the International Convention on the Suppression of the Traffic in White Slaves in the version of May 4, 1949.[32] All these conventions, however, are distinguished by a universally high level of ratification. Their far-reaching acceptance gave them a universally binding character despite numerous individual reservations.

2 – The International Labour Organisation

With its 181[33] binding agreements and 190 recommendations in the field of labour relations, the International Labour Organisation (ILO) has made a very special contribution towards the protection of social human rights. While agreements become binding to member states as soon as they are ratified, recommendations have no binding force at all. However, they are often used to flesh out agreements and express them in more concrete terms, lifting them above the status of a mere recommendation. Subsumed under the general term 'international labour standards', these fundamental rights at work begin by distinguishing and specifying general political freedom rights which ensure and safeguard the right to organise and to bargain collectively, freedom from

[21] One of the critics who fear that investors might be deterred is E. Klein, Menschenrechtskonventionen, Internationaler Pakt über bürgerliche und politische Rechte in: H. Volger (2000), pp. 354ff.
[22] For a survey, consult N. Paech, G. Stuby (2001), Part B, Ch. IV, pp. 660ff. and K. Ipsen (1999), Ch. 11, Sect. 48, pp. 668ff.
[23] Federal Gazette, 1969 II, p. 961.
[24] Federal Gazette, 1985 II, p. 647.
[25] Federal Gazette, 1990 II, p. 247.
[26] Federal Gazette, 1992 II, p. 122.
[27] Federal Gazette, 1954 II, p. 729.
[28] Resolution 3068 of the UN General Assembly (XXVIII) in force since July 16, 1976.
[29] Federal Gazette, 1972 II, p. 1473.
[30] Federal Gazette, 1972 II, p. 1489.
[31] Federal Gazette, 1972 II, p. 1478.
[32] Federal Gazette, 1972 II, p. 1482.
[33] Of which no more than 76 were ratified either by the German Reich or the Federal Republic of Germany. Cf. R. Birk (2000), Sect. 17, Sub-Par. 71f.

slavery, forced and child labour, and freedom from discrimination in the working world, frequently overlapping with the provisions of the two Covenants as well as other conventions on human rights. Similarly, the so-called social standards, which codify the economic and social rights of labour, essentially represent nothing more than concrete specifications of the general rights laid down in the Social Covenant relating, for instance, to employment and training, safety and health at the workplace, minimum wages, maximum working hours per day and week, minimum breaks, paid vacations, maternity rights, paid sick leave, dismissals, handicaps, and old age. In addition, there are rules on dispute settlement, works councils, etc. All in all, we have here a code of highly differentiated regulations that cover almost every aspect of labour relations.

Following the demand made by the ILO Secretary General in 1994 that social provisions should be included in an amendment to Art. XX GATT,[34] a number of fundamental social standards were defined which have since been regarded as core labour laws. At its 86th meeting in Geneva in 1998, the ILO adopted the Declaration on Principles and Rights at Work[35] embedding four fundamental rights: 1) freedom of association and the right to bargain collectively; 2) abolition of all forms of slave and forced labour; 3) complete elimination of child labour; and 4) abolition of discrimination in respect of employment and education. These fundamental social standards or core labour laws form the subject of eight key ILO conventions which may lay claim to practically general validity because of their high number of ratifications. I am referring to the following conventions which are here listed in their historical sequence (the number of ratifications is given in parentheses):

ILO Convention No. 29 on forced or compulsory labour of June 28, 1930 (161).[36] Art. 2 Par. 1 of this Convention defines forced or compulsory labour as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.' However, there are a few exceptions from this rule, such as military service, emergency services or services performed as a consequence of a conviction in a court of law.

ILO Convention No. 87 on freedom of association and the protection of the right to organise of July 9, 1948 (141).[37] It guarantees the right to establish and to join organisations without previous authorisation whose freedom from government interference is protected by a number of guarantees.

ILO Convention No. 98 on the application of the principles of the right to organise and to bargain collectively of July 1, 1949 (152).[38] It offers protection from discrimination directed against organisations as well as from mutual interference by trade unions and employers' organisations, supporting collective agreements at the same time.

ILO Convention No. 100 on equal remuneration for men and women workers for work of equal value of June 21, 1951 (160).[39] However, gender-specific differentiation is not entirely excluded

[34] Art XX GATT: 'Provided that the following measures are not applied so as to lead to arbitrary and unjustified discrimination between countries where equal conditions prevail, or to mask restrictions in international trade, none of the provisions laid down in this agreement shall be interpreted as preventing any of these states parties of this agreement from adopting or implementing any of the measures described below:' this is followed by a list of ten kinds of measures designed to protect diverse material and immaterial assets. Cf. Ch. Scherrer (2001).
[35] ILO Declaration of June 18, 1998, 137 ILR 253 (1998).
[36] Federal Gazette, 1956 II, p. 640.
[37] Federal Gazette, 1956 II, p. 2072.
[38] Federal Gazette, 1955 II, p. 1122.
[39] Federal Gazette, 1956 II, p. 23.

as the Convention defines equality in Art. 1 Sub-Par. B as applying only to 'rates of remuneration established without discrimination based on sex.'

ILO Convention No. 105 on the abolition of forced labour of June 25, 1957 (157).[40] Compared to the Forced Labour Convention of 1930, its remit is extended as it bans the use of forced or compulsory labour as an instrument of political coercion or education, as a punishment for political or ideological views, in the promotion of economic development, as an instrument of discipline at work, as a punishment for participating in strikes, and for discriminatory purposes.

ILO Convention No. 111 concerning discrimination in respect of employment and occupation of June 25, 1958 (156).[41] It obligates nations to implement policies to abolish discrimination with regard to access to employment, in-service training, and working conditions on the basis of race, sex, religion, political opinions, social background, etc.

ILO Convention No. 138 on the minimum age for admission to employment of June 26, 1973 (161).[42] The Convention aims to abolish child labour, providing that the minimum age should be no lower than the age of completion of compulsory schooling.

ILO Convention No. 182 on the worst forms of child labour of June 17, 1999 (129).[43] Extending the remit of ILO Convention No. 138, it aims to abolish slavery, prostitution, pornography, illegal activities, and any work that might harm or impair the health, safety, and morals of children.

This list of eight might be extended by adding other conventions pursuing the same key objectives such as, for instance, ILO Convention No. 102 on minimum standards of social security of June 28, 1951,[44] ILO Convention No. 103 on maternity benefits of June 28, 1952,[45] or ILO Convention No. 35 on protection and relief at work for workers' representatives of June 23, 1971.[46] The fact that these have been ratified only by a few states indicates, however, that they contain regulations which are not accepted as binding although the goals of these conventions meet with general approval.

Supported by the European Parliament, the United States in particular demanded that these social standards be included as clauses in trade treaties, and that a committee similar to that which monitors environmental issues be established to monitor conformance with social standards within the framework of the WTO. On the international plane, however, this demand is the subject of heated controversy not only between industrialised nations and developing countries but also between trade unions, NGOs, and – for a long time – within the ILO.[47] Both these initiatives were temporarily shelved by the WTO Ministerial Conference in Singapore in 1996, not only because the developing countries feared that infringements of the social clauses such as that banning child labour might be used as a pretext for trade sanctions or protectionist measures by the industrialised countries, but also because the WTO stated that it had no jurisdiction over workers' rights, and that any institutionalised cooperation with the ILO would be limited to an

[40] Federal Gazette, 1959 II, p. 441.
[41] Federal Gazette, 1961 II, p. 97.
[42] Federal Gazette, 1976 II, p. 201.
[43] Not ratified by the Federal Republic by 2000.
[44] Federal Gazette 1957 II, p. 1321.
[45] UNTS Vol. 214, p. 321, not ratified by the Federal Republic by 2000.
[46] Federal Gazette, 1973 II, p. 953.
[47] Cf. Ch. Scherrer, Greven, Frank (1998), pp. 12ff.

exchange of information. In the final declaration of the Singapore Ministerial Conference, this dissenting opinion was recorded as follows:

> '4. We renew our commitment to the observance of internationally recognised core labour standards. The International Labour Organisation (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalisation contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.'[48]

Although improving the working and living conditions of the labour force has meanwhile become an accepted goal which nobody would dispute worldwide, the ways and means of realising and implementing it are extremely controversial even now. Especially the ILO's concept of using legislation based on international social standards for this purpose has been in dispute ever since the ILO has begun its work. The ruling economic theory has been using an ever-changing line of arguments to deny that political programmes to protect labour and workers' rights could be reconciled with the laws of market economy.[49] The main argument was that the enforcement of labour protection programmes would hamper the development of competition, which was the most essential prerequisite of economic development and, consequently, of the automatic improvement of working standards. The key controversy was between classical economic dogma, which holds that working conditions can be improved and assured only if market economy is allowed to develop unhindered, and the ILO which, as an exponent of the representation of workers' interests by trade unions, believes that labour protection can be implemented only by corrective action based on legal rights and international agreements.[50] Although economic framework conditions have changed considerably since the Twenties, the ILO has been struggling ever since with this debate, which resembles that on how to deal with economic crisis, fighting the forces that oppose programmes to protect labour and promote rights at work.

Jeffrey Sachs, for instance, the director of the Harvard Institute for Economic Development, confronted the ILO with the argument that

> 'the greatest damage to growth is in across-the-board labour standards, that dictate either minimum standards or minimum conditions for higher and fairer wages or, worse still, provide for the extension of wages across the economy; in short, the German system applied to South Africa or some other developing country' ... Instead 'we must look for better tax systems, or zero tax systems and other mechanisms, but not to ... imposing minimum conditions of work or even institutional strategies for collective bargaining on developing countries. In my opinion, the cost of such conditions and strategies could be quite substantial for the developing countries, and bring modest, if any, gain to the advanced countries.'[51]

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[48] Quoted from W. Kreissl-Dörfler (1997), p. 40.
[49] For a summary of the evidence, see W. Sengenberger (2002), pp. 21ff.
[50] That this position is justified is assumed without proof in this instance. For arguments advocating the need for international social standards, see W. Sengenberger (2002), pp. 39ff. for further proof.
[51] J. Sachs (1996), pp. 23, 24.

Establishing a link between the implementation of working standards and free competition on the market, this line of argument has had considerable influence not only in the academic world but on the policies of the dominant powers in trade and business as well as of those international financial institutions that are responsible for shaping the international economic order. Thus, international loans and other kinds of assistance have again and again been predicated on conditions that impose the abolition of 'excessive' and 'harmful' regulations of the labour market. What is more, this theory connects up with those voices from states of the so-called Third World which regard the implementation of labour protection rights in their own countries as a form of veiled protectionism by the highly-industrialised nations, believing that such measures or conditions are only designed to deprive developing countries of their comparative competitive advantage.[52] Even the fundamental freedom of association has been blamed for infringing the laws of the market.

In addition to the contention that it is harming the market, it is claimed that the protection programmes of the ILO are 'wrong' and counter-productive. The ILO is said to obstruct rather than promote social progress and the speedy improvement of working conditions, while attempts to promote employment and better workplaces simultaneously are said to be irreconcilable.[53] And indeed, a regulated labour market containing powerful elements of social welfare is less attractive to international capital investment than a market without any such regulations. At the same time, this is bound up with the undeniable fact that wages do not necessarily increase when labour is scarce, unemployment does not automatically disappear when the demand for labour increases, and permanent poverty can coexist with economic growth. In other words: Reality proves again and again that the market model of orthodox dogma has its own contradictions and anomalies associated with its putative mechanism of self-regulation and adaptation, so that there is no automatic guarantee of either economic or social progress.

One particularly effective argument against agreeing on and introducing social labour standards is that they are too expensive in production as the cost exceeds by far the benefits which the workforce expects them to yield. Particularly in those countries that need to rely on swift economic progress, the increase in the cost of labour entailed by such social standards would wipe out any natural competitive advantages. In other words: In any country that has not yet reached a higher economic level, social labour standards are spendthrift luxuries. Hampering instead of fostering development, they are not part of the development process but only entailed by it at the best of times, or, as the Financial Times put it: What people in developing countries need is jobs and incomes, but not human rights.[54]

Apart from the fact that the add-on cost of social standards is exaggerated in most cases,[55] the positive effect which these measures have on labour productivity, staff morale, absenteeism, and accident rates are mostly left out of consideration. While there is no doubt that labour protection measures are expensive to launch, the cost even of shorter working hours will be compensated both immediately and in the long run by increases in productivity. Besides, quite a share of these costs will be borne by workers and consumers.

Ultimately, the reason why labour standards and rights at work are opposed by academic theorists as well as by political practitioners lies in the separation of the societal production

[52] For a survey, see D. K. Brown (2002).
[53] G. Fields (1990), R. B. Freeman (1992), and M. Wilkinson (1995).
[54] Financial Times, February 9, 2000.
[55] There is a number of ILO studies which demonstrate that the extra cost involved is relatively low; cf. ILO (2001), ILO (2002).

process into an economic and a social component. Both are regarded as mutually independent in asmuchas it is maintained that economic development does not have to be attended by social rights and progress, and that it even controls the process of development without being 'polluted' by a social component. Not wishing to enter into a detailed discussion of this defective understanding of development, which is not the subject of this study, I should like to point out nevertheless that this segregation and marginalisation of social development relative to economic development necessarily exerts a crucial influence on the legal perception of those rights that are expressly intended to strengthen the social component. This will be important when it comes to the question about the universality of these rights, their legal content, and their enforceability.

To the most important treaties among the more than 100 bilateral and multilateral agreements on the protection of human rights, committees have been assigned to render these rights more effective. They include the Committee on the Abolition of Racial Discrimination, which first met in 1970; the Human Rights Committee established under the Civil Covenant (1976); the Committee on the Abolition of Discrimination against Women (1982); the Committee on Economic, Social and Cultural Rights (1987); the Committee against Torture (1988); and the Committee on the Rights of the Child (1991). All these treaty committees have been invested with reporting and monitoring rights, develop standards of interpretation and control to monitor national practices, and comment in more general terms on the textual concretisation and implementation of human rights. Thus, the Social Covenant Committee has published general comments on the right to housing, the right to food, the rights of the elderly and the handicapped, and the influence of sanctions on the economic, social, and cultural rights of the respective population. This goes to show what crucial political and legal importance is accorded by the community of states to these human rights. As far as the formulation, interpretation, and standardisation of human rights is concerned, however, the most important role is played by the UN Human Rights Commission. The fact that it is staffed by diplomats underlines that its character is primarily political, and that its mission to spread and implement human rights throughout the entire UN system reaches farther than that of the special committees, which are rather more technical and advisory in character. Its legal rights of observation, reporting, and monitoring are accordingly more comprehensive, being topped only by those of the European Human Rights Commission.

3 – The Regional Level: Europe, OAS, AU

Before this investigation turns to the question of the assertability of these rights, however, some regional codifications of human rights will have to be discussed to give the reader an impression of their scope, form, effectiveness, and spread. In this process, the focus will be on European codes such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (EHRC) of 1950[56] and the European Social Charter of 1961.[57] Next, we will glance briefly at the American Human Rights Convention promulgated by the Organisation of American States in 1978[58] and at the 'African Charter on Human and Peoples' Rights', the so-called Banjul Charter of 1981.[59]

The EHRC was drafted by the Council of Europe along the lines of the Universal Declaration of Human Rights of 1948. Its 40 states parties undertake to 'secure to everyone within their jurisdiction the rights and freedoms defined in Sect. I of this Convention' (Art. 1). The material

[56] Federal Gazette, 1952 II, pp. 685, 953; 1968 II, pp. 1111, 1120; 1989 II, p. 546.
[57] Federal Gazette, 1964 II, p. 1261.
[58] ?
[59] ?

guarantees in question largely coincide with those given in the Universal Declaration of 1948 as well as in many national catalogues of fundamental rights. However, they are essentially restricted to the classic civil and political human rights augmented by provisions prohibiting torture, slavery, and forced labour. To compensate for this deficit on the social side, the European Social Charter was developed in the following years, again within the framework of the Council of Europe. However, it only entered into force in 22 of the 40 member states. What is more, these states are only required to accept as binding 10 out of the 19 articles that safeguard fundamental rights and/or 45 out of 72 paragraphs within these 19 articles, making for a much more limited scope of obligations than that of the EHRC. The Charter does not aim at creating individual social or economic rights but at obligating the states parties to adopt social standards in their own codes of law. Accordingly, the 'right to work' (Art. 1) is not defined as a subjective public right to which individuals are entitled, but rather as an obligation for the states' parties to arrange their political and legal objectives within their own codes of law 'so as to guarantee the effective assertion of the right to work.' The remainder, including the right to equitable, healthy, and safe working conditions, equitable remuneration for work, the right to organise and bargain collectively, the right to vocational counselling and training, the protection of children, adolescents, and female employees, and the right to social security and welfare have been similarly worded so as to obligate states parties to adapt their national social order accordingly. While the substance, content, and scope of these rights may differ in detail from one member state to another, all states parties are equally bound to implement and embed the social rights of the Charter within their own codes of law. This is made clear in Part II of the Social Charter.

Early on, the European heritage of human rights was adopted by the 'Organisation of American States' which, at its founding conference in Bogota in 1948, adopted an American declaration of human rights and duties in the form of an ordinary resolution. It was only given a binding format at the OAS Conference of San José, Costa Rica, in 1969 in the form of the 'American Convention on Human Rights'. Having been ratified by 12 states, it entered into force in July 1978. Today, 25 states are parties to it, not including the United States, by which it was signed but not ratified. Its catalogue of human rights largely corresponds to that of the European Convention on Human Rights, although it does include some unusual components such as the right to a name (Art. 14) and national citizenship (Art. 20). No attention at all is paid to social and economic rights because there is no American counterpart to the European Social Charter. In this, it differs from the 'African Charter on Human and Peoples' Rights' which was passed by the 'Organisation for African Unity' (OAU; renamed African Union or AU in 2002) and came into force in 1986. Next to the rights of the individual, it postulates duties towards the family, the society, and the state. Moreover, it includes a number of economic, social, and cultural rights, such as the right to equitable working conditions and equal remuneration for work of equal value (Art. 15), the right to health protection (Art. 16), and the right to education (Art. 17). What is more, it is the only charter of human rights to codify so-called third-generation collective rights.[60] Next to the right to self-determination (Art. 20), it postulates the right of peoples to dispose of their own natural resources (Art. 21), the right to economic, social, and cultural development (Art. 22), to national and international peace (Art. 23), and to an environment that is 'acceptable and favourable towards development' (Art. 23).

This goes to show that the dispute over the division of 'indivisible human rights' into civil and political rights on the one hand and economic and social rights on the other is reflected in regional human-rights documents as well. The only such document to overcome this split is the

[60] Cf. N. Paech, G. Stuby (2001), pp. 690ff.

African Charter, which besides represents the leading edge in the development of human rights as it includes collective rights.

4 – The Practice of Resolutions in the UN General Assembly

One of the instruments used by the UN in its efforts to tighten the network of human-rights protection, close any existing gaps, and plug any loophole left in the framework of human-rights obligations is the practice of adopting resolutions. Although resolutions, being recommendations pure and simple, are legally binding in the weakest possible degree, they may serve as a basis and point of departure in international treaty law in the shape of conventions or, alternatively, acquire considerable importance as reinforcing elements on the way to international customary law. Among its fundamental goals and principles, the UN Charter names in Art. 1 Par. 3 'the promotion of human rights and fundamental freedoms'. While this duty is incumbent on all organs and organisations of the UN, only a few of those really accept it as one of their key duties and translate it into activities of their own. The UN Security Council, for one, has so far consistently refrained from joining in the development and implementation of human rights, while the ECOSOC has not launched any initiatives of major importance except for creating the Committee on Economic, Social, and Cultural Rights. Only the General Assembly has devoted itself to this task with untiring commitment and an unending sequence of initiatives, ranging from the triad that includes the human-rights declaration of 1948 and the two covenants of 1967/76 which still form the bedrock of the code of human rights, numerous resolutions and declarations forming the basis of well-known multilateral conventions, and finally declarations which were so innovative and even revolutionary that their legal substance is disputed to this very day.

These (few) resolutions include the Declaration on the Right to Development[61] which was adopted by the General Assembly in 1986. So far, the only convention to codify this right was the Banjul Charter.[62] In a manner of speaking, it is the culminating point of all those years in which numerous attempts were made to embed this right in the canon of human rights.[63] The objective of this very detailed resolution is to ensure that human rights in general and economic, social, and cultural rights in particular are recognised as constituting independent and inherent elements of any development process and deserving special protection within that process for that reason. While it follows from this that all human beings are entitled to participate in the process of development, it does not follow that states are entitled to a specific level of development, or that wealthy states are obligated to provide development assistance and benefits towards that end, as certain developing countries demand occasionally. Thus, Art. 1 says:

> 'The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.'

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[61] UNGA Res. 41/128 of December 4, 1986. Adopted against the vote of the US, with Germany, Denmark, Finland, Great Britain, Iceland, Japan, and Sweden abstaining.

[62] Art. 22 of the Banjul Charter reads: '1. All peoples shall have the right to their economic, social, and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.'

[63] For more detail, see the three studies on the right to development by Arjun K. Sengupta, an independent expert commissioned by the Human Rights Commission and the General Assembly, which were published on July 27, 1999, E/CN.4/1999/WG.18/2, on August 17, 2000, GA A/55/306, and on January 2, 2001, E/CN.4/2001/WG.18/2.

There are three principles contained in this article: 1) There is a human right called the right to development, which is inalienable; 2) there is a specific process of 'economic, social, and cultural development' in which 'all human rights and fundamental freedoms can be fully realised'; and 3) the right to development is a human right which entitles 'every human person and all peoples ... to participate, contribute to, and enjoy' this particular process of development.

Efforts to integrate and guarantee all human rights, namely civil, political, economic, social, and cultural rights without distinction or legal gradation were based on the Philadelphia Declaration of the International Labour Conference of 1944 and upheld both by the San Francisco UN Conference one year later as well as in the Human Rights Declaration of 1948. The failure of this concept, which manifested itself in the separate covenants of 1967, led to open criticism in the Tehran Proclamation of 1968, which said that 'since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible.' In exactly the same vein, the Declaration on Social Progress and Development of 1969[64] emphasised the interdependence of these two sets of rights. Based on these foundations, a concept viewing the right to development as a human right evolved in the early '70s, which was first explicitly mentioned and recognised in Resolution No. 4 (XXXV) of the UN Human Rights Commission on March 2, 1979. Although the right to development was affirmed by the overwhelming majority of the UN General Assembly in 1986, its legal character is still under dispute.[65] Objections to its recognition as a binding right are being raised mainly by the highly-industrialised countries in an attempt to forestall demands for concrete development-aid contributions. Nevertheless, interpreting this right in purely instrumental terms is not really germane to the issue, although some developing countries occasionally use it in exactly this way as an argument against the former colonial powers. Accordingly, Art. 3 Par. 3 of Resolution 41/128 puts the following demand in somewhat restrained terms:

> 'States have the duty to cooperate with each other in ensuring development and eliminating obstacles to development. States should realise their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and cooperation among all states, as well as to encourage the observance and realisation of human rights.'

The rationale of the right to development does not lie in creating another right but in emphasising that sustainable human development is impossible without the undivided observance of all human rights. Consequently, the right to development may be regarded as an early attempt to implement what is today called 'mainstreaming' human rights within the UN system.[66] In the '90s, the UN continued on this path by holding a number of world conferences which focussed not only on the recognition of the indivisibility and interdependence of human rights but also on their implementation and assertion through action programmes. At these conferences, some aspects of human rights and development moved to the centre of the stage that had been more or less neglected until then, among them environment and development in Rio in 1992, human rights in Vienna in 1993, women's rights in Beijing in 1995, social development in Copenhagen in 1996, population issues in Cairo in 1997, shelter in Istanbul in 1997, and food in Rome in 1998. All these conferences had two common denominators: First, the close and indispensable links that exist between any kind of development and human rights, and second, to emphasise again and again that human rights are inseparably connected and

[64] Cf. Th. Schaber (1996), p. 169.
[65] On the present state of the debate, see N. Paech, G. Stuby (2001), pp. 700ff.
[66] Similarly, see R. Normand (2000), p. 12.

indivisible. A closer look at the general themes of these conferences reveals that all revolved around economic, social, and cultural rights, and that the point was to elevate them from their hitherto secondary rank to a position of political as well as legal equality with civil and political human rights. One of the methodological bridges that led towards this upgrading of social rights was the right to development. At the same time, this right was the bracket which integrated and consolidated the development of human rights and their various generations.

III – The Legal Content and Purview of Human Rights

Thus, the most important problem associated with economic and social human rights lies not in drawing up a complete inventory of all situations in life that call for protection, but in answering the question about the legal validity of the demands that follow from human rights, and the options of implementing them. Such options are often denied, citing the imprecision of related demands or their dependence on inadequately available resources, while those human rights that belong to the so-called second generation are categorised in legal dogma as political programmes that rank below the directly and immediately binding civil and political human rights of the first generation.[67] Not only does this deny the individual any option of invoking these rights,[68] governments and parliaments feel in no way obligated to enhance the applicability and effectivity of the Covenant.[69] Only a short while ago, the German Federal Diet, acting on a recommendation of its Human Rights Committee, rejected a motion from the floor to strengthen economic and social rights and to endow these rights with the capability of being adjudicated under international law.[70] Similarly, the representatives of the British Government in the EU Convention refused to include actionable European social standards in the new EU Charter. Meanwhile, they have been joined in their refusal by the representative of the Federal Government in the Convention.[71]

1 – Equality in Legal Force for Political and Social Human Rights

That states should refuse to put social rights into effect is as unacceptable politically as it is unjustifiable legally. The two human-rights covenants are equally binding for any state that ratifies them. In this regard, they do not differ at all: They are both treaties under international law that are binding for all states after they have ratified them. Allocating human rights to a first, second, and third generation and/or dimension[72] is a categorisation that primarily relates to their historical origins, which in each case were associated with revolutionary societal upheavals. While the classical political freedoms were first codified during the French Revolution, the

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[67] Cf., among others, W. Graf Vitzthum, K. Hailbronner (1997), III Margin no. 208; R. Higgins (1994), pp. 95ff.

[68] Thus, for instance, the Students' Association of Zurich University failed in their action against the Canton of Zurich to get a tuition fee increase cancelled. Among other things, they had based their case on the right to education named in Art. 13 of the Social Covenant. The case was thrown out by the Federal Court, which stated that these provisions were merely programmatical in nature and entailed, apart from a few exceptions, no subjective rights to any individual that could be adjudicated. Moreover, the provision laid down in Art. 13 Sub-Par. 2.c of the Social Covenant were not definite enough in the opinion of the Court. BGE 120 Ia 1.

[69] Thus, the US Ambassador to the UN Human Rights Commission stated that the Social Covenant had not been ratified by the United States because it feared that citizens might sue the administration to enforce their rights. The Economist, August 18, 2001.

[70] Motion by the PDS Parliamentary Party of March 13, 2002, FD document 14/8502. Recommendation to reject the motion by the Committee on Human Rights and Humanitarian Aid of June 13, 2002, FD document 14/9486. Motion rejected by the Federal Diet on June 28, 2002. In its motion, the PDS demanded to speed up the implementation of the individual complaints process; ratify a number of international-law agreements including the UN Convention on the Protection of Migrant Workers and their Dependents, ILO Convention No. 169, the revised European Social Charter, and the optional protocols of the UN Convention on the Rights of the Child; and to withdraw any reservations about that Convention. However, having rejected this motion, the Federal Diet nevertheless called upon Vietnam and the Sudan on the same day to conform to the human-rights conventions which they had ratified. While this demand was mainly concerned with the freedom of opinion, the press, and religion, it was also about the conventions against torture and the discrimination of women, both of which had been signed by the Sudan. Now, the latest coalition agreement between the SPD and the Green Party of October 2002 says: 'We will actively support measures to ensure that international social and environmental standards are developed further, and that related environmental and climate conventions under international law are ranked equal with trade law.'

[71] Tageszeitung, September 29, 2002. Germany's refusal is founded in the fear that, being the biggest net contributor, Germany might be made to pay for improved social standards in its neighbouring countries.

[72] Cf. E. Riedel (1989), pp. 9ff.

economic, social, and cultural rights of the so-called second generation resulted from the Russian Revolution and its impact on Germany, without which their incorporation in the Constitution of Weimar, for instance, would never have taken place. The so-called third generation, which includes the rights to self-determination, development, and peace, owe their codification to the no less revolutionary process of decolonialisation after 1945 which, however, had its breakthrough only in the '70s, when the UN recognised freedom movements and their struggle for political independence. Even this brief glance at history clearly shows who originated these human rights and the demands that relate to them, and where the forces are at home that reject and oppose these new rights and the new order concepts that emanate from them. At the legal level, these disputes mirror the bitter and often bloody struggles for liberation from colonial dependence, poverty, and underdevelopment.

At the same time, this categorisation highlights another difference which is often cited in support of rejecting the later generations of human rights, because it is said to mark a deviation from the typical characteristics of the classical first-generation rights: the fact that economic and social rights demand the provision of certain services, and that rights aiming at peace, self-determination, and development are collective property. Compliance with these rights may well differ with regard to its content and modalities, as we know from the classical distinction between defensive rights and rights entitling to services. It is true that the provisions of the Social Covenant are programmatical in nature, although this does not impair the binding force of the obligations they contain. Any state bound by the Covenant is obliged under international law to develop programmes under Art. 2 Par. 1 of the Social Covenant and 'to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.' While this obligation is immediate and binding, as the Human Rights Committee never tires of asserting, it differs from the classical defensive rights of the first generation in that it is not fulfilled by judgements from the bench.

States parties are obliged to develop detailed programmes for the successive implementation of these rights. As this obligation is both immediate and current, it is their duty to submit to the Committee at regular intervals programmes containing realistic schedules which show when exactly they intend to implement these measures. The Committee is empowered to provide assistance in formulating the content of these programmes through expert studies and evaluations. Needless to say, there are general standards for defining and implementing the basic level at which food, water, shelter, health, or education have to be provided, although the actual demands which governments may have to fulfil may differ considerably, depending on the country in question and its level of development. Moreover, the ILO has master concepts for minimum working standards which, with the assistance of the ILO, may be translated into concrete programmes for implementation in individual countries. All these international organisations aim to support and monitor the implementation and assurance of human rights in cooperation with the states involved, so as to accelerate the process of implementation and render it more effective.[73]

What is more, the typological separation into protective, service, and collective rights is not consistent enough for dogmatic postulates about their validity in law to be evolved from it. Quite a number of freedom rights are impossible to assert without governmental (advance) services, while entitlements must be necessarily accompanied by rights of protection. The Human Rights Committee established under the Civil Covenant has itself pointed out that affirmative action by

[73] On the Human Rights Committee under the Social Covenant, cf. P. Alston, G. Quinn (1987), pp. 157ff.; P. Alston (1992), pp. 473ff. Regarding the ILO, cf. R. Birk (2000), Par. 17, Margin no. 46ff.

the state is often necessary to guarantee freedom rights effectively. Thus, the protection of privacy postulated in Art. 17 of the Civil Covenant demands that the state refrain from interfering with the private lives, families, residences, and correspondence of its citizens. But that is not enough. For, as the Committee has pointed out, the protective effect and the efficacy of the law are predicated in our increasingly complex world on legislative, administrative, and judicial instruments and procedures that must be created to establish the limitations of the law as well as of any authority to interfere, and to check any abuse. The Human Rights Committee has called upon states to submit information on any steps taken by them to secure the right to privacy.[74] Even the ban on torture and inhuman treatment very often calls for affirmative action: Prison guards and police officers must be instructed and trained, programmes must be developed to ensure their familiarity with the rules of international law and the minimum standards for the treatment of prisoners, and judicial facilities for the prosecution of any violations must be created.[75]

How closely rights are interlinked and interdependent emerges from the fact that the right to self-determination, which is collective at the core, has been included in both human-rights covenants in their respective first Articles.[76] The 'unsystematic' inclusion of a collective human right in those two covenants, which are kept separate precisely because of the need to preserve systematic order, is the best possible proof you could find that this artificial separation is unsuitable. It is only after the right to self-determination has been realised that the individuals of a nation will have any chance of becoming aware of their freedom rights and put them to practical use. It is only the collective act by which a society freely decides on its own political status that paves the way for the exercise of political rights. The collective act by which a state is created forms the logical prerequisite for the ability of the individual to defend himself against any interference by the state by which his freedom is endangered. While defensive rights and entitlement rights alike are logically directed against the state, it is only through the exercise of collective rights that a society is given the chance of freely determining its own constitution in the first place. Basically, this was the message of the French Revolution, during which the right to self-determination was formulated for the first time.[77] The mechanism became irrefutable when the colonial peoples began their struggle for liberation after 1945, which was really about human dignity and the human rights of people that had been oppressed until then, although its ostensible goal was the creation of independent states. That the three 'generations' form a single unit is a constituting principle of the Code of Human Rights that has remained untouched to this very day: If only one of the three 'generations' is eliminated or undermined, the others will collapse of their own accord. At a consultation on poverty in Europe, the Council of Europe emphasised this human-rights mechanism in 1986 by pointing out that:

> 'Human rights, which the Council of Europe upholds, cannot be observed selectively. They are all of equal importance. Efforts must therefore be made to achieve respect for fundamental rights as a whole, whether social, cultural and economic or civil and political ... The first right is to build one's own destiny, which means first and foremost giving people a genuine

[74] Cf. General Comment 6 (16) of July 27, 1982; General Comment 16 (32) of March 28, 1988.
[75] Cf. General Comment 20 (44), Art. 7, and General Comment 21 (44), Art. 10 of April 7, 1992.
[76] Worded identically, they read as follows: '(1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. (2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principal of mutual benefits, and international laws. In no case may a people be deprived of its own means of subsistence.'
[77] Cf. N. Paech (1989), pp. 762ff., 768ff.

> opportunity to free themselves from the restrictions imposed by their environment and take part in shaping their own lives.'[78]

Another set of objections to the legal quality of social rights is based mainly on their vagueness and the difficulty of detecting violations. Ultimately, the essential argument is that these rights are incapable of being adjudicated.

If, however, we focus only on this capability, we are not doing justice to the protective character of human rights which, far from being confined to defences against the state, includes facilities for enabling and guaranteeing their assertion, as described above. Human rights are status rights that not only need to be protected from interference but require positive action to be established in the first place, a statement that holds particularly true for classical political defensive rights. Those human rights that guarantee freedom of opinion and the right to meet in public are not only infringed by censorship and prohibition, they simply do not exist for those who are generally prevented from asserting them by starvation, epidemics, or poverty, and who are often not even aware of their existence. While differences in the practice of implementing and guaranteeing political and social human rights do result in different modes of protection, they do not affect the enforceability of these rights.[79]

To be sure, guaranteeing freedom by normatively embedding its assurance in the constitution and refraining from interfering with it generally comes cheaper than putting it into practice by providing adequate food to large parts of the population, creating a working public-health system, or carrying out a land reform. What is more, those rights with which the state is not allowed to interfere are generally easier to define precisely than the programmes and steps which the state is obliged to implement and undertake to safeguard social, economic, or cultural rights. Or, to put it the other way around: Interferences with the protected sphere of civil and political rights are easier to identify precisely than it is to answer the question of at what point an act of commission or omission is apt to influence people's situation in life so much that it becomes equivalent to an infringement of human rights.[80] Even this uncertainty, however, in no way affects the binding legal force of all human rights, nor can it justify a split into first and second-class rights. What is more, many of the provisions of the social human rights can be implemented directly, such as, for instance, all bans on discrimination, which include protecting the freedom of association, among others.

When the German Federal Diet voted down a proposal to call upon the government at least to reinforce the mechanisms and instruments of the Social Covenant, this was not only an act of

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[78] Council of Europe: Exchange of views on poverty in Europe, September 30 – October 1, 1986. Abstract by special rapporteur G. Sarpellon, EPP (86) 5, Par. 35.

[79] Thus B. Simma (1998), pp. 191ff; M. Scherf (1990), pp. 233ff. What has been left out of account in this context is the problem of *erga omnes* and *ius cogens* that is by no means unessential in the dogma of human rights, meaning the question of whether there are peremptory human rights which may in no circumstances be infringed within the meaning of Art. 53 of the Vienna Convention on Treaty Law. Apart from the ban on torture, genocide, slavery, and apartheid, this question is hotly disputed. Cf. p. 27ff. below, as well as E.-U. Petersmann (2001), pp. 13f.

[80] The restructurisation of the Chinese economy in the aftermath of China's accession to the WTO may serve as an example. It is true that the Development and Research Centre of the State Council expects that as early as 2010, China's GNP will grow faster by one third than it would have if the country had not joined the WTO, creating 10m additional jobs every year. At the same time, however, it is predicted that as many as 140m jobs will be lost because of restructurisation measures. Cf. Roland Berger & Partner (2000); Wolfgang Voegeli (2002). A number of sociological studies suggest that it might be similarly difficult to answer the question about the point at which the human rights of the population are definitely infringed by any demands by the IMF that the government should dismantle certain social and economic facilities as a precondition for the extension of loans. Cf., for instance, W. van der Geest, R. van der Hoeven (1999).

political arrogance, it also directly contravened the obligation laid down in Art. 2 of the Social Covenant, although this is worded in rather general terms. In the remarks that conclude its comment on the third report submitted by Germany, the Social Covenant Committee expressed its concern 'that there is no comprehensive system in place that ensures that the Covenant is taken into account in the formulation and implementation of all legislation and policies concerning economic, social and cultural rights.'[81] A rather cautious way of describing this fundamental defect in the human-rights policy of the federal government.

Ever since the day when the Social Covenant was laid out for signature by state governments on December 19, 1966, there has been a lively discussion about the interpretation, concretisation, and implementation of its social, economic, and cultural rights. To focus this far-ranging debate and translate it into an international consensus, experts met at an international conference in Maastricht in 1986, where they agreed on guidelines for the implementation of the Social Covenant that became known under the name of 'Limburg Principles'.[82] Eleven years later, another round of international experts met in the same place at the invitation of the International Commission of Jurists, the Urban Morgan Institute, and the Centre for Human Rights of Maastricht University to deliberate on the content and scope of social-rights infringements on the basis of the Limburg Principles, and to suggest suitable responses and legal remedies. Their findings, which reflected developments in international law throughout the previous decade, were published under the name of 'Maastricht Guidelines'.[83] In their text, both declarations offer an authentic interpretation of the Social Covenant together with a representative analysis of public opinion in science and the field. However, the authority of both these bodies was not the same as that of the International Court of Justice, for instance, so that the guidelines cannot be regarded as anything more than a general representation of public opinion and legal quality. All the same, the statement in Sect. 4 of the Maastricht Guidelines, to the effect that both covenants are legally equivalent, carries greater weight than a mere expert opinion.[84]

2 – Levels of Governmental Obligation

In the international-law debate, the prevalent interpretation of the capacity of human rights to be adjudicated is now based not on distinctions between the generations and types of protection, entitlement, and collective rights but on different levels of obligation of the state to respect all human rights *in toto*. This model was first developed by Asbjörn Eide in a report on the right to food, which was commissioned by the Sub-Commission on Prevention of Discrimination and Protection of Minorities.[85] In it, he defines three levels of state obligations that are based on human rights, namely the level of 'respect', 'protection', and fulfilment.[86] Although the model was developed on the basis of a single social right, the right to food, it lays claim to validity for all human rights.

At the level of the 'obligation to respect', the model demands that states refrain from interfering with the integrity of the individual and absolutely abstain from intervening in those initiatives

[81] UN ECOSOC E/C 12/1, Add. 68, August 31, 2001. Cf. also M. Windfuhr (2001), pp. 44ff.
[82] Cf. Limburg Principles on the Implementation of the International Covenant on Economic, Social, and Cultural Rights, 9, Human Rights Quarterly (1987), pp. 121ff.; E. O. V. Dankwa, C. Flinterman (1988), pp. 275ff.
[83] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1999. http://www.umn.edu/humanrts/instree/Maastrichtguidelines_.html.
[84] Maastricht Guidelines, Sect. 5: 'It is now undisputed, that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity. Therefore, states are as responsible for violations of economic, social and cultural rights as they are for violations of civil and political rights.'
[85] A. Eide (1987); A. Eide (1989), pp. 2ff.
[86] A. Eide (1989 a), pp. 35ff.

and activities of their citizens which aim at developing and securing their material existence. This implies a direct safeguard of all those classical freedom rights which form indispensable prerequisites for realising social demands, such as the right to food, or core labour standards.

Under the 'obligation to protect', the state and its organs are called upon to take steps to protect the individual from any activities by third persons, whether individuals or groups, that might compromise his development. While this obligation leaves the individual with the sole responsibility for the implementation of human rights, it is intended to protect him from interference and encroachment. This level operates at the interface between the two classical categories of freedom and entitlement rights. As the state wards off societal obstructions, it provides the 'service' of actively creating those conditions which permit the exercise of freedom rights in the first place. This cannot be achieved simply by the state refraining from any activities of its own; rather, it is obliged to exercise its sovereign power against any activities by private societal forces by which the rights of third persons are curtailed. This illustrates especially well the fact that human rights are two-faced, i.e. interdependent and indivisible at the same time, and cannot be implemented merely by instituting defences against or entitlements to governmental activities.

The obligation of the state to provide services comes to the fore only at the third level, the 'obligation to fulfil'. Where the individual is incapable of securing for himself the enjoyment of human rights on his own initiative, and where, more importantly, he does not have the material resources to satisfy his basic needs, the state has the duty of taking steps to assist and prevent. Although the actual scope of this 'obligation to fulfil' may be ill-defined in detail, meaning the services that the state is obliged to provide so that the rights to food, health, water, and employment may at least be said to have been implemented, there is no doubt that these rights are legally binding and, consequently, actionable.[87] The substance of the conflict between the rule of law and the social state in the doctrine of domestic law[88] is mirrored in the three levels of obligation, from 'respect' to 'fulfil', in international law.

Moreover, the need to fulfil these obligations is predicated on the availability of resources, although this qualification does not diminish their legal force in any way.[89] The Maastricht Guidelines of 1997 state that:

> 'In many cases, compliance with such obligations may be undertaken by most states with relative ease, and without significant resource implications. In other cases, however, full realization of the rights may depend upon the availability of adequate financial and material resources. Nonetheless, as established by Limburg Principles 25 – 28, and confirmed by the developing jurisprudence of the Committee on Economic, Social and Cultural Rights, resource scarcity does not relieve states of certain minimum obligations in respect of the implementation of economic, social and cultural rights.'

To enhance the operationalisation of the capacity of being adjudicated, Eide distinguishes between obligations relating to conduct and obligations relating to results. While conduct

[87] This subdivision into three levels of obligation was adopted in the Maastricht Guidelines of 1997: '6. Like civil and political rights, economic, social and cultural rights impose three different types of obligations on states: the obligations to respect, protect and fulfil. Failure to perform any of these three obligations constitutes a violation of such rights ....'

[88] Cf. D. Schiek, Basic Law Commentary (2001), Art. 20 Par. 1-3 V., Margin no. 38 ff.

[89] Cf. R. Normand (2000), pp. 3ff. For a different although unsubstantiated opinion, see K. Hailbronner, W. Vitzthum (1997), Sect. 3, Margin no. 208, p. 243. Sociological literature similarly recognises the legal equivalence of the rights laid down in the Civil and Social Covenants; cf. M. Windfuhr (1999), pp. 176f.

comprises both positive and negative actions such as, for instance, the obligation of the state to refrain from torture or obstructing membership in trade unions, obligations relating to results are concerned less with ways and means and more with a status that is to be achieved, such as, for instance, eliminating starvation and defective medical provisions, or securing access to drinking water. While an 'obligation to respect' the freedom rights of the individual will normally entail an obligation to take action, there is no implication that the obligation to secure certain results can be met merely by providing material goods. For it may well be that, under certain unusual circumstances, a state may be able to avoid starvation better by refraining from intervention and from interfering with the freedom of its citizens and the way in which they control their resources. Similarly, the right to shelter cannot be realised simply by providing a minimum standard of housing, for it also prohibits the state from arbitrarily driving citizens from their homes, or destroying them. From this, it follows that human rights, although they can claim to be legally binding in international law because of respective treaties, may still be imperfectly effective in some respects, and that their capacity of being adjudicated is comparatively weak. This deficit may also be found in the legislation of some states and is not restricted to international law, with its generally weaker power of sanction.[90]

This being so, we may take it for a fact that there is no normative distinction between the legal binding force of the rights laid down in the Civil and the Social Covenant, a view that is being increasingly acknowledged in literature and science.[91] Disregarding any differences in the processes of implementation and the guarantees given, social, economic, and cultural rights bind the state just as much as political and civil rights.

3 – Ranking of Human Rights from Soft Law to *Ius Cogens*

It is one of the peculiar characteristics of international law and, by the same token, of human rights that the binding force of its rules varies between that of noncommittal programmatical statements and absolutely cogent laws. In international law, the canon of sources is limited, consisting mostly of treaty and customary law as outlined in Art. 38 of the statute of the International Court of Law. Even the 'general principles of law recognised among cultural nations' similarly mentioned in Art. 38 may lay claim to the character of a law only in asmuchas they may be included in customary law. At that, customary law is often difficult to define precisely, and its legal validity varies widely, ranging from the largely noncommittal status of so-called soft laws to the absolute power of *ius cogens*.[92]

The recently-popular term 'soft law' designates a rule of conduct that does not belong among the recognised sources of international law. As it has no legal character, it cannot convey any binding force on the habitual, behavioural, or customary patterns it describes. This being so, the

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[90] The differentiation between obligations of conduct and of result has been similarly adopted by the Maastricht Guidelines: '7. The obligation to respect, protect and fulfil each contain elements of obligation of conduct and obligation of result. The obligation of conduct requires action reasonably calculated to realise the enjoyment of particular rights. In the case of the right to health, for example, the obligation could involve the adoption and implementation of a plan of action to reduce maternal mortality. The obligation of result requires states to achieve specific targets so satisfy a detailed substantive standard. With respect to the right to health, for example, the obligation of result requires the reduction of maternal mortality to levels agreed at the 1994 Cairo Conference on Population and Development and the 1995 Beijing Fourth World Conference on Women.'

[91] Cf., for example, R. Higgins (1994), pp. 100ff.; Maastricht Guidelines of 1997, Sect. 4, see Note 82 above. The same holds true for the right of self-determination, although the right to development and the right to peace are still under dispute.

[92] For general purposes, cf. W. Heintschell von Heinegg in K. Ipsen (1999), Sect. 15, Margin no. 36ff.; Sect. 19, Margin no. 20; N. Paech, G. Stuby (2001), B II, Margin no. 137ff., pp. 482ff., 484ff.

only benefit of the term very probably is that it provides a name to that lowest rung on the ladder of law development in international customary law from which binding sources of customary law may develop under certain special conditions. Assuming that it has any function at all, the term 'soft law' might serve to characterise some of the rights specified in the Universal Declaration of Human Rights of 1948 or the Helsinki Charter of 1975, as both documents were adopted by their signatory states as noncommittal, programmatical declarations. However, when the human rights named in the Universal Declaration of 1948 were adopted in the two covenants of 1967, they were translated into binding treaty law. Other rights, including, for instance, the right to property named in Art. 17 of the Universal Declaration – which is, however, missing from both human-rights covenants of 1967 – may only acquire the status of a binding source of law by a process of gradual transformation into customary law. In the field of human rights, this non-treaty rulemaking process is an unusual exception as there is hardly any single right that is not safeguarded by multilateral treaties – the collective rights to development and peace alone excepted. On the other hand, their validity in customary law is of some importance to all those countries whose governments did not ratify related conventions and are, therefore, not bound by them, as the United States did in numerous cases. A right will be binding on states that are not bound by related treaties only if it develops beyond the treaty framework and acquires validity under customary law. And there is a general consensus of opinion that this is just what all major human rights have done, once again with the exception of the collective rights to development and peace.

If we may assume for a fact, then, that human rights are valid under treaty or customary law, this tells us nothing about their status in the hierarchy of law sources. More obligatory even than standards laid down in treaties, there is in international law an absolutely peremptory law, *ius cogens*, that is beyond the reach of any treaty and, consequently, obligatory and untouchable for all states. In Art. 53, the Vienna Convention on the Law of Treaties of 1969[93] gives a definition of peremptory norms and their effect that has come to be generally recognised today:

> 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present convention, a peremptory norm of general international law is a norm accepted and recognised by the entire international community of states 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.'

From the enforcement point of view, it is important that these cogent norms of international law apply *erga omnes* (to everyone). This means that any non-compliance with the duties encoded in these norms may be reprimanded by any legal body under international law without regard to treaty relationships. In the definition of the International Court of Justice (ICJ), *erga omnes* norms are norms 'establishing rights of such importance that all states should have a legal interest in their protection.'[94] The implication is that while the peremptory norms in *ius cogens* always operate *erga omnes*, not all norms from which *erga omnes* obligations result can be necessarily characterised as *ius cogens*.

The ICJ specifically named the ban on aggression and genocide as well as the principles and rules of fundamental human rights, including protection from slavery and racial discrimination. While the ICJ in a later ruling unmistakably included the ban on aggression contained in Art. 2

[93] Federal Gazette (1985) II, p. 927. Having been ratified by 35 states, the Convention came into force on January 7, 1980. As according to general opinion it is mostly a codification of pre-existing customary law, it is binding even on those states which have not ratified the Convention.

[94] ICJ ruling of February 5, 1970 (the so-called Barcelona Traction Case), ICJ Reports (1970), 2.

Sect. 4 of the UN Charter in the category of *ius cogens*,[95] and the ban on torture was characterised as *ius cogens* by the International Criminal Tribunal for Ex-Yugoslavia,[96] similarly precise statements regarding other cogent norms are rare.[97] While it is generally accepted that fundamental human rights belong in the body of *ius cogens* or at least operate *erga omnes*, disputes will go on arising about exactly what right is involved.

However, as two examples from Tanzania and Brazil show, this determination is of considerable importance. Within the framework of structural reforms demanded by international financial institutions, Tanzania was required to raise school fees for elementary education. Now, Art. 13 of the Social Covenant, which has been ratified by Tanzania, says that elementary education should be free. Consequently, Tanzania was obliged by these financial institutions to take steps that clearly contravene its obligations under the Social Covenant. If Tanzania had refused to comply with this condition of the structural adjustment programme, could it have effectively defended itself by citing Art. 13 of the Social Covenant, without losing the loan because of its refusal? According to Art. 53 of the Vienna Convention, the obligation would have been void if Art. 13 had the character of *ius cogens*. What options of resistance does the right to education have to offer if it is only backed up by international treaties? Does international law, whether ordinary or peremptory law, apply only to states or to international organisations as well? And, finally: Who is responsible for the fact that the number of pupils in elementary schools is declining, while that of illiterates is growing?[98] The second example comes from Brazil. In the autumn of 1998, in the aftermath of the Asian Crisis, the country needed an emergency loan package which was granted by the IMF, albeit under the condition that substantial cuts be made in the budget. A considerable proportion of these cuts related to social spending. In point of fact, the question was whether the Brazilian government had any alternative options to cut its budget. In point of law, the question was whether the cuts were radical enough to affect the substance of social human rights.[99]

In the practice of international law, the assumption today is that the category of fundamental human rights having the character of *ius cogens* includes the core labour standards enumerated by the International Labour Conference on June 18, 1998, in Art. 2 of its declaration on fundamental rights at work.[100] Being largely concurrent with the companion rights quoted in the

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[95] ICJ ruling of June 27, 1986 (the so-called Nicaragua Case), ICJ Reports (1986), 14ff. 190.

[96] ICTY ruling of December 10, 1998 (Furundzija), ILM 38 (99), 317ff., Par. 153ff.

[97] In the message that announces its accession to the Vienna Convention on the Law of Treaties, Switzerland pointed out that unambiguous identification is difficult: 'The question of what norms are actually peremptory in customary law is answered by customary law itself, so that it could not be answered in the Convention. It remains in dispute. According to the International Commission of Jurists, the law banning aggression that is embodied in the Charter of the United Nations is *ius cogens*. Further examples were quoted during the conference and in related doctrines: the bans on slavery, piracy, torture, and genocide; the principles of the sovereign equality of states and self-determination; and certain rules of humanitarian international law.' Quoted from J. P. Müller, L. Wildhaber (2001), p. 104.

[98] According to the World Bank, enrolment in Tanzania's elementary schools has dropped from 68% to 48% since 1986, while at the end of the last century, 18% of men and 38% of women were illiterate. World Bank Development Report 1999/2000, World Bank (2000).

[99] Recent reports by the World Bank suggest that Indonesia is considering allowing an IMF loan of 5 billion Dollars to expire this year without renewing it. The background of this is formed by increasing unrest arising against the fiscal restraint programme imposed by the IMF by which the millions of poor living in the country are hit particularly hard (higher prices for petrol and electricity, etc.).

[100] Art. 2 says 'that all Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining;

Social Covenant, they form a core code that is absolutely binding and cannot be abrogated by any government, not even within the framework of a treaty.[101] So far, there has been no authoritative ruling – by the ICJ, for instance – on what other rights among those named in the covenants belong in the category of peremptory norms, so that the issue will have to be decided from case to case.[102] This will work only, however, if the conditions that lead to the development of peremptory legal provisions are clear.

It is a generally recognised fact that cogent laws may be based on any of the classical sources of international law, namely treaties, customary law, and general legal principles. From these, cogent law may evolve in a successive, historical process of concentration such as the one we were able to observe with regard to the right of self-determination. On the other hand, peremptory law may evolve as a legal norm immediately and simultaneously with its first appearance in international relations, as happened in the case of the ban on aggression in Art. 2.4 of the UN Charter. The issue of whether and how further *ius cogens* norms may develop does not depend to any crucial extent on whether you favour a more voluntary concept, in which norms owe their peremptory character solely to the will of international-law bodies as well as to agreements concluded between them, or a concept based on natural law,[103] in which cogent norms are part of an extralegal *ordre public* consisting of a body of non-negotiable social and ethical values without which the community of states could not exist. After all, not even the advocates of the natural-law concept would suggest that no other cogent norms could be added to the body that has already been accepted. Given that it is basically possible for new *ius cogens* norms to develop, the process must necessarily reflect the customs and practices of the states, as the dogma of classical sources of law suggests. This mainly positivist approach has meanwhile found its way not only into Art. 53 of the Vienna Convention, but also into the ruling dogma of international law. As Heintschell von Heinegg put it:

> 'Consequently, absolute norms do not form part of an independent code of values; rather, they are specific norms under international law that were created by the subjects of international law in a generally-accepted legislative process, and have been recognised by them as absolute.'[104]

On occasion, the contribution made by the courts towards the establishment of cogent international law is highlighted. In those cases that have met with general acceptance, however, the courts, the ICC and the ICJ most prominent among them, rather than contributing towards the creation of new rules have tended to refer to existing *ius cogens*, applying it as such and strengthening it through their jurisprudence. Accordingly, Art. 38 Sub-Par. d of the ICJ statute

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(b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour, and (d) the elimination of discrimination in respect of employment and occupation.' Cf. pp. 9ff. above.

[101] Cf. e.g. E. U. Petersmann (2000), pp. 13f.

[102] The same thing has been pointed out by the International Law Commission in Par. 5 of its commentary on Art. 26 of the rules regulating the responsibility of states (UNGA Res. A 56, 83 of December 12, 2001): 'The criteria for identifying peremptory norms of general international law are stringent. Art. 53 of the Vienna Convention requires not merely that the norm in question should meet all the criteria for recognition as a norm of general international law, binding as such, but further that it should be recognized as having a peremptory character by the international community of states as a whole. But various tribunals, national and international, have affirmed the idea of peremptory norms in contexts not limited to the validity of treaties. Those peremptory norms that are clearly accepted include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.' Report of the International Law Commission on the Work of its Fifty-Third Session, Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 10 (A/56/10), Ch. IV. E. 2, p. 208.

[103] For a general comment on these theories, see S. Kadelbach (1992), pp. 130ff.

[104] W. Heintschell von Heinegg in K. Ipsen (1999), Par. 15 Margin no. 42, p. 159.

mentions judicial decisions and the 'teachings of the most capable international jurists' only as 'tools to assist in the definition of legal norms'. Similarly, Art. 53 of the Vienna Convention, leaving jurisprudence aside, demands that a norm should be recognised as peremptory by the 'international community of states as a whole'. While negotiators at the Vienna Conference on Treaty Law agreed that such recognition need not be voiced in express terms, they could not agree on whether norms should be recognised unanimously by all states or just by a large majority.[105] Ultimately, the editorial committee adopted a proposal to the effect that norms should be recognised as cogent by the vast majority of states, and that all major legal systems of the world should be involved.[106]

This compromise, however, gave rise to a new problem that was already familiar from the dogma on the sources of international customary law, which is of some importance with regard to the still-controversial debate about human rights: the persistent objector. A state that persistently and emphatically rejects a norm because of its origins in customary law is supposed not to be bound by it.[107] If this rule similarly applied to cogent law, neither the absolute validity of a norm nor its nullifying effect on treaties would be justifiable any longer. Thus, a treaty might even become null and void for one of its parties under Art. 53 of the Vienna Convention while remaining valid for the persistent objector. To prevent such nonsense, and to safeguard the exceptional status of *ius cogens*, the almost general consensus is that derogation for objecting states is not an option, and that such states will have to bear the consequences of any infringement of the peremptory norm in question.[108] If it is true that the absoluteness of a norm serves to protect certain fundamental legal assets that are of particular importance to the community of states, it is equally true that such a norm may lay claim to universal validity, and that objecting states cannot be exempt from it. Accordingly, the Federal Constitutional Court has ruled that all those maxims are to be regarded as cogent law which are indispensable for the continued existence of international law, rooted firmly in the legal convictions of the community of states, and whose observance may be postulated by all members of the community of states.[109]

In the course of its preparations for the Vienna Convention, the International Law Commission debated for a long time about whether or not to include norms generally recognised as peremptory in Art. 53 so as to help clarify this rather abstract regulation. Items mentioned in this context included not only the largely uncontroversial provisions of Art. 2.4 of the UN Charter, which prohibit aggression, crimes against international law, torture, trafficking in slaves, forced labour, piracy, genocide, and racial discrimination, but also the sovereign equality and independence of states, the right to self-determination, the duty to settle disputes peacefully, and human rights in general. As no consensus could be reached on what concrete examples to quote, however, no catalogue of examples was included in the Commission's draft that was submitted to the UN General Assembly.[110] The debate was revived at the conference itself but led to the same results, so that it was decided to include only a number of formal characteristics in Art. 53 of the Convention.

However, at both the ILC and the Vienna Conference it had become clear in the course of negotiations that the constitution of peremptory norms would be best served by a high degree of

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[105] Cf. S. Kadelbach (1992), pp. 41ff.
[106] Cf. United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March – 24 May 1968, Official Records I, 317, Documents of the Conference, U.N. Doc. A/Conf.39/11/Add.2.
[107] The permanent opposition of the NATO countries and other nuclear powers against making the use of nuclear weapons illegal in customary law may serve as an example.
[108] Cf. the voluminous literature quoted by S. Kadelbach (1992), p. 196, Note 135.
[109] Federal Constitutional Court 18, pp. 448f.
[110] Yearbook of the International Law Commission (YILC) 1963-I, p. 314, ILC Report, YILC 1966-II, pp. 247ff.

integration and coherence in the system of international relations. Consent to fundamental and non-negotiable norms in mutual relations is predicated on the presence of largely identical political and legal interests, which may then be cast into the form of obligatory rules by generally-accepted institutions claiming universal authority. This being so, the United Nations were singled out as the organisation most suitable for this purpose, capable of performing this feat of integration and providing the clearest possible information on consent and dissent.

This was no doubt true as far as human rights are concerned, which were only mentioned at various disconnected points in the UN Charter because of marked disagreements among the Allies (Art. 1 Par. 1.3, Art. 13 Par. 1.b, Art. 55 c, Art. 62 Par. 2, Art. 76 c of the UN Charter). In the Universal Declaration on Human Rights of 1948, this disagreement could only be glossed over by according only programmatical significance to the declaration instead of legal validity. The two human-rights covenants of 1966 even institutionalised this conflict, and it took until the present day for social and economic rights to acquire the same degree of legal validity as civil and political human rights. The fact that many human-rights treaties contain emergency provisions permitting the cancellation of certain human rights in the event of a war or a public emergency (e.g. Art. 15 II EHRC, Art. 4 of the Political Covenant, Art. 27 II of the American Human-Rights Convention, Art. 4 of the Social Covenant – for the purpose of 'promoting the general wealth in a democratic society') has led to a differentiation among human rights. Thus, the untouchable minimum standards that remain in applicable conventions essentially include only the right to life as well as the prohibition of torture, inhuman treatment, and slavery. Consequently, only fundamental and/or elementary human rights are accepted as incontrovertible and having the quality of *ius cogens,*[111] although the prohibition of torture, racial discrimination, and forced labour is highlighted again and again.

Another international institution that resembles the UN in terms of universality and integration is the ILO within which, as described above,[112] separate laws have been developed to enforce and strengthen rights at work in parallel to the development of human rights within the framework of the UN. Following the 81st meeting of the International Labour Conference in June 1994, the Organisation has been devoting most of its time to issues relating to improvements in the development and implementation of rights at work. In its opinion, the globalisation of the economy demands that fundamental human rights be enforced universally.[113] In this, it focuses on fundamental rights at work that had mostly been accepted as *ius cogens* before: the prohibition of forced and child labour; the freedom to associate, form trade unions, and negotiate collectively; equal pay for men and women; and the abolition of discrimination at the workplace. In its activities, the Committee on Legal Issues and International Labour Standards (LILS) concentrated on the ratification and promotion of fundamental ILO conventions as well as on strengthening the ILO's monitoring systems. All states that have not yet ratified all seven conventions on fundamental rights[114] – only 21 had done so at the time – were urged to do so.

In the years that followed, the ILO's role in the implementation of fundamental human rights was further strengthened by declarations from other organisations, such as the Copenhagen World

[111] As, for instance, by the ICJ in the Barcelona Traction Case. ICJ Rep. (1970), 3ff., 32; W. Heintschell von Heinegg in K. Ipsen (1999), Par. 15 Margin no. 59, p. 163.
[112] Cf. Ch. II.2, pp. 9ff.
[113] Cf. ILO, Defending values, promoting change. Social justice in a global economy. An ILO agenda. Report of the Director General, International Labour Conference, 81st Session, Geneva (1994).
[114] The above-mentioned (p. 13) 8th Resolution 182 of 1999, which extended the reach of Resolution 138 of 1973, could not then be taken into account separately.

Summit for Social Development of 1995[115] and the Doha Ministerial Conference of December 1996, although closer cooperation was rejected.[116] At the same time, a plan to formulate a declaration on fundamental rights at work was adopted. To allay numerous concerns, the Director General was compelled to assure member states that this would in no way entail any further obligations beyond those which they had voluntarily accepted by acceding to the ILO. He added that the only purpose of the Declaration was to clarify key obligations. This objective was confirmed once again when the draft Declaration was presented in 1997:

> 'In the light of the most recent consultations, one thing should be stated very clearly: the Declaration as such is not aimed at establishing the fundamental character of the rights in question. Their pre-eminence follows from their subject matter and from the fact that they have already been recognized as fundamental both within and outside the ILO. In other words, fundamental rights are not fundamental because the Declaration says so; the Declaration says that they are fundamental because they are fundamental because they are. The particular objective of the Declaration is in fact to promote universal implementation, by all Members of the ILO, of those rights that are recognized as fundamental in the workplace through (among other means) additional technical assistance aimed at facilitating ratification of the seven fundamental Conventions.'[117]

In other words: Instead of creating new laws or speeding them on their way, the Declaration was intended to remind those member states which had not yet ratified the specific Conventions that they had undertaken to observe and implement the fundamental principles when they joined the ILO. In the debates about the Declaration of 1998, it was pointed out on several occasions that its implications did not reach beyond those of the ILO Constitution and the 1944 Declaration of Philadelphia, and that it did not impose any further commitments:

> 'It should first of all be pointed out that, basically, the Declaration does not set out to establish or extrapolate a new or more detailed charter of fundamental rights; its aim is to underscore the renewed relevance and importance, in the context described in the Preamble, of fundamental rights, the principle of which is already enshrined in the Constitution and the Declaration of Philadelphia ... In short, the Declaration requires nothing more of ILO Members than to be consistent and to comply with the commitment they have already

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[115] Cf. Commitment 3 (i) of the Heads of State and Government: ' We commit ourselves to promoting the goal of full employment as a basic priority of our economic and social policies, and to enabling all men and women to attain secure and sustainable livelihoods through freely chosen productive employment and work. To this end, on the national level we will: ... (i) pursue the goal of ensuring quality jobs, and safeguard the basic rights and interests of workers and to this end freely promote respect for relevant International Labour Organization Conventions, including those on the prohibition of forced labour and child labour, freedom of association, the right to organize and bargain collectively, and the principle of non-discrimination.
Par. 54 (b) of the Action Programme reads: 'Safeguarding and promoting respect for basic workers' rights, including the prohibition of forced labour and child labour, freedom of association, the right to organize and bargain collectively, equal remuneration for men and women for work of equal value, and non-discrimination in employment, fully implementing the Conventions of the International Labour Organization (ILO) in the case of states parties to those Conventions, taking into account the principles embodied in those Conventions in the case of those countries that are not states parties to thus achieve truly sustained economic growth and sustainable development.'

[116] Cf. Ch. II.2, p. 11 above.

[117] ILO, International Labour Conference. 86th Session Geneva, June 1998, Report VII: Consideration of a possible Declaration of principles of the International Labour Organization concerning fundamental rights and its appropriate follow-up mechanism.

> undertaken, and serves to encourage them in their endeavours; it certainly does not seek to impose further commitments on them.'[118]

Defined by the UN as 'a formal and solemn instrument suitable for rare occasions when principles of lasting importance are being enunciated',[119] it is impossible either to constitute law or to compact ordinary into cogent law by virtue of a declaration. Its purpose is declamatory, not constitutive. Yet it constitutes an important path towards both supporting and developing the legal standards that have already been acquired. Why? First, because such a declaration, being based on the consensus of the overwhelming majority of all states, sets up an effective barrier against any relapse below the level of established legal guarantees. It codifies achievements in the struggle about legal positions, setting them out in writing for all states and organisations. At the same time, it establishes a system of regular reports, reviews, and checks. Second, it lays foundations from which new resolutions and conventions may be developed which, building on their predecessors, are better placed to meet the requirements entailed by recent social problems and conflicts. By casting an old resolution into more precise and concrete terms, its successor both reaffirms and acquires its legal quality.

A good example is Resolution 182 of 1999, which enhanced both the precision and the remit of Resolution 138 of 1973 on child labour. In certain countries, where child labour is one of the traditional forms of production, the ban is seen as a protectionist measure to restrict competition rather than as a human right.[120] To persuade not only these countries, but also their trading partners that this ban constitutes an elementary human right that is inalienable and should be observed under any conditions, it must be reiterated and restated continuously. Originally no more than a political demand, this right was later recognised under customary law and finally adopted into the catalogue of fundamental rights contained in the Declaration of 1998. Despite the opposition of a major country, India, it ultimately coalesced into cogent law, a fact that is reflected in various declarations from the WTO, the OECD, and the Copenhagen Summit.[121] Their assent confirms that the ban had by now become strong enough to acquire peremptory force. Similar things might be said about the right to equal remuneration for men and women for work of equal value, which so far has not been fully implemented even in the highly industrialised states. It developed from the general ban on discrimination as well as from the demand for equal opportunities and equal treatment contained in the ILO Constitution and the Declaration of Philadelphia. While the ban on forced labour, in turn, is not spelled out in the text of the Declaration, it naturally evolves from the fundamental principles of the ILO Constitution and the Philadelphia Declaration as well as from the peremptory prohibition of slavery. Despite numerous infringements, the status of this ban as a universal and peremptory human right remains undisputed.

Similar considerations led to the conclusion that the satisfaction of elementary human needs, meaning the provision of food, water, and medical care, should be added to the body of *ius cogens*. It results from the indisputably cogent right to life, which becomes meaningless if minimum standards for the provision of these goods are not assured. The fact that it is difficult to give a positive definition of such minimum standards and the obligation to provide these services does not affect their binding force in any way. What is more, this difficulty fades into insignificance in emergencies, in famines, where a breakdown in supplies causes underfeeding to

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[118] ILO, Report VII (Note 117), p. 13.
[119] Memorandum of the United Nations Office of Legal Affairs, E/CN.4/L.610 (1962), April 2, 1962.
[120] Cf. p. 39 below.
[121] Cf. Note 115 above; ILO Report VII (Note 117).

an extent that is detrimental to health, acute shortages of water (e.g. when prices go up after privatisation), or epidemic diseases (e.g. tuberculosis, malaria, AIDS.[122])

The fundamental significance of the inalienability of these rights lies in the fact that all adverse treaties are null and void, and that they take precedence over other rights, such as property or patent rights, that clash with them. This, in turn, provides a legal framework which releases governments from treaty obligations without liability to damages, enabling them to infringe the patent rights of pharmaceutical companies, for instance, to ensure that their population is supplied with low-cost medication. While these legal options do not always coincide with available political options, they form the most important prerequisite of any effective human-rights policy.

4 – International Law as an Element of Federal Law: Basic Law, Art. 25

From the very beginning, integrating the Federal Republic of Germany in the framework of obligations and institutions of international law was one of the key objectives in the democratic reconstruction of the country after 1945. For this reason, it was decided during the deliberations preparatory to drafting the Basic Law to adopt Art. 4 of the Weimar Constitution, which made all generally-recognised rules of international law binding elements in the law of the German Reich. However, having learned a lesson from the debate in the Weimar era which predicated the validity of international-law rules on their recognition by the German Reich, the term 'generally-recognised rules' was replaced by 'general rules' so as to render their validity independent of any recognition by the new state. Furthermore, the new Art. 25 of the Basic Law was worded ('They shall take precedence over the laws') to ensure that the general rules of international law would outrank ordinary federal law as well as the Federal Constitution.[123] However, this opinion, voiced by some during the deliberations, is controversial. Others believed that these rules should rank equally with those of the Constitution, while the Federal Constitutional Court ranked them somewhere between ordinary federal law and constitutional law.[124] Consequently, Art. 25 of the Basic Law provides that the general rules of international law shall rank above ordinary federal law but below the Basic Law.

In international law itself, there are no provisions specifying exactly what constitutes a general rule of international law. While the Basic Law does empower the Federal Constitutional Court to rule on this matter (Art. 100 Par. 2 BL), it makes no specifications as to the content of these rulings. At the same time, Art. 59 Par. 2 of the Basic Law indicates that international treaty law acquires validity in German federal law not by virtue of Art. 25 BL but through so-called transformation or adoption acts.[125] Consequently, the general rules in question consist mostly of universally valid customary law, supplemented by general legal maxims as outlined in Art. 38 of the ICJ Statute.[126] Wherever peremptory law (*ius cogens*) is involved, there can be no doubt that it relates to the general rules of international law. These, however, are not restricted to peremptory law alone. To clarify matters further, the Federal Constitutional Court pointed out that international-law rules within the meaning of Art. 25 of the Basic Law should be based on general and established state practices, implemented by them in the conviction that such

[122] Cf. the case of South Africa, where the Supreme Court was ultimately constrained to order the government to develop a plan of treatment to fight the AIDS epidemic. See Chapter VI, pp. 65ff. below.
[123] Cf. Basic Law Commentary, Zuleeg (2001), Basic Law Commentary Art. 24 Par. 3/25, Margin no. 4.
[124] Federal Constitutional Court (FCC) 37, pp. 271ff., 279.
[125] Cf. FCC 1, pp. 396ff., 410f.; 6, pp. 290ff., 294.
[126] Cf. FCC 23, pp. 288ff., 317.

practices are lawful.[127] It is not mandatory for all states to constantly follow these practices, or to be subjectively convinced of their lawfulness at all times. It is quite sufficient for these two criteria to be fulfilled by a large and representative majority of states that are affected by the import of the rule in question and may participate in the exercise of the practice that establishes it.[128] These are exactly the criteria that are applied in international law today to identify customary law.

All these largely-undisputed provisions prompt the conclusion that the general body of human rights, to the extent that it has been raised to the status of customary law by the Human-Rights Declaration of 1948 and the two Covenants of 1966/76, consists of 'general rules of international law' that take precedence over federal law. Specifically, this holds true for economic and social human rights. Some commentators, including Mr. Zuleeg, do not share this conclusion, arguing that 'the rise of human rights to the status of international customary law has not been completed worldwide'.[129] This, however, is an obvious misinterpretation of the development of international law within the last decade at least. As stated above, key human rights, whether based on the Human-Rights Declaration of 1948 or the two international covenants of 1966, have meanwhile been upgraded to the status of binding international customary law. The most notable exception to this rule is the right to property.

The mere fact that a rule has been identified as general tells us nothing about its effectiveness in domestic law. Merely establishing the validity of international-law provisions within the domestic framework does not answer the question, for instance, whether and to what extent these 'general rules' may, or possibly even must be applied by what organs of the state. For a long time, it was left undecided whether the binding effect that applies to the state as a whole similarly obliges all administrative authorities and courts of law to apply international law directly. Even though Art. 25 of the Basic Law says in Clause 2 that certain rights and obligations accrue to the inhabitants of the federal territory directly from the general rules of international law, giving them the highest possible degree of effectiveness, this provision is no more than a declaration in the general view.[130] Whenever it is the intent of these rules to convey specific benefits upon the individual, these benefits are transformed into subjective rights by Art. 25 of the Basic Law. Thus, an individual may directly invoke these rights in court, for instance, whenever they are of importance with regard to preliminary questions.[131] Similarly, he may claim that a sovereign act constitutes an infringement of general international-law rules, submitting a petition to the Constitutional Court in which he claims infringement of Art. 2 Par. 1 of the Basic Law.[132] All treaties under international law are subject to interpretation in conformance with international-law rules as per Art. 31 of the Vienna Convention, taking into account 'any maxim of international law that may be applied to the relations existing between the parties to the treaty'. From all these individual factors we may conclude that all those rules which convey subjective rights through Art. 25 of the Basic Law imply an obligation for the state to implement those rules actively. The state is obliged to ensure the immediate and direct effectiveness of these rules in all areas of government activity, including legislation,

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[127] Cf. FCC 46, pp. 342ff., 367.
[128] Cf. FCC 15, pp. 25ff., 35; 46, pp. 342ff., 376. R. Geiger (1985), p. 164.
[129] Basic Law Commentary Zuleeg (2001), Art. 24 Par. 3/25 BL, Margin no. 44. This appears even in the first edition of 1989. His position is confusing because he categorises the human rights covered by the European Declaration on Human Rights as general rules of international law applying within the regional framework. Cf. Margin no. 19.
[130] Cf. FCC 15, pp. 25ff., 33.
[131] Cf. FCC 46/342ff., 363, 403f.
[132] Cf. FCC 23, pp. 288ff., 300. R. Geiger (1985), pp. 192ff.

administration, and jurisprudence.[133] This obligation is limited only by those cases in which inalienable principles of the constitution are infringed.

The consequences for economic and social human rights are the same as those for civil and political human rights. Not only the limited group of peremptory rights mandated by *ius cogens*, but all these rights are 'general rules of international law' which, contrary to an opinion that is still widespread,[134] immediately convey specific rights to their beneficiaries and oblige states just as immediately to implement them. With regard to the binding rights at work laid down in the respective ILO Conventions, the organs of the state cannot confine themselves to implementing and guaranteeing these rights within the Federal Republic, but are required to observe them in their international contacts as well as their treaties. For, under Art. 25 of the Basic Law, the binding effect which they have on the actions of the state extends to international relations. At the same time, the obligations imposed on the state by social human rights are at least the same as those imposed on governmental organs by the constitutional principle of the social state.[135] Even if the numerous ILO Conventions which the Federal Republic has undertaken to implement cannot be numbered among the general rules of international law because they belong to the realm of treaty law, the principles of social and labour legislation they contain have been informed and strengthened by influences of customary law so that they are now 'general rules', which must be implemented not only because of related treaty obligations but because they form a 'constituent part of federal law' under Art. 25 BL. Therefore, the Federal Republic is prohibited in its international economic exchanges from entering into any contractual relations in which the observance of social and economic human rights is not assured. Thus, for instance, agreements designed to protect investments or secure loans must contain provisions that forbid any negative impact on human rights and/or make the conclusion of the respective contract dependent on the observance of applicable human-rights standards. Along these lines, contracts on the funding of or participation in dam-construction projects not only cover the working conditions of the workforce employed, but also the fate of the affected population. The same holds true for commercial agreements, which state that products must not be made under conditions that infringe elementary human-rights standards (forced labour, inhuman working conditions, child labour, prohibition of trade-union membership, etc.).[136]

With their adoption into federal law as general rules of international law, social and economic human rights were further strengthened with regard to their validity and enforceability vis-à-vis all organs of the state. However, assertion so far has been inadequate, and more attention needs to be paid to these rights in the formulation of foreign-trade agreements as well as in jurisprudence. Emphasising the fact that every individual state is responsible for implementing human rights even in international relations is important because the options of the UN in

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[133] Putting this principle into words, the Federal Constitutional Court stated that: 'By virtue of Art. 25, the authorities and courts of law of the Federal Republic of Germany are prohibited from interpreting and applying the laws of Germany in a manner infringing the general rules of international law; obliged to refrain from any action which might validate activities undertaken by foreign transactors within the territory ruled by the Basic Law that contravene any of the general rules of international law; and prohibited from cooperating in a controlling role in any action undertaken by foreign sovereign authorities in contravention of the general rules of international law.' FCC 75, pp. 1ff., 19.

[134] Cf. Ch. III, pp. 18ff. above.

[135] For more detail, see Basic Law Commentary, M. Kittner (1989), Art. 20 Par. 1 – 3, IV. The Principle of the Social State.

[136] A ruling such as that of the Federal Court of Justice on imports of asbestos extracted abroad under conditions that violated elementary industrial-safety standards would no longer be tenable today (NJW 1980, p. 2018). This was pointed out by M. Kittner even in 1989 (Basic Law Commentary, Margin no. 84).

implementing and enforcing human-rights guarantees are not the same as those of individual states, in spite of its importance in the normative process.

5 – The Binding Effect of Human Rights on International Organisations

The last validity problem remaining is the question about the extent to which international organisations such as the World Bank, the International Monetary Fund (IMF), or the World Trade Organisation (WTO) are bound by human rights in their policies and treaty relations, which undoubtedly have the biggest impact on the protection and implementation of human rights. In their own view, these intergovernmental and/or multilateral institutions operate largely outside the framework within which human rights apply, as these are mainly concerned with the relationship between the individual and the state, while they themselves maintain relations only with states.[137] The WTO's response to a survey conducted on the subject by the two special rapporteurs of the Sub-Commission on the Promotion and Protection of Human Rights, J. Oloka-Onyango and Deepika Udagama, is typical for this attitude. Substantiating its independence from human rights, the WTO stated, among other things:

> '... while the multilateral trading system can help to create the economic conditions which contribute towards the fulfilment of human rights, it is not within the mandate of the WTO to be a standard setter or enforcer of human rights. Unlike most human rights law, WTO Agreements generally specify rights and obligations between States and not between States and individuals. WTO Agreements do not create or articulate human rights as such, but do facilitate a climate necessary for economic prosperity (and) the rule of law and seek to curb unilateral action and abuses of power in international trade. These are all-important elements necessary for the respect of human rights.'[138]

A similar argument was brought forward by the Vice President of the World Bank, Ibrahim Shihata, at a conference of the International Commission of Jurists in Abidjan in 1998:

> 'Each of these organisations is a juridical body, the legal capacity of which is confined by its respective mandate as defined in its charter. It does not belittle any international organization if its charter specifies its specialized functions in a manner that excludes concern for certain aspects of human rights. But it demeans the organization to ignore its charter and act outside its legal powers. This is simply a matter of specialization of international organizations.'[139]

Both these opinions ultimately express two mutually complementary arguments as to why the two organisations should be relieved from any legal obligation to observe and promote human rights: First, as their member states themselves were bound by human rights, the organisations themselves had no obligation towards them. Another reason why this should be so was that the obligations established in the treaties of the multilateral institutions did not extend to relations between states and individuals, but only to relations between states and/or between states and the institutions.

This position is in no way convincing.[140] It is correct that protecting human rights is one of the key functions of government, and that most legal regimes permit citizens to enforce related

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[137] Cf. J. Oloka-Onyango, D. Udagama (2001), pp. 25ff., Margin no. 54ff.
[138] Quoted from J. Oloka-Onyango, D. Udagama (2001), p. 26, Margin no. 57.
[139] I. Shihata (1998), p. 145. Speaking on the half of the IMF, its General Counsel, F. Gianviti, denied that the organization was bound by the two human-rights conventions. F. Gianviti (2001), p. 10.
[140] It was similarly rejected by J. Oloka-Onyango, D. Udagama (2001), p. 27, Margin no. 58ff.

claims in an action at law. It is also true that the institutions in question, such as the WTO, the IMF, and the World Bank, are legally empowered to act and conclude treaties independently, although they do not claim the full status of an international-law body.[141] Formed exclusively by states, they are themselves a product of the international law system which is governed by the UN Charter and the body of human rights. Acting through the medium of the states, their activities are bound by the mandates of the member states and informed by the political and legal terms of reference of this system. They cannot opt out from this system entirely or even partially by refusing to accept certain parts of the legal regime. Similarly, states cannot evade their legal obligations by 'hiding' behind multilateral institutions.[142] The system of international law accords rights as well as obligations to both states and organisations. The fact that organisations cannot be sued by individuals in no way implies that such organisations may pursue their international activities without reference to the fundamental principles laid down in the UN Charter as well as in international customary law. To take an obvious example: There is no political or legal justification for multilateral institutions to pursue, in their contacts with states, credit or foreign-trade policies in which barefaced infringements of *ius cogens* provisions are tacitly accepted, including racial or gender discrimination, the promotion of child labour, or the toleration of torture.

First and foremost, it is the function of these organisations to provide highly practical services through implementing and operating multilateral and plurilateral trade agreements (Art. III of the Agreement Establishing the World Trade Organisation of 1994), through facilitating the expansion of global trade, promoting a high degree of employment, developing the production potentials, and generally promoting the stability of currencies (Art. I of the IMF Agreement of 1944), and through rebuilding the territories destroyed in the Second World War together with their national economies, promoting foreign investment, and stabilising payment balances (Art. 1 of the World Bank Statute of 1945). All these technical functions which I have just outlined may be gathered together under the heading of human development and welfare. None of these concrete technical functions is an end in itself; instead, each constitutes a step on the way towards promoting human development. Improved living standards, full employment, and increased real incomes all relate to the individual, and they are justifiable only by virtue of their contribution towards securing and improving human existence, just like the entire global trade order and the stabilisation of payment balances. In the words of the UN Committee on Economic, Social and Cultural Rights: 'trade liberalization must be understood as a means, not an end. The end which trade liberalization should serve is the objective of human well-being to which the international human rights instruments give legal expression.'[143] Now, if it is true that the goals pursued by the WTO and the Bretton Woods institutions are the same as those pursued by the UN on the basis of its Charter (Art. 55), it is equally true that all are bound by the same

[141] Cf. Art. VIII of the agreement establishing the WTO of 1994: '(1) The WTO shall have legal personality, and should be accorded by each of its members such legal capacity as may be necessary for the exercise of its functions.'
[142] Sub-par. 19 of the Maastricht Guidelines of 1997 uses the following words to express this: 'The obligations to protect economic, social and cultural rights extend also to their participation in international organizations, where they act collectively. It is particularly important for states to use their influence to ensure that violations do not result from the programmes and policies of the organizations of which they are members. It is crucial for the elimination of violations of economic, social and cultural rights for international organizations, including international financial institutions, to correct their policies and practices so that they do not result in deprivation of economic, social and cultural rights ...'
[143] UN Doc. E/C.12/1999/9-26 November, 1999.

legal standards. As far as the World Bank and the IMF are concerned, this is underscored by the fact that the treaties with the ECOSOC link them to the UN as special organisations (Art. 57).[144]

[144] At the 53rd meeting of the Sub-Commission on Promotion and Protection of Human Rights on August 8, 2001, a WTO representative, Gabrielle Marceau, publicly acknowledged that the WTO as well as its member states were bound by the human-rights conventions.

IV – World Trade Order and Human Rights

It is generally acknowledged today that the process of globalisation has a considerable negative impact particularly on people living in countries that are economically underprivileged and politically weak. Because of the dramatic decline brought about by the increasing radicalisation of the free-trade concept not only in the least-developed countries at the outer fringes of the world market but also in so-called emerging countries like Argentina, which take great pains to comply with all targets and conditions imposed by the IMF, living conditions among large parts of the population have deteriorated far below the threshold set by the west European human-rights standards. The fact that income disparities keep growing more critical not only between the countries of the North and the South, but also within these countries themselves, first appeared on the agenda of the United Nations at its World Social Summit in Copenhagen in 1995. Special rapporteur J. Bengoa was requested to analyse the relationship between human rights and income distribution. In his report,[145] which was published in 1998, he arrived at the unambiguous conclusion that globalisation causes increasing income disparities as well as economic polarisation. In this, he followed the UNCTAD report on trade and development of 1997.[146] The two reports similarly agree in their judgement that the increasing liberalisation of world trade serves mainly to enhance the power of transnational corporations, whose transactions largely remain outside the reach of the entire UN Code, and whose responsibility towards international law is minimal. UNCTAD warned that growing political unrest might result if states should fail to put a stop to the social deprivation of major population groups and their factual exclusion from the social responsibility of the government. To highlight this danger, Bengoa pointed out that the ownership of capital and land is increasingly concentrated in the hands of fewer and more powerful enterprises.

Despite all this, those institutions of the global trade order that are responsible for the polarising and destructive forces unleashed by globalisation, such as the IMF, the World Bank, and the WTO, are still undisputed in their role as irreplaceable guarantors of economic development and societal progress, as are the treaty catechisms of their credit and foreign-trade policy, such as GATT, GATS, TRIPS, etc. Only a few politicians are as unbiased as Zbigniew Brzezinski, who frankly describes them as what they are, 'a part of the American system'.[147] Nor is their position compromised because they had to use more and more of the means and resources in their tool kit to clear away the disasters and ruins left behind by their politics.

There is general agreement that globalisation is not a process that grows naturally, but is largely amenable to political control. To deregulate governmental and, by the same token, legal influences on the dynamism of globalisation and the transfer of political decision-making from the state to the markets as mechanisms of coordination and control, therefore, is a step which deliberately aims to duplicities societal development and hand over its control to the forces of the market. To these forces, however, human rights appear as a completely alien concept. Hesitant attempts to include human-rights regulations in treaties meet with interest only where they relate to guaranteeing and reinforcing freedom rights for trade, investment, and capital transfer.[148] What is more, it is highly questionable whether the approach that politicians have been following

[145] J. Bengoa (1998).
[146] UNCTAD (1998), cf. also UNRISD (1995).
[147] 'In addition, the worldwide network of special organizations, most prominent among them the international financial organizations, must be regarded as part of the American system. Officially, the International Monetary Fund (IMF) and the World Bank represent global interests and bear worldwide responsibility. In reality, however, they are dominated by the United States, which sponsored their establishment at the Conference of Bretton Woods in 1944.' Z. Brzezinski (1999), p. 49.
[148] Cf. E.-U. Petersmann (2001).

for a long time, namely to depoliticise, i.e. to unleash the forces of, the market, can be redirected and buffered with the aid of human-rights concepts. Globalisation of human rights versus globalisation of the markets?

There is, however, another set of reasons why the application of human rights is resisted and treated with reserve. They are concerned not so much with the social control of the markets and the integration of transnational business activities into world law, but rather with working conditions in production sectors that have been the exclusive domain of developing countries for a long time: textiles and garments, shoes and toys, and agricultural plantations. This is the area in which transnational groups (TNGs) that operate globally are not prepared to put up with legally binding social standards but only with codes of conduct developed by themselves, if at all.[149] However, even the developing countries themselves opposed the implementation of the proposal by France and the US to adopt social clauses into the WTO code.[150] In the words of an established critic of the World Bank and the IMF, Martin Khor of the Malaysian Third World Network, the reasons for such opposition may be summed up as follows:

> 'The attempt... to introduce 'labour standards' and 'rights at work' into the agenda of the WTO quite obviously was not made because of any particular benevolence towards the workers of the Third World. Rather, it is a protectionist attempt to prevent jobs from being relocated from the North towards the South.'[151]

Critics are aware that their criticism coincides with the opposition of employers and governments. However, they point out that their criticism is different inasmuch as it is mainly based on opposition towards those organisations that are institutional embodiments of the world trade order. This opposition emerges clearly in the final declarations of two conferences attended by trade union federations, women's and human rights groups, and research institutes which were held in New Delhi and Bangalore in 1995. The Delhi declaration says:

> 'Delegates noted with some concern the completely unsatisfactory situation with regard to the observation of labour standards ...
> 1. There is general agreement that the inclusion of the social clause under WTO regulations is entirely motivated by protectionist considerations. Its provisions are designed to act as non-tariff trade barriers favouring the developed countries ... Furthermore, the Consultation noted that the resistance of governments, employers, and exporters in the South against the social clause is motivated by interests of these groups that have nothing to do with the interests and rights of the overwhelming majority of the working population ...
>
> 5) There is general agreement that a social clause can be no substitute for a social policy which guarantees the rights of the working population.
> 6) There are essentially two ways of responding to the cross-links between labour, environmental, and human-rights standards on the one hand and multilateral trade agreements on the other. First, there is the opinion that these cross-links, being part of a more comprehensive and exploitative international order, should be rejected out of hand. ... At this

[149] In 2000, the OECD counted 246 codes of conduct, most of which had been formulated by corporate managements. The 'Global Compact' launched by the UN Secretary General in Davos in 1999 is not a code of conduct but a voluntary initiative under which nine principles are used to persuade enterprises to observe certain minimum standards in the areas of human rights, labour standards, and environmental protection. Cf. B. Hamm (2002, 2002a).
[150] This proposition was supported by a member of national and international trade union federations, including the DGB, as well as by several NGOs, such as Oxfam. Cf. Ch. Sherrer, Th. Greven, V. Frank (1998), pp. 18ff.
[151] Quoted from Ch. Scherrer et al. (1998), p. 22.

> juncture, it must be pointed out that there is a very strong difference between this rejection and the position of the government (India) as it implies rejecting the WTO/GATTS.'[152]

According to the World Bank,[153] it is confronted by similar opposition in its attempts to implement core labour standards. Particularly with regard to the right to associate and bargain collectively, many governments deny that the World Bank is entitled to intervene in matters relating to the establishment or protection of trade unions, as these are regarded as organisations that are not only economic, but also political in nature. Any pressure from some donor countries, including the Federal Republic, to enhance its commitment for trade union rights is countered by the World Bank by pointing out that any decision by receiving countries to avail themselves of the advice and assistance offered by the World Bank was entirely 'voluntary', and that cooperation could not be 'predicated' on it.[154] To substantiate this argument, the World Bank invokes the Articles of Agreement of its Charter which, so it says, permit it only to take economic criteria into consideration and forbid any political commitment. In fact, this constitutes a relapse into the old and outdated distinction between political rights on the one hand and economic and social rights on the other. Reducing poverty, one of the key goals of the World Bank, demands that social and economic human rights be taken into account as well as political rights.

What is more, both the World Bank and the IMF are much less reticent when it comes to enforcing other conditions. When the promotion of the 'Western China Poverty Reduction Project' (Quinghai-Component) was at issue, the World Bank made its credit dependent on the fulfilment of conditions relating to environmental protection and the assurance that the rights of the Tibetan population in the project region would be protected. Undoubtedly, the last-named condition, being political in nature, was allegedly inadmissible under the Articles of Agreement. The Chinese government, supported by the developing countries represented on the board of the World Bank, rejected this demand for being an inadmissible interference with its internal affairs. When the World Bank insisted on compliance with these conditions under pressure from the donor countries, the Chinese government withdrew its application. The project is now funded entirely by the Chinese government, which has thus effectively eliminated any outside influence on its Tibetan policy. Once again, the principle of 'voluntariness' on the part of the receiving country was preserved intact. Success in enforcing terms relating to human rights, whether they be political or social in nature, depends on the financial and economic performance of the applicant rather than on the Articles of Agreement.

1 – Property and Social Human Rights

However, there is one aspect of globalisation that has recently come to the fore, namely the key aspect of property and its role in the global trade order, which is as fundamental as it is problematic.

Since August 2000, the Sub-Commission on the Promotion and Protection of Human Rights has been attempting in several resolutions to alert governments to the fact that human-rights obligations take precedence over economic policy, and that there are 'obvious conflicts between the intellectual property regime of the TRIPS Agreement (on intellectual property) on the one

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[152] Final declaration of the national consultation on the question of social clauses in multilateral trade agreements, March 20 – 22, 1995, New Delhi; cf. K. Piepel (1995), pp. 119ff.
[153] Cf. H. Schaffer (2002), 181.
[154] Cf. also K. Horta (2002), pp. 168ff.

hand and international human rights on the other'.[155] At the same time, it developed a draft declaration on Fundamental Human Rights Principles for Business Enterprises[156] to be submitted to governments for their signature, the objective being to cast the legal obligations of enterprises that operate on a transnational basis in clearer and more concrete terms.[157] The TRIPS Agreement has provided essential supplementary provisions protecting copyrights, brand names, designations of origin, commercial samples, patents, etc. While this considerably favours those industries where expenditures on research and investment are particularly high, it may at the same time have a disastrous effect on the right to food, health, and self-determination. The recently-uncovered practice of the Monsanto Company, which used detectives to identify farmers who kept stocks of their patented seeds merely for the purpose of prosecuting them, could evolve only in the context of this extreme concept of property rights by which the existence and survival of innumerable farmer families is compromised.[158]

The consequences which patent protection has for the treatment of HIV patients as well as the resultant conflict between property rights and social human rights appeared particularly clearly in the dispute between the governments of South Africa and Brazil and certain international pharmaceutical companies. Most developing countries are unable to set up pharmaceutical research facilities and industries of their own. As their national resources are inadequate for them to comply with their obligation under Art. 12 of the Social Covenant to supply their population with medicines, they need to rely on imports. Confronted by the prohibitive cost of importing anti-Aids medication made by international pharmaceutical groups,[159] some countries, such as Brazil, India, and South Africa, have begun to institute laws that permit the production of generic Aids/HIV medicines under compulsory licences in their own country, or to import such cheap substitutes from abroad.[160] Such a law, called the Medicines and Related Substances Amendment Act No. 90, was passed in South Africa in 1997. In Brazil, Act No. 9,279, the Industrial Property Law, was adopted on May 14, 1996, which says that patents will be protected only if the holder of a patent agrees to set up production facilities in the country after a certain period of time.

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[155] Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Resolution: The Realization of Economic, Social and Cultural Rights of August 17, 2000; E/CN.4/Sub.2/Res.2000/7 of August 15, 2001; E/CN.4/Sub.2/Res.2001/4; and E/CN.4/Sub.2/Res.2002/11 of August 14, 2002. This study is not concerned with the attempts, which have been going on since the '70s, to oblige transnational groups to observe certain social rights through so-called codes of conduct. These attempts must be regarded as failures after the industrialised countries prevented an agreement within the UN framework in 1991. Subsequent attempts involving voluntary codes, of which about 500 are in existence today, similarly failed to produce acceptable results because of a fundamental lack of controlling and monitoring mechanisms. Cf. Ch. Scherrer, Greven, Frank (1998); ICHRP (2002), pp. 143ff.

[156] Draft Fundamental Human Rights Principles for Business Enterprises, Addendum 1, of December 4, 2001, UN Doc. E/CN.4/Sub.2/X/Add.1; UN Doc. E/Cn.4/Sub.2/WG.2/WP.1/Add.1.

[157] The Preamble says that although '... governments have the primary responsibility to promote and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing ... human rights.' Subsequently, Art. 1 says: '... transnational corporations and other business enterprises also have the obligation to respect, ensure respect for, prevent abuses of, and promote international human rights within their respective spheres of activity and influence.' These Draft Fundamental Rights Principles were developed with the cooperation of trade unions, employers' associations, some governments and enterprises, NGOs and the ILO; cf. Report of the Seminar to Discuss Human Rights Guidelines for Companies, Geneva, May 29 – 31, 2001, UN Doc. E/CN.4/Sub.2/2001/WG.2/WP.1/Add.3.

[158] Sub-Par. 2 of the Resolution reads as follows: 'Declares, however, that since the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food, and the right to self-determination, there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law, on the other.'

[159] In the United States, the cost of treating a patient with branded medicines amounts to at least 10,000 US$ per year. Cf. B. Döpp (2001), pp. 23f.

[160] Cf. Ph. Riviere (2001), p. 9.

In South Africa, 39 pharmaceutical groups filed a suit against Act No. 90 with the High Court in Pretoria, which began its hearings on March 5, 2001.[161] Proceedings ended abruptly, however, when the pharmaceutical companies came under powerful public pressure after a massive campaign conducted by numerous NGOs, abandoning their case on all counts on April 19. At the same time, some offered to supply the South African government with cut-price or even free drugs. Resistance against the Brazilian law took a different course. Pressurised by the pharmaceutical lobby, the US government took the offensive in this case, demanding consultations with the Brazilian government within the WTO framework as early as May 20, 2000.[162] The US complained that the obligation to set up local production facilities constituted an act of discrimination and an infringement of Art. 27 and 28 of the TRIPS Agreement, which details the rights that emanate from patents, as well as of Art. III GATT 94, which provides for legal equality of foreign and domestic goods. Brazil had succeeded in supplying HIV patients with free medicines by producing generic substitutes, thus lowering the mortality of Aids patients by half. On June 16, 2000, the EU joined the consultation process to defend its own economic interests. Held at the seat of the WTO in Geneva, consultations began on June 29 and ended inconclusively in December of the same year. Subsequently, in early January 2001, the US applied to the WTO Dispute Settlement Body for the institution of a panel which succeeded in brokering an agreement between the parties in July 2001. While both sides maintained their different legal positions, the US agreed not to pursue the proceedings to their conclusion, while Brazil, in turn, agreed not to institute an action against the US Patent Act, which contains identical obligations regarding local production.[163]

What looks like a typical case of tactical withdrawal and horse-trading, it is probably rather an indication that social human rights have acquired greater clout compared to the classical freedom and property-related postulates of economic policy. At the moment, this is probably not true for other social rights as yet. However, when millions of people are affected by conditions of such disastrous dimensions, forces will arise that are strong enough to enforce the precedence of human rights over economic interests. Ultimately, the same happened at the 4th WTO Ministerial Conference in November 2001 in Doha (Qatar), where trade ministers decided, after tough negotiations and after the Conference had been prolonged, to adopt a declaration on the TRIPS Agreement which was intended to end the dispute about pharmaceutical patents.[164] The Declaration entitles all governments to take any steps necessary to protect the health of their own population without fear of sanctions.[165] Consequently, governments will be able in the future to disregard any patent rights that bar access to low-price medication, be it through the issue of compulsory licences for domestic production or through importing generic products in case transnational pharmaceutical groups should refuse to lower their prices.

Against the background of these problems, the UN Sub-Commission for the Promotion and Protection of Human Rights passed a resolution[166] at its 52nd meeting on August 17, 2000, in

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[161] Cf. M. Faden (2002), pp. 19ff. The plaintiffs included seven German companies and/or their South African subsidiaries. For more details, cf. the case study described in Ch. VI, pp. 67ff. below.

[162] Based on Art. 4 DSU, Art. XXII GATT 94, Art. 64 TRIPS Agreement. Cf. M. Faden (2002), pp. 22ff.

[163] Cf. M. Faden (2002), p. 27 for further evidence.

[164] Declaration on the TRIPS Agreement and public health; cf. M. Faden (2002), p. 30.

[165] What appears as a matter of course is expressed in the following terms in Art. 12 Par. 2 of the Social Covenant: 'The steps to be taken by the states parties to the present Covenant to achieve the full realisation of this right shall include those necessary for ... c) the prevention, treatment and control of epidemic, endemic, occupational, and other diseases.'

[166] UN Sub-Commission on the Promotion and Protection of Human Rights: Intellectual property rights and human rights, Res. 2000/7 (August 17, 2000), UN Doc. E/CN.4/Sub.2/Res./2000/7. The same tenor is evident in previous

which it earnestly warns that negative consequences for social human rights in general and the rights to food, health, and self-determination in particular might arise if the TRIPS Agreement should be implemented in its present form. Reminding governments that their human-rights obligations take precedence over their economic policies, the Commission refers to 'apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law, on the other'. Once again, the Resolution clearly states that 'property rights' do not partake of the character of human rights but rather of subordinate instrumental rights. With a view to the WTO Conference at Doha in November 2001, the Sub-Commission passed two more resolutions in August 2001 which emphatically underline the precedence of social, economic, and cultural human rights over economic policies in general and the TRIPS Agreement in particular.[167]

2 – The Constitutionalisation of Freedom Rights: The 'Petersmann Controversy'

This dispute over patent rights is not only about securing and commercialising intellectual property but also abut the general ranking of universal freedom rights in the hierarchy of human rights, and their integration in the law of worldwide trade and business organisations. At the juridical level, it is Ernst-Ulrich Petersmann who has been investigating this problem most intensively for a number of years. His concept of constitutionalising human rights constitutes a demand for the comprehensive and binding integrating of human-rights standards in the law and the institutions of the world trade order.[168]

Petersmann's interpretation of the concept of constitutionalism is not very precise[169] – in his view, it is a general historical process of trial and error which aims at protecting freedom rights from abuse by (governmental) forces through the recognition of six interlinked core principles:

> '(1) the rule of law; (2) the limitation and separation of government powers by checks and balances; (3) democratic self-government; (4) human rights; (5) social justice; and (6) the worldwide historical experience that protection of human rights and 'democratic peace' cannot remain effective without international law providing for the collective supply of international 'public goods' (such as collective security) and for reciprocal international legal restraints on abuses of foreign policy powers."[170]

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resolutions: Human Rights as the Primary Objective of Trade, Investment and Financial Policy, Res. 1998/12 (August 20, 1998); UN Doc. E/CN.4/Sub.2/Res./1998/12; Trade liberalization and its impact on human rights, Res. 1998/30 (August 26, 1999), UN Doc. E/CN.4/Sub.27Res./1999/30.

[167] UN Sub-Commission on the Promotion and Protection of Human Rights: Globalisation and its impact on the full enjoyment of all human rights, Res. 2001/5 (August 15, 2001), UN Doc. E/CN.4/Sub.2/Res/2001/5: The Sub-Commission 'urges all governments and international economic policy forums to take international human rights obligations and principles fully into account in international economic policy formulation, including during the forthcoming Fourth Ministerial Conference of the World Trade Organisation (Doha)'. Res. 2001/21 (August 16, 2001), UN Doc. E/CN.4/Sub.2/Res/2001/21, Intellectual property and human rights: The Sub-Commission 'reminds all Governments of the primacy of human rights obligations under international law over economic policies and agreements ... calls upon all Governments to ensure the implementation of the TRIPS Agreement does not negatively impact on the enjoyment of human rights as provided for in international rights instruments by which they are bound'. For more detail on the precedence of human rights in trade and economic law, see R. Elliott (2001 a), pp. 27ff.

[168] Cf. E.-U. Petersmann (1998, 2000a, b, 2001, 2002a-c). This is only a shortlist of his numerous publications on the same subject.

[169] Cf. especially R. Howse's criticism (2002), pp. 651ff.

[170] E.-U. Petersmann (2002b), pp. 621ff., Note 76; (2001b) pp. 3ff.

Yet even these generally uncontroversial principles, which include human rights in the abstract, do nothing to make the concept more concrete and meaningful. However, the context of his repeated demands for 'globalisation of human rights and of economic integration law', for 'integration of human rights into the law of worldwide organisations', and for 'mainstreaming human rights into WTO law' shows quite clearly that his concept of merging economic and trade law on the one hand and human rights on the other implies that trade law and its institutions (i.e. particularly the WTO) should guarantee the implementation of human rights 'as empowering citizens, as constitutionally limiting national and international regulatory powers, and as requiring governments to protect and promote human rights in all policy areas across national frontiers'.[171] For there is one point of criticism that is to be found in all his publications: the defects in the effectiveness and enforceability of human rights and the lack of an institutional framework for their adjudicability and their guarantees.

However, Petersmann's central approach, which is to pick on – of all things – the integration of human rights into international trade law and on the WTO to remedy these defects, has been the object of resolute and increasingly sharp criticism.[172]

Most of this criticism is founded in the neoliberal understanding of human rights,[173] which is mainly concerned with the enforcement of 'economic liberties, property rights and freedom of competition'. Without further ado, Petersmann declares that all these are economic human rights, 'essential for enabling individuals to acquire, process, use and dispose of the resources necessary for enjoying human rights'.[174] The focus of Petersmann's human-rights concept is on economic liberties, from property via non-discrimination to competition, all of which he raises to the rank of human rights. Nor does he leave any doubt that he is perfectly ready to include economic rights and liberties among the core human rights that have the character of *ius cogens*.[175]

> 'Yet, the 1966 UN Covenant on Economic, Social and Cultural Rights does not protect the economic freedoms, property rights, non-discriminatory conditions of competition and the rule of law necessary for a welfare-increasing division of labour satisfying consumer demand through private investments and the efficient supply of goods and services and opportunities. The practice of UN agencies and the WTO is still far away from protecting economic and social rights in conformity with the human right to access to justice.'[176]

He hopes to remedy this obvious deficiency by firmly integrating these into the code of international economic and trade law or, in other words, by 'constitutionalising' them.

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[171] E.-U. Petersmann (2002b), p. 621.
[172] Cf. the controversy between Philip Alston and Robert Howse in No. 13 (2002) of the European Journal of International Law as well as previous criticisms by R. Howse, K. Nicolaidis (2001) and S. Peers (2001).
[173] It is characteristic of this understanding on which all publications are based that it adopts the neoliberal analysis of underdevelopment: 'The paradoxical fact that many developing countries remain poor notwithstanding their wealth of natural resources (e.g. more than 90% of biogenetical resources in the world) is attributed by many economists to their lack of effective human rights guarantees and of liberal trade and competition laws. Lack of effective legal and judicial protection of liberty rights and property rights inhibits investments and acts as an incentive for welfare-reducing private and governmental restrictions of competition and collaboration between cartelised industries and authoritarian.' Petersmann (2002b, 3D Note 23) quoting H. de Soto, The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere (2001).
[174] E.-U. Petersmann (2001a), pp. 1f.
[175] E.-U. Petersmann (2001a), pp. 14f.; Faden (2002), pp. 61f.
[176] E.-U. Petersmann (2002b), pp. 621ff. Note 41, identical with E.-U. Petersmann (2001a), pp. 26f.

What is remarkable in this context is that Petersmann's terminology is highly blurred, a fact criticised by Philip Alston, among others.[177] Thus, there is one point at which Petersmann mentions the 'economic dimensions of human rights', of which he says that 'savings, investments, and economic transactions depend on property rights', whose content he defines as 'freedom of contract and transfer of property rights'. Economic freedoms are viewed by him as the 'freedom to produce and exchange goods and services including one's labour and ideas'.[178] On another occasion, he talks of 'fundamental rights', asserting that they have 'human rights functions'.[179] Petersmann expresses himself with such lack of determination and clarity because first, as mentioned above, he is well aware that these freedom rights have not been recognised as fully-fledged human rights in any of the major conventions, in international customary law, or in most of the literature on the subject. Second, this is his way of evading any precise specification of the legal character of these 'rights' so as not to distance himself too far from the ruling dogma. However, his attempt to base the qualification of economic liberties as human rights by citing the rulings of the European Court of Justice has already been refuted by Steve Peers.[180]

Furthermore, the transformation of economic liberties into human rights according to Petersmann establishes a hierarchy which permits governments to pursue social and other positive human rights only to the extent that they can be proven to constitute 'necessary' restrictions of market freedom. Although Petersmann admits that 'WTO law gives clear priority to the sovereign right to restrict trade if this is necessary for the protection of human rights', he makes the following crucial point:

> 'The universal recognition of human rights requires us to construe the numerous public interest clauses in WTO law in conformity with the human rights requirement that individual freedom and non-discrimination may be restricted only to the extent necessary for protecting other human rights.'[181]

In this necessity test, economic freedom and non-discrimination rights automatically function as standards in investigating the question of whether and to what extent they may be restricted in favour of social human rights, for instance.[182] This implies that the task of weighing these rights in the balance is now in the hands of WTO institutions with a marked preference for freedom rights.[183]

In this hierarchy, social rights similarly occupy a lower rung on the ladder. Not that Petersmann refuses to recognise them as fully-valid human rights. Nevertheless, they occupy an entirely marginal place in all his discourses, operating only in the economic field 'for the proper functioning of economic and "political markets" and for rendering competition "self-enforcing"

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[177] Cf. Ph. Alston (2002), pp. 815ff. in Ch. B. Human rights and market freedoms are, in effect, one and the same thing.
[178] E.-U. Petersmann (2002b), pp. 629f.
[179] 'As freedom from hunger and economic welfare are preconditions for the enjoyment of many other human rights, the WTO's guarantees of economic liberties and of welfare-increasing cooperation across frontiers serve important human rights functions.' E.-U. Petersmann (2000a), p. 1375.
[180] Cf. S. Peers (2001), pp. 123ff.
[181] E.-U. Petersmann (2002b), p. 645. R. Howse (2002), pp. 655f.
[182] Article XX GATT, which regulates exceptions, similarly uses the term 'necessary' in Par. a, b and d, together with 'essential' in Par. j.
[183] R. Howse (2002). In the same context, Note 13 refers to the Thai Cigarettes Case in which the Thai government did not succeed in substantiating its ban on the import of cigarettes by the hazard they present to the health of young people. The WTO panel pointed out that control could be effected by less restrictive measures, such as advertising and marketing regulations.

by assignment of individual freedoms, property rights and liability rules to all economic actors and scarce resources.'[184]

Petersmann's understanding of human rights is firmly focused on economic liberties, with all the other human rights playing a subordinate functional role – an impression that is reinforced further by the literary sources which Petersmann refers to,[185] as well as by his conviction that the WTO and the IMF are the most efficient organisations to enforce human rights.[186] In any other author who is less knowledgeable than Petersmann, such an assessment would appear naive, for both these institutions were neither created for such a purpose, nor is their organisational structure, concept, and procedure designed specifically for the enforcement of human rights. They are dominated by the interests of large corporations and not by the social, economic, and cultural needs of the population in general. Moreover, since they themselves are not really prepared to acknowledge human rights as binding, any attempt to give them a mandate of enforcing human rights as key institutions appears relatively unpromising in the first place.

That said, the concept of constitutionalising and integrating freedom rights appears in its true colours as a project which aims at instrumentalising human rights in promoting the goals of free trade and its political foundations, namely property, competition, privatisation, and deregulation. Raising these essentials of the world trade order to the status of human rights and giving them the same arsenal of instruments of legal enforceability would be tantamount to a considerable shake-up and redefinition of the system of human rights, which is anything but consolidated as it is. It is only too obvious that this concept aims at establishing a hierarchy of human rights, at the top of which economic freedom and property rights reign supreme. McGinnis (another advocate of this line of thought), demanded that 'economic freedoms, including property and contract rights, be placed at the top of a new agenda for international human rights', affirming at the same time that empirical studies had furnished incontestable proof of the efficiency of such an approach in guaranteeing prosperity, social stability, and civil rights.[187] While there is no doubt that there will be no mutual interference or competition with the classical political and civil human rights of the so-called first generation, it is very likely that, contrary to the opinion of McGinnis and Petersmann, they will indeed interfere with the social and economic as well as with the collective human rights of the so-called second and third generation. Moreover, establishing such a hierarchy would necessarily entail a decisive revaluation of human rights, as they would no longer be founded on human dignity but tied to an economic system in which man is less of a subject and more of an object of societal processes.

3 – WTO Law in the Light of Human Rights: Principles of Interpretation

The general statement that, within the framework of a modern social order, social human rights may take precedence over economic liberties under certain conditions must be reflected in the administration and interpretation of the law in concrete cases. The mutual dependence and supportiveness of all human rights does not necessarily lead to a well-balanced order of equilibrium; rather, it is twisted by the overwhelming power of the market into the hierarchy of rights described in the preceding chapter. This being so, we need to investigate the question of how and to what effect human rights can maintain their eminent rank in WTO treaty law. Ultimately, the question is whether governmental obligations resulting from social human rights have been so well embedded in WTO law that the latter cannot be used to obstruct governmental

[184] E.-U. Petersmann (2000a), p. 1376.
[185] For a more detailed criticism, see Ph. Alston (2002), pp. 815ff.
[186] Cf. e.g. E.-U. Petersmann (2002b), p. 631; E.-U. Petersmann (2000b), pp. 24ff.
[187] Cf. McGinnis (1999), pp. 1032ff.

policies that are in the public interest. Only recently, this problem showed up clearly in conjunction with the TRIPS Agreement, when countries which had attempted to pursue public interests in the field of health, for example, by providing cut-price medicines to their population, were reminded that such steps could not be taken in controversion of and only in compliance with the Agreement.

Thus, everything depends on how the individual provisions of these agreements are interpreted. For this purpose, rules have been set up in Art. 31 and 32 of the Vienna Convention on the Law of Treaties of 1969[188] which have come to be recognised as international customary law even by states that are not parties to the convention.[189] According to these rules, the core elements of interpretation include the text of a provision, its place in the context of the treaty as a whole – in connection with which subsequent agreements and practices need to be considered as well as 'any maxim of international law that may be applied to the relations between the treaty parties' (Art. 31 Par. 3.c) – and, finally, its goals and purposes. Art. 32 lists a number of supplementary interpretation instruments such as the preparation of the treaty and the circumstances in which is was concluded.

If we apply these instruments to analyse the provisions of the TRIPS Agreement, we encounter a number of regulations by which states are given wide discretion in deciding on their own national humanitarian and development goals. Even the preamble refers to 'the special needs of the least-developed countries members in respect of maximum flexibility in the domestic implementation of laws and regulations'. Art. 1 affirms this flexibility by stating that 'members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice'.

Of particular importance in this context is Art. 8 of the TRIPS Agreement, which emphasises the choice of options open to member states 'to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their social-economic and technological development' and permits states to adopt methods against the abuse of intellectual property. Under the 'context rule' laid down in Art. 31 of the Vienna Convention, this article also influences the interpretation of other TRIPS Agreement regulations, such as, for instance, Art. 30.

Art. 27 Par. 2 of the TRIPS Agreement provides that certain inventions may be excluded from patentability if this 'is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or to avoid serious damage to the environment'. Today, it is generally agreed that for any definition of 'public order' or 'morality', human rights need to be consulted such as, for instance, the right to food or health.[190] Similar exceptions are to be found in GATT and GATS. Thus, Art. XX of GATT (1947) prohibits interpreting any regulation so that a state party is prevented from taking steps to protect public morality, the life and health of people, animals, and plants, to preserve exhaustible natural resources, etc.[191] In Art. XIV, GATS permits

[188] Federal Gazette 1985 II, p. 927. Entered into force in 1980.
[189] Particularly the Appellate Body of the WTO has acknowledged this in a variety of rulings such as, for instance, in the case of the United States – Standards for Reformulated and Conventional Gasoline (US Gasoline Case), Report of the Appellate Body, WT/DS2/AB/R (April 29, 1996), p. 17; India – Patent Protection for Pharmaceuticals and Agricultural Products, Report of the Appellate Body, WT/DS50/AB/R (December 19, 1997), Par. 46.
[190] Cf. F. M. Abbott (1999), p. 730.
[191] This is expressly confirmed in the ruling in the US Gasoline Case, in which the WTO Appellate Body, citing Art. XX of GATT, states that 'WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement.' US Gasoline, Note 152, p. 29.

exceptions 'which are required to maintain public morality or public order … (or) … to protect the life and health of people, animals, and plants'. In addition, the Agreement expressly states that 'exceptions permitted with regard to the public order … may be invoked only in the presence of a real and adequately severe threat to the fundamental values of society'. That these fundamental values include human rights is clear at all events.[192] The so-called Limburg Principles of 1986, which form part of the Social Covenant, follow the same line of thought in their attempt to define 'public order':

> 'The expression "public order (*ordre public*)" as used in the Covenant may be defined as the sum of rules which ensures the functioning of society or the set of fundamental principles on which the society is founded. Respect for economic, social and cultural rights is part of public order (*ordre public*).'[193]

Another exception, this time relating to exclusive rights of exploitation under a patent, is formulated in Art. 30 of the TRIPS Agreement, which adds that 'the vital interests of any third parties shall be taken into account' in weighing different interests in the balance. Considering that Art. 8 Par. I of the TRIPS Agreement expressly mentions the 'protection of public health and nutrition' – two human rights –, there can be no reasonable doubt that these rights may indeed form 'vital interests of third parties'.[194] Earlier on, another GATT Panel had ruled that prohibiting cigarette advertisements was justifiable as being a necessary measure to protect public health under Art. XX of GATT.[195]

In addition to the exceptions specified in Art. 30, Art. 31 of the TRIPS Agreement authorises 'the utilisation of patented objects for other purposes without the consent of the lawful holder'. This refers to the recent practice of issuing compulsory licences, against which the pharmaceutical industry is up in arms. Art. 31 emphasises that private patent rights have their limitations and may be infringed in the public interest to the requisite and commensurable extent. 'In the event of a national emergency or other circumstances of extreme urgency' and 'for public non-commercial use', governments may utilise a patent without seeking the consent of the holder beforehand, being obliged merely to 'pay compensation commensurable with the facts of the case'. Finally, Art. 40 of the TRIPS Agreement empowers WTO members to counteract abuses of private property by issuing their own legal regulations.

Taken together, all these regulations imply that states may avail themselves in their own legislation of numerous exceptions from the property rights laid down in the TRIPS Agreement,

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[192] In his report on the liberalization of trade in services and human rights of June 25, 2002, the High Commissioner similarly stated in Par. 63: 'The protection of public morals, life and privacy are familiar themes to human rights law and their inclusion in GATS could be seen as a link to the promotion and protection of human rights, such as the right to life, the right to health and aspects of the right to privacy. While a human rights approach would place the promotion of human rights at the centre of the objectives of GATS rather than permitted exceptions, these links nonetheless provide an entry point for human rights approach to liberalization and a means of ensuring that the essentially commercial objectives of GATS can be implemented with respect for human rights.' E/CN.4/Sub.2/2002/9

[193] Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, Maastricht, June 2 – 6, 1986, pp. 66, 67.

[194] Thus, for instance, R. Howse (2000), pp. 503ff. : 'In interpreting the nature of "health" as a legitimate interest within the meaning of Art. 30 of TRIPS, it would be appropriate to consider, first of all, that public health is one of those interests explicitly indicated in 8:I to be capable of being advanced "consistent with the provisions of this agreement …" To read Article 30 consistently with world health policy would mean giving clear priority to the legitimate health interests in question over any competing interests of the right holder.'

[195] Cf. the Thai Cigarettes Case: Restrictions on Importation of and International Taxes on Cigarettes, Report of the Panel of November 7, 1990, DS10/R, BISD 37S/200,30 ILM 1122.

so that they are not helpless in the face of exclusive patent rights. What is more, they substantiate the conclusion drawn by the High Commissioner on Human Rights[196] that WTO law has meanwhile come to accept the fact that it is embedded in international law, which is in turn defined by human rights, instead of postulating that human rights should be integrated in and under its code of treaties. This becomes even clearer if we include the following additional aspects in our analysis.

According to Art. 31 Par. 1 of the Vienna Convention, the TRIPS Agreement belongs in the context of the entire Marrakech Code, whose core is formed by the WTO Agreement created by the WTO in 1994. The Code includes the GATT of 1947, the GATS and TRIPS Agreements, and a number of other agreements and conventions. The preamble to the WTO Agreement is of special significance inasmuch as it contains the most comprehensive statement of the objectives and purposes of the entire Code. I shall confine myself to quoting the following passage, which explains in very clear terms that within the framework of international business and trade, human-rights guarantees are not an end in itself but constitute instruments in achieving more far-ranging social and societal objectives. In the Preamble, the states parties point out

> 'that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income …, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development'.

Art. 7 of TRIPS specifies in concrete terms that the subject and objective of the Agreement is to ensure that intellectual property promotes technical innovation and the proliferation and spread of technology, that both the users and creators of technological know-how should benefit from it, and that this should be practised in a manner conducive to the welfare of society and the economy.

If we follow Art. 31 Par. 3 of the Vienna Convention in consulting 'any later convention between states parties on the interpretation of the Agreement or the application of its provisions', among the items considered should be the resolutions adopted by the WTO Ministerial Conferences after 1996. At the very first conference, states parties avowed 'that the WTO Agreement contains provisions conferring differential and more favourable treatment for developing countries, including special attention to least-developed countries'.[197] At the last Ministerial Conference in Doha, the debate revolved around the relationship between economic liberties and social human rights. In an unambiguous statement, the Conference declared that health protection should take precedence over the economic interests of the pharmaceutical industry, which invokes the rights conferred by patents on its intellectual property. Among other things, the document says:

> '4. We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO member's right to protect public health and, in particular, to promote access to medicines for all.
> In this connection, we affirm the right of WTO members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.

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[196] Commission on Human Rights, Liberalization of trade in services and human rights, Report of the High Commissioner of June 25, 2002, E/CN.4/Sub.2/2002/9 Par. 7; The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights, Report of June 27, 2001, Par. 22.
[197] Singapore Ministerial Declaration, December 13, 1996, Par. 13.

> 5. Accordingly and in the light of paragraph 4 above, while maintaining our commitments in the TRIPS Agreement, we recognize that these flexibilities include:
>
> a) In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.
>
> b) Each member has the right to grant compulsory licences and the freedom to determine the grants upon which such licences are granted.
>
> c) Each member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it is being understood that the public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.
>
> d) The effect of the provisions of the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Art. 3 and 4.
>
> 6. We recognize that WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.'

Even though the Council has not yet found a solution along these lines, and the US have meanwhile begun to call for a moratorium on this Agreement, this deliberate reference to the rules of interpretation of international law does show that governments were perfectly clear in their minds that, instead of formulating an exception to the TRIPS Agreement, they were merely describing the rights and obligations accruing from the Agreement in a legally correct manner.

After all, the precedence of human rights over any other rights has already been acknowledged in a number of decisions by WTO panels and appellate bodies. Thus, the WTO Appellate Body applied the term 'exhaustible natural resources' to endangered species in the US Shrimp/Turtles case of 1998,[198] a trade dispute with environmental implications. Citing the body of international environmental law that had begun to emerge even before negotiations on the GATT text began, the Appellate Body ruled that international environmental law provided a suitable standard to be consulted in interpreting the term 'exhaustible natural resources'.[199] Naturally, the same necessarily applies to the code of human rights, which had similarly begun to emerge long before the WTO was established. In the Thai Cigarettes Case, the WTO Panel held that Art. XX (B) of GATT 'clearly allowed contracting parties to give priority to human health over trade liberalization'.[200] Moreover, the Appellate Body emphasised in a relatively recent decision that WTO members were free to act in the public interest. In the EC Asbestos Case,[201] the Appellate Body had to decide whether banning imports of asbestos and asbestos-containing products was

[198] United States: Import Prohibition of Certain Shrimp and Shrimp Products (US Shrimp/Turtles Case), Report of the Appellate Body, WT/DS58/ABR, October 12, 1998.
[199] US Shrimp/Turtles, Note 157, Par. 130.
[200] Thai Cigarettes, p. 1137.
[201] European Communities: Measures Affecting Asbestos and Asbestos-Containing Products (EC Asbestos Case), Report of the Appellate Body, WT/DS135/AB/R, March 12, 2001.

'necessary to protect human life or health' and was consequently admissible under Art. XX of GATT. As the Body explained,

> 'It is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation … In addition … the more vital or important (the) common interests or values pursued, the easier it would be to accept as "necessary" measures designed to achieve those ends. In this case, the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well known, and life-threatening, health risks posed by asbestos fibres. The value pursued is both vital and important in the highest degree.'[202]

As we are moving towards the Fifth WTO Ministerial Conference to be held in September of this year, it is particularly apposite to recall the recommendation placed by the Committee on Economic, Social and Cultural Rights – a body of independent experts – before the Third WTO Ministerial Conference in 1999:

> 'Human rights norms must shape the process of international economic policy formulation so that the benefits for human development of the evolving international trading regime will be shared equitably by all, in particular the most vulnerable sectors. … Trade liberalization must be understood as a means, not an end. The end which trade liberalization should serve is the objective of well-being to which the international human rights instruments give legal expression. In this regard, the Committee wishes to remind WTO members of the central and fundamental nature of human rights obligations. At the World Conference on Human Rights, held in Vienna, 171 States declared that the promotion and protection of human rights is the first responsibility of Governments.'[203]

Accordingly, there can be no doubt whatsoever that, despite the institutional segregation into different organisations and procedures, human rights and international economic and trade law form an amalgamation in legal dogma in which one category cannot move without the other moving as well. The claim, first made a long time ago, that human rights penetrate the other codes of law can no longer be answered by the claim that these other codes are relatively independent and beyond reach of any influence. Within the framework of the precepts of justice prevailing in today's international society, the objective of trade, freedom, and property rights can no longer be pursued and implemented in isolation from human rights, as the latter incorporate fundamental societal perspectives and objectives to which freedom and property rights need to adjust. However, this does not always imply subordination, as in the event of different rights competing, freedom rights may indeed prevail in individual cases, albeit only after close scrutiny. All in all, however, the situation is as it was described by Audrey Chapman:

> 'Ultimately, a human rights approach requires that intellectual property protection serve the objective of human well-being, to which the international human rights instruments give legal expression. Human rights are inalienable and universal claims belonging to individuals, and in some situations, to communities, but never to corporations. Human rights are understood to exist independently of recognition or implementation while intellectual property rights are granted by the state according to criteria defined by national legislation. In contrast with human rights, which establish permanent and irrevocable

[202] EU Asbestos Case, Note 162, Par. 168, 172.
[203] UN Committee on Economic, Social and Cultural Rights, Statement to the Third Ministerial Conference of the World Trade Organization, Seattle, November 30 – December 3, 1999, E/C. 12/1999/9, November 26, 1999, Par. 5-6.

> entitlements, intellectual property rights are temporary; they exist for a limited period and can be revoked, licensed or assigned to someone else.'[204]

One of the major conclusions of the preceding analysis is that WTO law acknowledges, as provided in numerous regulations, that it is embedded in the framework of general public needs and may be subordinate to it in certain circumstances, although the fact is often criticised that it is almost exclusively informed by economic and trade-law interests. Freedom and property rights as encoded in WTO law are not blind towards human rights, although these are not mentioned even once. However, the exceptions stated with regard to governmental action permit human rights to be taken into account to a very large extent.

[204] A. Chapman (2002).

V – Enforcement of Human Rights

However, the fact that freedom and social human rights are integrated in legal dogma is not tantamount to a guarantee of the enforceability of social human rights, which have always been at a disadvantage. While claiming and implementing these rights on the political claim may be a legitimate option documented in applicable laws, the political effort required to enforce them within a society is still considerable. Even though the United Nations Committee on Economic, Social and Cultural Rights assures us in no uncertain terms that 'any intellectual property regime that makes it more difficult for a state party to comply with its core obligations in relation to health, food, education, especially, or any other right set out in the Covenant, is inconsistent with the legally binding obligations of the state party',[205] this does not tell us anything about ways and means to enforce them.

1 – Enforcement within the WTO Framework

Another example illustrating the difficulties of the case is the declaration promulgated by the WTO Ministerial Conference in Doha in November 2001. It unambiguously documents the precedence of health protection over economic interests as it draws the right conclusions from the open conflict between the urgent need to protect public health in a society plagued by epidemics and the liberties and property rights of an international pharmaceutical industry which has the key to the effective control of these epidemics but refuses to surrender it for reasons of profit. Doubtlessly, the declaration was drafted against the background of the booming demand for anthrax drugs in the United States and Canada, where anthrax was feared as the most dangerous poison of all in the time after September 11, 2001. The Bayer Corporation was forced to sell its antidote Ciprofloxacin at considerably reduced prices by governments which threatened to issue compulsory licences if their demand was not met. As the parallels to the demands regarding anti-AIDS drugs are obvious, the Ministerial Conference acknowledged that the TRIPS Agreement does not prevent governments from taking steps to protect public health, and that WTO members are entitled to invoke the regulations of TRIPS to justify these steps. At one point, the declaration states that:

> 'b) Each member has the right to grant compulsory licences and the freedom to determine the grounds upon which licences are granted.
> c) Each member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.'[206]

In addition, the term of grace granted to the least developed countries (including India but not Brazil, Thailand, or the Philippines) before full compliance with TRIPS is required was extended to 2016 in the declaration. The declaration further acknowledged that, because of inadequate industrial capacities, many countries found it difficult to put such compulsory licences to their proper use. For this reason, the TRIPS Agreement Council was instructed to develop a solution for the problem by the end of 2002. On the other hand, it took the United States less than four months to withdraw from the Declaration and demand that a moratorium be declared on the consequences.[207]

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[205] Committee on Economic, Social and Cultural Rights (2001), Par. 12.
[206] World Trade Organization, Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2.
[207] Cf. B. Loff, M. Heywood (2002), p. 627.

Although the human rights approach, under which protecting and promoting human rights – especially social rights and rights at work – does not constitute an exception from other rights but forms the core that defines and shapes those rights, has been universally acknowledged in the meantime, a multitude of questions remain that are bound to give rise to future conflicts. They appear again on the agenda of the next WTO conference in Cancun (Mexico) in September of this year.[208] In particular, the ways and means of embedding the precedence of human rights in international and regional agreements on trade, investment, and financial policy are still under dispute, and the same holds true for the role which the UN human-rights instruments and organisations might play in securing these rights within the respective agreements and implementing them in practice.

So far, the most determined attempts to clarify these issues were made by the Sub-Commission on the Promotion and Protection of Human Rights. On several occasions since 1998, it has commissioned Joseph Oloka-Onyango and Deepika Udagama to study the options of enforcing economic, social, and cultural rights in the face of the dangers of globalisation, paying particular attention to the role and the influence of those multilateral institutions which bear most of the responsibility for the process of globalisation through their legal and political instruments: the IMF, the World Bank, and the WTO. So far, the authors have presented three studies[209] which mainly deal with international trade and its most important organisations and instruments, such as the WTO, GATS, and TRIPS, as well as with the attempt to implement a multilateral agreement on investment (MAI), which has failed for the time being. At the same time, available options of integrating and safeguarding the precedence of human rights in these institutions were investigated as well.

The authors' findings are not spectacular but useful. To begin with, they leave no doubt that social rights are immediately binding not only on states but also on multilateral institutions, a fact that was disputed by the WTO so far.[210] As mentioned before, organisations that were founded by states, such as the WTO, being subjects of international law, are bound by the principles of international law and, consequently, by human-rights law as much as the states themselves. Next, the authors advocate abolishing the established segregation between international economic law on the one hand and human rights on the other, which finds its parallel in the institutional separation of organisations that hardly communicate with each other, although they all operate under the roof of the United Nations.[211] They agree with the approach of this study inasmuch as trade, investment, and capital transfer should ultimately serve to promote people's well-being, and that, by the same token, international economic law should not operate apart from or, worse, against the human-rights code, but should be based on it. Economic rights and human rights should never be regarded as separate and conflicting codes, just as much as the factual segregation of WTO and Bretton Woods institutions on the one hand and UN human-rights organisations on the other should never be taken to imply that the two are irreconcilable. At the same time, there is no doubt that most of the initiatives to promote such an

[208] Items on the agenda include the abolition of agrarian subsidies and tariffs, the GATS Service Agreement, anti-dumping initiatives and the protection of intellectual property under TRIPS. At the same time, current plans suggest that social rights will not be discussed.

[209] J. Oloka-Onyango, D. Udagama (1999, 2000, 2001).

[210] Cf. the answer given by the WTO to a request by the UN Secretary General for information on the Report on Intellectual Property Rights and Human Rights that the Sub-Commission was planning at the time. J. Oloka-Onyango, D. Udagama (2001), margin no. 57. Cf. also the acknowledgement made by WTO representative G. Marceau, Note 144 above.

[211] This is also the central demand of R. Howse and M. Mutua (2001), pp. 4ff. In addition, they wish to see human rights being accorded precedence over the liberalisation of trade, which would conform with the correct interpretation of the hierarchy of norms in international trade law, p. 21.

integral approach and such a joint strategy have been launched by representatives of human-rights organisations.[212]

Unlike Howse/Mutua, Oloka-Onyango/Udagama did not fail to appreciate that the instruments of trade law, such as the TRIPS and GATS Agreements, generally accord greater weight to freedom and property rights. In contrast, they emphasised the significance as well as the possibilities offered by the exceptions laid down in these Agreements, demanding at the same time that developing countries should be better represented within the dispute settlement mechanism of the WTO.[213] Their suggestion that a clause should be included in international economic and trade agreements which obliges multilateral institutions not to call for or undertake any steps that are apt either to compromise social achievements or set back the development process[214] might serve to correct efficiently the well-known negative effects of the IMF's Structural Adjustment Programmes (SAPs) and/or its Extended Structural Adjustment Facilities (ESAF).[215] This might lead to just such a revision of neoliberal structural adjustment policy as has often been demanded before.[216] For implementing human rights, the crucial approach is to observe them early on, when policy formulation begins, and not later, when they merely serve as a reference framework for correcting misdirected developments and repairing the damage.

Ultimately, therefore, the problem lies not so much in the material content or the dogmatic position of social rights but rather in the process itself, i.e. the political ways and means of their implementation. This presupposes the presence of a powerful public sector with enough political clout to assert its legal position in the face of the weight of transnational capital, which is often backed up by the administration of the country itself. In addition, much will depend on societal forces, such as trade unions and non-governmental organisations, whose task it is to demand that the state implement those rights in the form of policies and, if necessary, force it to do so. The South African case study presented in Chapter VI (pp. 57ff.), which describes the implementation of an effective anti-AIDS policy in the face of an international pharmaceutical industry insisting on its patent rights and in the face of a governmental health policy with a focus on different things, provides a great deal of interesting material showing what happened at both these levels.

As the 5th WTO Ministerial Conference in Cancun looms ahead, the process that was begun at Doha but has meanwhile ground to a halt should be resumed. There should be another formal declaration documenting that member states acknowledge that the WTO code primarily binds them to their fundamental obligation of respecting, protecting, and implementing human rights. This declaration should include at least four undertakings and/or elements, as follows:[217]

In the event of a state being confronted with a conflict between the rights and obligations arising from treaties concluded within the framework of the WTO on the one hand and the International Code of Human Rights accepted by it on the other, the latter shall take precedence.

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[212] Thus, the Sub-Commission of the Human-Rights Commission suggested an expert conference on the consequences of liberalisation, to which representatives of the Bretton Woods institutions as well as of the OECD would be invited. Cf. N. Weiss (2002), p. 119.
[213] J. Oloka-Onyango, D. Udagama (2001), p. 17ff.
[214] Cf. also A. Eide (1989).
[215] Cf. W. van der Geest, R. van der Hoeven (1999).
[216] Cf. R. Gerster (1998), R. Falk (1998).
[217] Cf. also R. Elliott (2001a), p. 63; UN Commission on Human Rights, Report of the High Commissioner (2002), Par. 68ff.

Nothing in the entire WTO code may be construed as preventing member states from taking any steps required to fulfil, protect, and respect human rights, including specifically the right to health, food including water, shelter, and education, as well as the core rights at work.

All economic and trade treaties concluded between states under WTO agreements should contain provisions that spell out related obligations to respect, protect, and fulfil whatever human rights are involved. This also holds true for the GATS and TRIPS Agreements themselves, which should be amended to say that in the event of a conflict arising between a government's treaty and human-rights obligations, the latter shall prevail.

In arbitrations before the Dispute Settlement Body, any provisions contained in agreements concluded within the framework of the WTO which bind states parties to specific obligations should be interpreted in the light of their conformability with related human-rights codifications.

In addition, there is quite a multitude of concrete measures which states may or should implement to safeguard and fulfil individual human rights.[218] The basic idea is to adopt an approach which prevents any conflicts between contractual and human-rights obligations in the first place. To this end, any human-rights obligations that might conflict or compete with the matter regulated by the treaty in question should be included in it as early as possible. Such treaties are not critical if concluded between partners with similar societal (socio-economic) constitutions, no matter whether we are looking at core rights at work (freedom to associate and join trade unions, prohibition of child labour, etc.) or at general civil and political rights. To that extent, it would be superfluous to include these rights expressly in any contract. But, as we shall see, it will indeed be necessary to include social clauses even in treaties among transatlantic states parties so as to ensure for them the powers necessary for safeguarding social rights (health, food, education, etc.), whose protection and fulfilment calls for active interference by the state, and whose importance will increase considerably as the deregulation of international trade progresses.

2 – The NAFTA Example

As mentioned above, J. Oloka-Onyango and D. Udagama proposed including clauses in the text of treaties which would specify the obligation to observe human and other fundamental rights and facilitate monitoring compliance with these obligations at the same time. In the North American Free Trade Agreement (NAFTA)[219] that was concluded between the US, Canada, and Mexico in 1992, this proposal has been implemented in a rather problematic way. Among other points, the Agreement is criticised because it allows private companies to institute proceedings before an arbitration panel against the governments of all three states parties in case they should infringe any of the investors' rights that are protected by NAFTA.[220]

To mollify those critics who feared that environmental and working conditions might deteriorate rapidly because of NAFTA, two supplementary agreements were concluded which empower

[218] Regarding the right to health under TRIPS, see the proposals of the High Commissioner in: Commission on Human Rights (2001), Par. 59ff.
[219] The North American Free Trade Agreement of December 7, 1992. Quoted from 32 International Legal Materials (1993), p. 605.
[220] NAFTA Art. 1115-1138. Thus, Mexico was sentenced in 2002 to pay US $16.7m to the California-based Metalclad Corporation after its government had broken an agreement which allowed Metalclad to set up a factory for processing and disposing of hazardous waste. The company had argued that to all intents and purposes, this constituted an expropriation of future profits by the government.

both individual citizens and groups to sue a government that infringes its own (not the international) environmental and labour-protection laws.

In the first agreement, the North American Agreement on Environmental Cooperation (the Environmental Side Accord), states parties avow their duty to protect the environment, affirming at the same time their support for all three governments in issuing and enforcing environmental legislation. To this end, a Commission on Environmental Cooperation (CEC) was created to investigate citizens' complaints about governmental defaults or infringements. The CEC incorporates a Council composed of representatives of all three states, a Joint Public Advisory Committee for technical and scientific support, and a Secretariat. Any citizen as well as any NGO resident in one of the three states is entitled to appeal in the event of governments violating their own environmental legislation. However, the Secretariat may refuse to entertain such an appeal if it is not convinced that it 'appears to be aimed at promoting enforcement rather than at harassing industry'.[221] Complaints may be based on current and future impairments of either private or public interests. If the government in question should fail to answer such criticism satisfactorily, a two-thirds majority of the CEC Council may instruct the Secretariat to prepare a report on the facts of the case. For this purpose, the Secretariat will gather information from public investigations, NGOs, and experts, collating it into a report together with the original complaint and the reply made by the government. Reports will be published if two thirds of the CEC Council should vote in favour of so doing. Unlike the OECD and the ILO, the CEC is not empowered to investigate any enterprises accused of infringing environmental regulations; all it can do is to expose to the public debate any infringements that have been neither monitored nor sanctioned by the government. This public exposure of the behaviour of both the government and the enterprise in question may serve as important evidence in litigation. However, in those rare cases in which the report uncovers evidence of consistent violations of domestic environmental law, a contentious panel may be convoked that is empowered to impose fines and, in extreme cases, suspend the privileges of the company in question under NAFTA. In certain cases, such violations of environmental legislation may entail infringements of human rights, such as the rights to life and health. Thus, for instance, an indigenous group from the north Mexican state of Chihuahua recently submitted a complaint to the CEC Council in which it accused the Mexican government of having failed to protect the territory of the tribe from environmental destruction and doing nothing to remedy its effects.[222]

Similarly, the second accord, the NAFTA Labour Agreement,[223] fails to set minimum standards for labour relations, nor does it refer directly to any of the internationally-recognised conventions. It merely appeals to states to safeguard existing rights at work,[224] for which it establishes a three-tiered hierarchy:

Category I: Freedom of association; protection of the right to organise; right to bargain collectively; right to strike.
Category II: Prohibition of forced labour; abolition of discrimination at the workplace for any reason, including race, religion, age, gender, or any other reason specified in national law; equal

[221] Council Provision 99-06, Par. 5.4.
[222] CF. ICHRP (2002), p. 94.
[223] North American Agreement on Labour Cooperation of September 14, 1993, 32 International Legal Materials (1993), p. 1499.
[224] The preamble says: 'The following are guiding principles that the parties are committed to promote, subject to each Party's domestic law, but do not establish common minimum standards for their domestic law. They indicate broad areas of concern where the parties have developed, each in its own way, laws, regulations, procedures and practices that protect the rights and interests of their respective workforces.'

remuneration for men and women; continuation of wage payments in the event of occupational injuries or diseases; protection of migrant workers.
Category III: Protection at work for children and adolescents; minimum employment standards including minimum wages and overtime pay even for employees not covered by collective agreements; measures to prevent occupational injuries and diseases.

While the major international standards regarding rights at work are reflected in these three categories, their deficits begin to show if we look at the distinctions and gradations of the instruments available to protect and enforce these standards. Under the Agreement, which resembles the Environmental Agreement in this respect, this purpose is served by a Commission for Labour Cooperation (CLC) consisting of a ministerial-level Council and an independent Secretariat. In each country, there is a National Administrative Office (NAO) that is supposed to enforce the terms of the Agreement and ensure communication among the three member states. Once again, individuals as well as NGOs or trade unions may appeal to this Commission. The Agreement offers four processes for handling such appeals: consultations among NAOs; ministerial consultations; expert investigation and arbitration; and, finally, penal proceedings. However, proceedings before a court of law, formal depositions, and rules of evidence are not involved in any of these cases.

For dealing with the first category, the Agreement merely provides consultations among NAOs or at the ministerial level, although according to international standards it includes core rights at work, which constitute cogent law. Infringements of rights belonging to the second and third category may be appealed only by states, and only to the extent they are trade-related. If negotiations should break down, a state may appeal to the Evaluation Committee of Experts, which is empowered to investigate related claims and make proposals regarding the implementation of rights at work which, however, are not binding. The Committee's reports will be submitted to the Council for debate. Only in cases relating to the third category of rights may contentious proceedings be instituted, and sanctions imposed. If both ministerial consultations and expert investigations should end inconclusively, two of the three Labour Ministers may institute arbitration proceedings. Should the panel find that the claims are valid, the accused state must begin enforcing the rights in question under pain of a fine within 60 days. Should it fail to comply with its enforcement obligations within six months, trade sanctions may be imposed. All these measures are facultative and have not been applied so far. Until now, direct negotiations between an NAO, the accused state, and the appealing party have proven more effective in problem-solving. Moreover, the investigations of national experts have been corroborated by the findings of international scientific seminars on specific aspects of threatened rights at work. Of the 23 appeals made under this Labour Agreement by 2002, 19 have led to consultations, while financial sanctions have not been imposed in any case so far.[225]

The weaknesses of both Agreements are obvious: They operate without direct reference to the acquis of international law in defining an unambiguous minimum standard. The enforcement instruments offered by the Labour Agreement essentially consist of diplomacy, negotiations, and expert studies, fines and sanctions being options exclusively reserved for the third category of rights. There is no independent organisation which could supervise negotiation and expert-consultation procedures or the proceedings themselves, which often last for years, and for which there is no genuine system of appeal. On the other hand, we must acknowledge that progress has been made. First, any citizens as well as any groups and organisations concerned may initiate reviews of any defaults in supervising domestic enterprises and transnational corporations by

[225] Cf. Human Rights Watch (2001), pp. 24ff.

either their own or any of the two other foreign governments. Second, we should not underrate the political impact of publishing investigations and reports detailing the names of the enterprises involved, which describe the behaviour of these enterprises and that of the respective governments. Finally, the two NAFTA Side Accords represent the most articulate attempt so far of linking economic law and trade liberalisation on the one hand and social concerns and demands on the other. In an assessment of the Labour Agreement, Human Rights Watch concluded that, despite all its faults, it 'remains the most ambitious link between labour and trade ever implemented'.[226]

3 – Suits Against Transnational Corporations

In recent times, individuals as well as organisations, such as trade unions or NGOs, have increasingly adopted the practice of suing transnational corporations (TNCs) in national courts for human-rights infringements, including specifically violations of rights at work. Thus, to improve working conditions in the garments industry all over the world, the Clean Clothes Campaign (CCC), an alliance of trade unions and NGOs from 11 European countries, pursued 26 cases in which rights at work were infringed in Asia, Africa, eastern Europe, and central and northern America in 2001 alone. While most cases concerned infringements of local law, there were also violations of international law codified in the ILO conventions and the Social Covenant. At the same time, corporate codes of conduct were infringed in almost all cases, although these are not legally binding. Transnational lawsuits for infringements of human rights or other grave misdemeanours that are instituted against corporations in the country where their headquarters are located are attended by a multitude of difficulties, which is why their history is only beginning. Nevertheless, the interest in such suits is growing.[227]

Apart from the fact that such judicial proceedings direct considerable public attention to corporate practices that contravene human-rights law in the countries of Africa, Asia, and Latin America, lawsuits like these often entail considerable financial expenditures. Companies which, operating either as partners in a joint venture or on their own behalf, connive at human-right infringements by, for instance, buying goods made by slave labour to profit from lower costs in another country, may now be brought to book, especially in the United States. Ascoly and Oldenziel quote a lawyer engaged in lawsuits of this kind as describing their positive effects as follows:

> 'Once companies see there is a substantial financial cost to their business plan, they will change their behaviour. Their activities are logically ranged in a way to maximize profits. So, if they see that being a joint venture partner with a government that uses slave labor or bombs civilians is going to carry a very high financial penalty, then from the outset they will not engage in such activity. The government will not be able to benefit from the efficient use of their resources, if they cannot attract Multinational Enterprises to partner with them. So you will have a situation where the governments might actually begin to change their human rights policy, in order to participate in the global economy.'[228]

The primary objective of such lawsuits is to obtain compensation for injuries sustained. However, as they also warn corporations to drop similar practices in the future, another of their objectives is to influence the behaviour of these corporations as a whole as well as that of their counterparts, which are often enough governments of host countries.

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[226] Cf. Human Rights Watch, p. 1.
[227] Cf. N. Ascoly, J. Oldenziel (2002).
[228] Cf. N. Ascoly, J. Oldenziel (2002), pp. 12f.

In any case, proceedings may be instituted either by individuals or by groups of victims, although this is often difficult because the cost of such lawsuits is normally high, and plaintiffs are often poor. Moreover, even victims sometimes do not wish to be involved in legal disputes because they fear reprisals and social isolation. For this reason, organisations were given the right to file cases on behalf and on account of the victims in some countries. Even more rarely, some legal codes permit lawsuits in the public interest such as, for instance, in cases relating to environmental protection where individual victims cannot be identified. Thus, for example, Indian law allows any person with a legitimate concern in the public interest to petition the Supreme Court, thus forcing it to deal with an increasing number of human-rights cases and encouraging it to accept a greater role in politics.[229] In the law of the Netherlands, organisations are similarly entitled to take action, provided that their statutes clearly show that they are representing the interests of plaintiffs, and that the same is reflected in their activities in recent years.

In many cases, the success or failure of a lawsuit may depend on the seat of the court where the case is filed. This is important with regard not only to applicable law but also with regard to past judgements in similar trials. Moreover, the purely technical facilities of legal representation may depend on it; the judicial infrastructure as a whole may be inadequate, and funds may be lacking. Plaintiffs will need to calculate very carefully in advance the chances which their case will have in any given location. According to Article 2 of the Brussels Convention on Jurisdiction and the Enforcement of Court Decisions in Civil and Trade Matters of 1968,[230] the court located at the seat of the company in question shall have jurisdiction. While the seat of a company is mostly identical with the location of its headquarters, it may also be the place where it was founded and registered, as provided, for instance, in Dutch law. Richard Meeran, who is familiar with transnational cases of this kind, wrote on the selection of a suitable forum:

> 'The key obstacle to accountability is access to justice. It is primarily due to the vast disparity of access to justice that the multinationals want the cases heard in the developing countries' local courts, whereas the victims want the cases heard in the multinationals' home base courts. The key factor in relation to access to justice is funding. In many developing countries there is no legal aid system, and public interest lawyers operate on 'shoestring' budgets.'[231]

One important reason why many victims prefer suing a TNC at the seat of its headquarters and not of its local branch office lies in the fact that most companies are organised so as to keep their local branches in a state of insolvency, without proper insurance and/or generally unattractive for any claim for damages. In many cases, local lawsuits in a host country hardly deter TNCs from continuing their abusive practices:

> 'In some countries, it appears that the level of damages that can be awarded or the fines that can be imposed against companies are so low that it is often cheaper for large corporations to pay fines or damages than invest in management or structural changes that prevent harm from recurring.'[232]

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[229] Cf. ICHRP (2002), p. 79.
[230] Art. 2. Subject to the provisions of this Convention, persons domiciled in a contracting state shall, whatever their nationality, be sued in the courts of that state. Persons who are not nationals of the state in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that state.
[231] R. Meeran (2001), p. 10.
[232] ICHRP (2002), p. 79.

Conversely, proceedings instituted at the seat of a corporation's headquarters often have a much greater effect on public opinion and are much more effective in demonstrating the cause of human rights:

> 'Such cases hold the promise of extending the protection of an independent and well-functioning judicial system to victims (or potential victims) in countries where corporations can take advantage of the absence of the rule of law … they demonstrate in a convincing way the international dimension of human rights. Litigation is based on the belief that companies should not engage in activity abroad that would be outlawed at home.'[233]

The key objection raised by corporations against courts located at the seat of their headquarters is based on the 'forum non conveniens' doctrine which applies particularly in the common law systems of the United States and Great Britain. There are three arguments that may be used in such a plea: That the alternative forum is located closer to the facts of the case, the witnesses, and the evidence; that the alternative court has the capacity, the means, and the time to guarantee a fair trial; and that an end must be put to the obnoxious practice of 'forum shopping', i.e. the selection of a court from the point of view of financial profitability. However, as these pleas were recently thrown out by various courts in Great Britain[234] as well as in one ruling by the US Supreme Court,[235] their significance in future cases is likely to be much smaller.[236]

Another strategy adopted by transnational corporations in their defence is to shift the responsibility completely to subcontractors or suppliers, which are entirely independent legally. There is a system that is particularly well established in the garments industry whereby local companies, acting as legally independent producers and often working through agents, make branded garments for TNCs. In that industry especially, supply chains encompass the entire world, consisting of small factories, workshops, and cottage industries. The only way to counter this defence successfully is by proving that the violation (slave, forced, or child labour; prohibition of trade unions; etc.) was committed by the corporation in its own home country, e.g. by ordering or conniving at such practices and/or by virtue of the fact that the corporation is so closely linked to its production facility that the corporate management not only instructs and monitors fabrication activities but also supervises working conditions, so that production conditions are practically controlled by it.

In a number of cases, the Alien Tort Claims Act (ATCA) of 1789 has proven a suitable basis for action against TNCs at their corporate headquarters in the United States.[237] At the same time, it

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[233] ICHRP (2002), pp. 105f.

[234] Thus, for instance, in the Cape Asbestos Case of July 2000, the House of Lords threw out the plea that a forum in South Africa was better placed to investigate the circumstances under which the plaintiffs had been contaminated with asbestos by stating that the funds available in South Africa were inadequate for pursuing the complaints; cf. N. Ascoly, J. Oldenziel (2002), pp. 24, 54f. For the same reason, the House of Lords in July 1997 rejected the objection raised by the Rio Tinto Zinc Corporation in a British court to the effect that a court in Namibia was better placed to investigate the alleged injury (cancer) caused to the victim by uranium dust while working in the Rössing mine. Cf. N. Ascoly, J. Oldenziel (2002), pp. 24, 56.

[235] On March 26, 2001, the US Supreme Court endorsed the decision by an appellate court in an action launched by the widow of Ken Saro-Wiwa, the representative of the Ogoni nation, against Royal Dutch Petroleum and Shell as accomplices in grave infractions of human rights and crimes against humanity, ruling that the proper forum was New York and not the Netherlands or England, as had been alleged in the defendant's plea of forum non conveniens. Cf. N. Ascoly, J. Oldenziel (2002), pp. 63 ff.

[236] See also ICHRP (2002), p. 105.

[237] Cf. ICHRP (2002), pp. 103ff.

allows foreign nationals to sue foreign TNCs for crimes committed outside the US.[238] To be sure, a foreign TNC needs to have some sort of representation in the US, for which a general agent, a joint venture, a branch office, or years of business activity might be cited as proof in case its headquarters are not located in the country. Indictable violations include infringements of established international-law provisions such as the prohibition of slavery, genocide, torture, crimes against humanity, and war crimes, as well as infringements of human rights including core labour standards.

In the so-called Chentex Case, for example, five senior trade union members sued Chentex Garments, a Nicaraguan subsidiary of the Nien Hsing Textile Co. domiciled in Taiwan, in the US Federal District Court at Los Angeles for dismissing a total of 700 male and female workers who were all organised in the trade union. Its case was based on the Alien Tort Claims Act (freedom of assembly and association; cruel, inhuman, and degrading treatment; infringement of the rights to life, freedom, and safety). Plaintiffs were able to withdraw their suit in May 2001 after the defendant had recognised the trade union itself as well as the right of the plaintiffs to engage in trade union activities, reinstalled its employees in their former position, and withdrawn its own complaints against the trade union members concerned.[239] After 1999, there were three other cases in which a number of international garments companies were sued by numerous workers in Saipan, an island in the Northern Mariana Group, for imposing so-called sweatshop conditions, i.e. insecure working conditions, unpaid overtime, excessive exploitation, etc., on the basis of the ATCA and the Racketeer Influenced and Corrupt Organizations (RICO) Act. By 2002, all defendants except for Levi Strauss & Company had agreed to settle the matter out of court, agreeing to observe employment standards in the future and to set up a compensation fund.[240] Similarly, the above-mentioned complaint filed by the Ogoni people against Shell in 1996 for grave violations of human rights (summary executions, torture, cruel and inhuman treatment, causing bodily harm, and illegally executing Saro-Wiwa and John Kpuinen, etc.) was based on the ATCA and the RICO Act. The case is still on trial.[241]

Another case of outstanding significance heard by the US Federal District Court at Los Angeles was the Unocal Case, in which the Unocal Corporation domiciled in California was sued by Burmese villagers for having deliberately employed forced labour and other grave infringements of human rights (death of family members, rape, loss of their homes and property, etc.) when a gas pipeline was built through the Tenasserim region in Burma. Once again, this case was based on the ATCA and the RICO Act as well as on the Torture Victim Protection Act. The case was thrown out by the District Court, which held that the existence of a joint venture between Unocal and the Burmese government was not an adequate reason for holding Unocal responsible for crimes committed by the Burmese government, although the company had been expressly alerted to these conditions beforehand. The Court demanded some closer form of involvement, such as joint activities or agreements and/or control over the military.[242] The case is now in the Supreme Court of California, where the issue is not whether the rationale of the case was adequate, or whether foreign nationals are entitled to sue in the first place, but the problem of whether Unocal

[238] Cf. 28 United States Code Section 1350, which says: 'The District courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.'
[239] Cf. N. Ascoly, J. Odenziel (2002), pp. 50ff.
[240] Cf. N.Ascoly, J. Odenziel (2002), pp. 59ff.
[241] Cf. Note 235 above. A similar complaint was made by other inhabitants of the Niger Delta against the Chevron Texaco Cooperation because a number of persons had been killed or injured or had simply disappeared during non-violent demonstrations against the activities of this San Francisco oil company that were destroying their livelihood. Filed in 1999, this case was similarly based on the ACTA and the RICO Act. It is still pending. Cf. N. Ascoly, J. Odenziel (2002), pp. 69f.
[242] Cf. ICHRP (2002), pp. 130f.

can be called to account because it aided and abetted the human-rights infringements committed by the Burmese army and government when it paved the way for the construction project by cleansing the region and subjecting workers to compulsion.[243] Preferring the same charges with respect to the same Tenasserim region of Burma, four Burmese citizens, who have fled the country meanwhile, instituted proceedings against the French oil and gas corporation Total Fina Elf (TFE) in a Belgian court in April 2002. They similarly charged TFE with lending moral, financial, logistics, and even military support to the Burmese military which had to look after security in the pipeline-construction area. TFE is charged with having been fully aware of the human-rights violations committed by the military to ensure security, including the use of forced labour. The case is base on the Belgian Act on Universal Jurisprudence of 1993, which had previously served as a basis for convicting four Rwandans of complicity in crimes against humanity committed during the Tutsi genocide. The Court is still hearing the evidence in this case.[244] Whether or not this Belgian law may be applied to other human-rights infringements, such as, for instance, the violation of core labour standards, depends on whether these infringements may be legally characterised as crimes against humanity. The same holds true for other principles of global law such as the international criminal law which came into force in the Federal Republic on July 1, 2002.

Apart from the numerous factual difficulties that attend these suits, such as the cost of representation by counsel, communication with plaintiffs, securing evidence, or the imbalance of power and influence between plaintiffs and corporations, it is not yet absolutely certain that this strategy is entirely successful. The fact that, at least in the minds of the judiciary as well as of many governments, many human-rights norms have not yet attained the level of legal importance and significance which they should have from the point of view of legal dogma should not lead anybody to underestimate or neglect them in the struggle for enforcing social standards even with private enterprises. Even soft law is not without authority or practical influence, just as its enforcement generally tends to depend more on the political commitment of those who are interested in enforcing the law than on the 'neutral' entities they appeal to. The development of international law, which often takes decades to run through the evolutionary process from political programmes to cogent law, demonstrates how the reach of the legal sphere is extending to all areas and forms of governmental action. However, this process of legalisation is bound to extend increasingly to non-governmental fields of action, as the ICJ pointed out as early as 1949:

> 'The subjects of Law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not states.'[245]

Today, this trend is emerging even more sharply than the demand for a new legal regime which, in the words of the former ICJ Judge Christopher Weeramantry, confines 'multinational actors … within the mores of human rights, and the principle of accountability':

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[243] Cf. N. Ascoly, J. Odenziel (2002), pp. 59ff. For more detail on the issues of complicity and deliberate cooperation with forces (joint ventures, subcontractors, suppliers, etc.) committing human-rights infringements, see ICHRP (2002), pp. 121ff.
[244] Cf. N. Ascoly, J. Odenziel (2002), p. 27.
[245] ICJ Reparations for Injuries Case, ICJ Reports (1949), p. 178.

'We must attune the international law of the future to the concept that a large variety of new actors have appeared on the international scene, with rights and responsibilities which international law will recognize as inhering in them. The great corporations are a very potent group of these new international actors whom the law of the future will recognize as accountable to the international legal system.'[246]

[246] Ch. Weeramantry (1999), p. 49.

VI – The South African Case Study

There is probably no case that illustrates more clearly the legal and political problems resulting from the conflict between the freedom and property rights laid down in the WTO Treaty Code on the one hand and human rights on the other than a legal dispute in which the South African government was sued by an alliance of 39 international pharmaceutical manufacturers, which the government won in a surprising manner. On April 19, the international pharmaceutical corporations that had formed the Pharmaceutical Manufacturers Association of South Africa (PMA) withdrew their suit against the government of South Africa which they had filed with the High Court of Pretoria three years before.[247] The objective of the case was Amendment No. 90 to the South Africa's Medicines and Related Substances Control Act No. 101 of 1965, which had been passed by parliament on October 31, 1997.[248] The Act had met with violent opposition from the Democratic Party (DP), the New National Party (NNP), and representatives of the pharmaceutical industry. On February 18, 1998, the PMA filed a suit with the intention of reversing the law because it allegedly infringed various rights of its members, including specifically the right to property guaranteed by the South African Constitution.[249] The industry even succeeded in getting South Africa placed on the United States Trade Representatives' (USTR) 301 Watch List. In 1999, however, the country was removed from the index by President Clinton, who stated that the countries of Africa were perfectly entitled to adopt their own laws without interference from the USA, provided they did not contravene the TRIPS Agreement. On March 5, 2001, the case was heard publicly in the High Court for the first and only time; a little more than a month later, the plaintiffs withdrew their suit, having reached an agreement with the government.

The background of this suit, which is of significance not only in South Africa but elsewhere as well, is the following: As there are almost 5 million people infected with HIV/AIDS living in South Africa, the country is among those hit hardest by the epidemic, with the numbers of patients and deaths constantly increasing particularly among young, economically active people. The growing proportion of people infected with HIV/AIDS is having a devastating effect on social, economic, and humanitarian conditions even now, and it is bound to get worse in the near future. In the three years that passed between the time when the suit was filed and the time when it was withdrawn, more than 400,000 people died of AIDS-related diseases, many of them because they could not afford expensive medication. As no vaccine capable of preventing AIDS will become available within the foreseeable future,[250] there is only a limited number of drugs to alleviate the symptoms of the disease and extend the life of the patients, and these have to be taken regularly, sometimes in the form of cocktails.

The biggest drawback of these medicines lies in their enormous cost, which is unaffordable for public health systems as well as for most privately insured patients, particularly in the poor countries of Africa, Asia, and Latin America. After all, 19% of households in South Africa with a monthly income of less than 885 Rand were dependent on the private health sector in 1995. Early in 2001, the cost of treating a patient with three drugs amounted to approximately US$ 15,000 per year in the United States, and to approximately US$ 5,500 per year in South Africa,

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[247] The Pharmaceutical Manufacturers Association and Others v. The President of South Africa and Others, case no. 4183/98, High Court of South Africa, Transvaal Provincial Division.

[248] The National Council of Provinces assented to the bill on November 20, and it was signed into law by President Nelson Mandela on November 25, 1997. Regarding the conflicts of this legislation process, see A. Gray, T. Matsebula et al. (2001).

[249] Cf. Art. 25 I: 'No one may be deprived of the right to property except in terms of law in general application, and no law may permit arbitrary deprivation of property.'

[250] Cf. M. Specter (2003), pp. 54ff.

which breaks down into a monthly cost of about 3,500 Rand or US$ 450. In June 2001, after the suit had been withdrawn, the cost came down to US$ 1,500 per year or 1,000 Rand (US$ 125) per month, a sum that was still far beyond the reach of the average household.[251] Even so, the number of patients provided with medication increased from 10,000 to 150,000. Nor were such swift price cuts limited to South Africa. In Honduras, for instance, the price of antiretroviral medicines fell by 85% in 2001, while in Nicaragua, the cost of a cocktail remained stable at US$ 5,000 per year.

Pharmaceutical corporations pursue different pricing strategies which, among other things, depend on the availability of cheap generics. In South Africa, 13 out of a total of 15 registered antiretroviral drugs are covered by patents which guarantee high prices, provided there is no competition from cheap generics. Thus, the patented AZT/Lamivudine drug made by GlaxoSmithKline, which prevents the transmission of the disease from the mother to the unborn child, costs 811 Rand per month in South Africa, while the corresponding generic drug, which is not available in South Africa, costs 232 Rand. Another drug, Nevirapine by Boehringer Ingelheim, which similarly prevents transmission in the womb, costs 365 Rand, while the corresponding generic drug, which again is not available in South Africa, costs 145 Rand.[252]

Intending to open access to generic drugs through Amendment No. 90, South Africa lost three years in the courts. Brazil, on the other hand, is different: Confronted by an AIDS problem of similar dimensions, the country decided as early as 1996 that 100% of all persons diagnosed with HIV should be provided with generic medicines. In this, it benefitted from the fact that patents on medicines were prohibited under national patent law, enabling the government to arrange for the production of generics of antiretroviral drugs which were not protected by patents in Brazil, including Zidovudine by GlaxoWellcome and Diflucan by Pfizer. The success of the approach was generally acknowledged. Not only did the cost of treatment with two or three drugs go down by 80% and 36%, respectively, by the year 2000, the production costs of generics went down by an average of 70% because they could be made locally. Moreover, the threat of issuing compulsive licences for local production strengthened the country's position in negotiations with other pharmaceutical corporations, leading to drastic price cuts: The price of Efavirenz by Merck, for example, fell by 70%. All this enabled Brazil to develop a comprehensive HIV/AIDS programme which grew to be the biggest in the world, with demonstrable success. As Mary Robinson stated in her report of 2001,[253] the programme was instrumental in lowering the number of AIDS casualties by 50% within the last four years. The incidence of opportunistic diseases requiring hospital treatment was reduced by 80%, while the incidence of the most severe diseases, such as tuberculosis, viral cytomegaly, and Kaposi's sarcoma similarly declined by up to 60%. Thanks to this achievement, the Brazilian Ministry of Health was able to save US$ 422m in expenditures. Lastly, the programme helped to improve Brazil's technological and research capacities, thus enabling the country in the long run to assist poorer nations in their struggle against the HIV/AIDS epidemic. Based on all these data, Mary Robinson reached the following conclusion:

> 'On the facts that have been provided by the Government of Brazil, it is possible to say that the Brazilian case demonstrates how the provisions of the TRIPS Agreement can be implemented in ways that respect, protect and fulfil the right to health. Through careful legislative implementation of TRIPS provisions – in particular Art. 31 on compulsory licensing – Art. 71 of the Brazilian Intellectual Property Law supports the implementation

[251] Quoted from B. Loff, M. Heywood (2002), p. 624. Cf. also S. Power (2003), p. 64.
[252] Source: equal treatment, newsletter of the Treatment Action Campaign (TAC), November 2002, Vol.? No. 9.
[253] Commission on Human Rights (2001), Par. 51ff.

> of national health policy aimed at providing essential medicines to those who need them. Furthermore, by implementing the public health safeguards in the TRIPS Agreement, the Brazilian Government has successfully married the implementation of the Agreement with its obligations under human rights law – in particular its duty to provide affordable essential drugs.'[254]

While Brazil had been forced to modify its patent legislation to conform to the TRIPS Agreement, the government had been granted the right to issue compulsory licences in certain circumstances: abuse of patents by their holders, abuse of economic power, and in certain other situations, including 'national emergencies' or 'the public interest'.[255] Both these terms are defined in the Presidential Decree on Compulsory Licensing of 1999, which says:

'a) national emergency is understood to be a condition of impending danger to the public, even if existing only in a part of the national territory'. Furthermore, the Decree says: 'there are considered to be within the public interest those facts, among others, related to the public health, nutrition, protection of the environment, as well as those of primordial importance to the technological or social and economic development of this country.'

This definition corresponds to Art. 31 b) of the TRIPS Agreement, which permits utilising a patent even without the consent of its holder 'in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use'. In view of the epidemic character of HIV/AIDS, governments should not find it difficult to declare the plague a national emergency. The fact that corporations are obviously prepared to negotiate and modify their prices did not induce the Brazilian government to abandon its own research and production which, after all, enables it to maintain pressure on the pharmaceutical industry. At the same time, it had to defend a suit before the Dispute Settlement Body, in which the US government complained about a clause in the Industrial Property Act of 1996 which permitted Brazil to produce or import generic versions of medicines which the patent holder was not prepared to produce in the country itself within a term of three years. The US based its case on an alleged infringement of TRIPS which, so it said, guaranteed 'that patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced'.[256] However, the US withdrew its suit when Brazil demonstrated that a similar clause is to be found in US patent law.[257]

Even though the South African government followed a different, though hotly disputed, AIDS policy,[258] it was confronted by the same problem as the Brazilian government – the need to make commercial AIDS preparations affordable and, consequently, accessible to the masses of poor patients. It had attempted to do this before, but had been defeated in court by the pharmaceutical industry. Thus, the South African Pharmacy Council had amended its ethical code in 1984, and the government had issued Decree R2525 to allow pharmacists to sell substitute drugs in the

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[254] Commission on Human Rights (2001), Par. 58.
[255] Cf. Art. 71 of the Intellectual Property Law of 1996, No. 9279: 'In cases of national emergency or public interest, declared in an act of the Federal Authorities, insofar as the patentee or his licensee does not meet such demand, a temporary non-exclusive compulsory license for the exploitation of the patent may be granted, without prejudice to the rights of the respective patentee.'
[256] Cf. South Africa's moral victory, The Lancet, Vol. 357, No. 9165 of April 28, 2001, p. 1303.
[257] In a similar case, the European Commission sued Canada for infringement of TRIPS in the WTO Dispute Settlement Body in 2000. Canada's patent law permitted generics producers to begin manufacturing generic versions six months before the expiry of related patents, and to stockpile these products so as to be able to throw them on the market immediately after patent expiry. Cf. R. Elliott (2001b).
[258] Cf. O. Quist-Arcton (2001); S. Power (2003), pp. 54ff.

place of prescribed medication even without the consent of the prescribing physician. After the pharmaceutical industry intervened, both measures were banned by a court order. In 1995, the South African Pharmacy Council reaffirmed its support for the substitution of branded preparations by generic products, which was similarly supported by the Pharmaceutical Society of South Africa. In 1996, the government published its national drug policy in which it proposed measures to rationalise the prescription and use of drugs enumerated in a list of essential medicines as well as a variety of mechanisms to reduce costs, including the generic substitution of drugs no longer protected by patents, parallel imports,[259] and compulsory licenses[260].

In its Medicines and Related Substances Amendment Act No. 90, the government named four alternative methods of reducing procurement costs in the public and private sector and facilitating access to the medicines in question. 1) Parallel imports of branded or licensed preparations from a third country at lower prices as per Sect. 15C.[261] 2) Generic substitution of medicines no longer protected by patents as per Sect. 22F.[262] While this provision facilitates supplying the population with equivalent medicines either through imports or through production at home, it applies only to branded preparations whose patents have expired. 3) The creation of a

[259] The term 'parallel imports' describes the import of patented branded preparations from countries where these preparations are offered at lower prices.

[260] A compulsory licence breaks the patent held by a producer through the issue of a licence to another producer to manufacture and distribute the same preparation. In South Africa, such compulsory licences may be issued only in certain precisely circumscribed situations, and only in a procedure laid down in Sect. 4 and 56a and c of the Patents Act 57 of 1998.

[261] 15C. Measures to ensure supply of more affordable medicines. The Minister may prescribe conditions for the supply of more affordable medicines in certain circumstances so as to protect the health of the public, and in particular may

a) notwithstanding anything to the contrary contained in Patents Act, 1978 (Act. No. 57 of 1978), determine that the rights with regard to any medicine under a patent granted in the Republic shall not extend to acts in respect of such medicine which has been put onto the market by the owner of the medicine, or with his or her consent;
b) prescribe the conditions on which any medicine which is identical in composition, meets the same quality standard and is intended to have the same proprietary name as that of another medicine already registered in the Republic, but which is imported by a person other than the person who is the holder of the registration certificate of the medicine already registered and which originate from any site of manufacture of the original manufacturer as approved by the council in the prescribed manner, may be imported;
c) prescribe the registration procedure for, as well as the use of, the medicine referred to in paragraph b).

[262] 22F. Generic Substitution

1) Subject to subsections 2), 3) and 4), a pharmacist shall –

a) inform all members of the public who visit his or her pharmacy with a description for dispensing, of the benefits of the substitution for a branded medicine of an interchangeable multi-source medicine; and
b) dispense an interchangeable multi-source medicine instead of the medicine prescribed by a medical practitioner, dentist, practitioner, nurse or other person registered under the Health Professions Act, 1974, unless expressly forbidden by the patient to do so.

2) If a pharmacist is forbidden as contemplated in subsection 1)b), that fact shall be noted by the pharmacist on the prescription.

3) When an interchangeable multi-source medicine is dispensed by a pharmacist he or she shall note the brand name or where such brand name does not exist, the name of the manufacturer of that interchangeable multi-source medicine in the prescription book.

4) A pharmacist shall not sell an interchangeable multi-source medicine –

a) if the person prescribing the medicine has written in his or her hand on the prescription the words 'no substitution' next to the item prescribed;
b) if the retail price of the interchangeable multi-source medicine is higher than that of the prescribed medicine; or
c) where the product has been declared not substitutable by the council.

price committee to implement transparent pricing mechanisms as per Sect. 22G,[263] before which the pharmaceutical industry is required to justify its pricing policy. 4) The option of requesting international tenders for medicines used in the public-health sector. Such cost-cutting measures are commonly applied in many countries.

Sales of generic drugs have been increasing considerably in the United States as well. While their share in the total volume of medicines sold was as low as 19% in 1984, it increased to 43% of all medicines prescribed in 1996. Cost savings are considerable. Even if we look only at medicines sold by pharmacies, the Congressional Budget Office estimates that buyers saved between 8 and 10bn US$ by changing from branded to substitute preparations in 1994 alone. In an official report, the US Government ascribes this to three factors: First, the Drug Price Competition and Patent Term Restoration Act of 1984 – also known under the name of Hatch-Waxman Act – made it easier for manufacturers to access the market for generic, non-antibiotic medicines. Second, most states had issued substitution acts after 1980 which permitted pharmacists to sell generic drugs even though the original prescription might have specified a branded preparation. And third, some governmental health programmes, such as Medicaid, as well as numerous private health-insurance companies actively supported generic substitution.

As we can see from these examples, the lawmaking initiative adopted by the government of South Africa, being neither out of the ordinary nor irreconcilable with the cost-cutting practices of other countries, did not discriminate against the industry concerned. This, however, was the argument of the plaintiff (PMA), which alleged that substituting generics constituted an unfair and discriminating practice, and that the quality of these medicines was greatly inferior. The considerable loss of profit involved was impossible to compensate in view of the enormous cost of research for these preparations, thus curtailing future options for research into new products.[264] Apart from the fact that the pharmaceutical industry so far has failed to deliver a transparent account of its real research expenditures, the enormous price reductions it has granted of its own accord indicate that the profits it has drawn from its sales so far are exorbitant rather than normal. Investigations undertaken in cooperation with the Universities of Minnesota and Yale have revealed that the discovery and development of the composition of two major antiretroviral medicines, d4T and abacavir, was financed by public funds received by these two

[263] 22G 1) The Minister shall appoint such persons as he or she may deem fit to be members of a committee to be known as the pricing committee.
2) The Minister may, on the recommendation of the pricing committee, make regulations –
a) on the introduction of a transparent pricing system for all medicines and scheduled substances sold in the Republic;
b) on an appropriate dispensing fee to be charged by a pharmacist or by a person licensed in terms of section 22C 1) a).
3) a) The transparent pricing system contemplated in subsection 2) a) shall include a single exit price which shall be published as prescribed, and such price shall be the only price at which manufacturers shall sell medicines and scheduled substances to any person other than the state.
b) No pharmacist or person licensed in terms of Section 22C 1) shall sell a medicine at a price greater than the price contemplated in paragraph a).
c) Paragraph b) shall not be construed as preventing a pharmacist or person licensed in terms of this Act to charge a dispensing fee as contemplated in subsection 2) b).
4) To the members of the pricing committee who are not in the full-time employment of the state may be paid such remuneration and allowances as the Minister, with the concurrence of the Minister of Finance, may determine.

[264] In its written statement of March 28, 2001 (Replying Affidavit), the PMA commented on this as follows: 'If no encouragement in terms of reasonable financial returns on the required investment is to be allowed to the research-based multi-national pharmaceutical industry, the motivation for the research for a solution for this disease will disappear. Then the only remaining scenario is that the disease will find its own end: the funeral of the very last carrier of the virus.' (7.2.1.4).

universities, and that Bristol Meyers Squibb and Burroughs Wellcome later received licences for them.[265]

The authorisation of parallel imports is based on the well-known fact that identical preparations are marketed at extremely different prices in various countries.[266] Parallel imports are used by many European states as well as by South Africa. Recently, a case of parallel importation has come to the public notice in which the Philippine Department of Health together with the Department of Trade and Industry used a governmental company to purchase a certain branded preparation at a lower price in India, saving US$ 3.5m. When the Pharmaceutical and Health Care Association of the Philippines went to the Supreme Court to protest against this practice, the Court refused to entertain its complaint, stating that the practice was justified because it lowered the cost of treatment for patients in government hospitals. The PMA, on the other hand, branded the practice as an infringement of the right to intellectual property under WTO regulations, claiming that the Act would isolate South Africa from the rest of the world. However, its argumentation proved easy to refute with regard to generic substitutions, parallel imports, and price controls.[267]

Protesting against the planned creation of a price committee empowered to make recommendations to the Ministry of Health to the effect that producers should be obliged to sell their medicines at a specific price, and that the sales margins of pharmacies should be restricted to a minimum, the plaintiff claimed that its constitutionally-guaranteed rights to trade were being infringed. The South African Pharmacy Council replied by pointing out that direct or indirect price controls had already been established in most market-economy systems, including Denmark, Germany, the Netherlands, and Sweden. In Canada, a Patented Medicines Review Board was created in 1987 in an effort to put prices under pressure. While this effort was successful, the pharmaceutical industry's suit for infringement of constitutional rights was not.

There was no confrontation over the legal core problem of this dispute, the relationship between WTO law, human rights, and national constitutional law, because the PMA withdrew its complaint soon after the first hearing. Thus, we were deprived of a court ruling on this highly important point, which would have been significant far beyond the borders of South Africa. Doubtlessly, some of the reasons for this development include the fact that the suit attracted a great deal of public attention, as well as the continually-growing volume of protests against the behaviour of the pharmaceutical industry, which were supported by a group of AIDS activists. Key members of the group included the trade union federation COSATU and especially the Treatment Action Campaign (TAC), which appeared on the scene in December 1998. Having organised a number of demonstrations, it became truly popular only when it mounted a campaign against Pfizer Inc. to induce the company to lower the price of its anti-fungal preparation Diflucan/Fluconazole. In October 2000, TAC members returning from a trip to Thailand brought

[265] Cf. M. Heywood (2001), p. 15.
[266] Thus, for instance, the cancer drug Zantac is sold by GlaxoWellcome for Rs. 17.39 in India, for Rs 658.36 in Indonesia, for Rs. 603.24 in Great Britain, and for Rs. 1200.38 in the US. In July 2000, the Committee for Proprietary Medicinal Products of the European Union granted an approbation to GlaxoWellcome for its antiretroviral medicine Trizivir. In a press release, the company described the merits of the medicine as follows: 'its potent HIV activity in antiretroviral naive patients and that only one tablet twice daily is required, with no food or water restrictions. Furthermore, the simplified regimen of Trizivir may help to improve adherence to treatment, one of the key challenges in managing the treatment of HIV infection.' However, as the cost of the drug amounts to US$ 2,409 per person and year, its use is restricted to the rich countries of the north. In India, Cipla Ltd. developed a similar triple-combination drug which is supposed to be similarly well tolerated. Cipla offered it at a price of US$ 350 per person and year. Cf. M. Heywood (2002), p. 223.
[267] Cf. M. Heywood (2001), p. 16.

5,000 tablets of the generic drug Fluconazole/Biozole back to South Africa with them. When they announced a campaign to challenge the abuse of this patent at a press conference, they rang in an intense public debate on patent abuses and counter-strategies.[268] Encouraged by this success, the TAC decided to join the legal dispute between the PMA and the government in the capacity of *amicus curiae*[269] so as to take a hand in the legal argument.[270] The TAC's argumentation focused on the human right to health, which in case of a conflict takes precedence over the right to private property as expressed in patent law, particularly when that right is abused. It argued that the three regulations in the Amendment Act which had come under attack from the PMA could not be unconstitutional as they enabled the government to fulfil its obligation to implement the constitutional right of people to have access to health care, to protect the constitutional rights to personal dignity (Sect. 10), life (Sect. 11), and equality (Sect. 9), and to act in the best interests of the children (Sect. 28).

On the international plane, the TAC had previously established contacts with Oxfam, Médecins sans frontières, Action for Southern Africa (ACTSA), and the Health GAP Coalition in the United States. When hearings began on March 5, large-scale demonstrations took place not only in Pretoria, where they were led by the COSATU and the churches, but also in 30 other cities worldwide, from the United States to Australia. 250 organisations from 35 countries had signed a petition demanding the withdrawal of the suit. When the plaintiffs withdrew unconditionally and even agreed to bear the cost of the proceedings, they were doubtlessly capitulating before the pressure of organised public opinion,[271] but they had also seen that their enterprise was legally hopeless. In a declaration issued jointly with the pharmaceutical companies, the government undertook to observe international law as well as the trade obligations resulting from it, meaning the TRIPS Agreement and patent protection regulations. In addition, pharmaceutical producers would be consulted with regard to the implementation of applicable drug laws. This marked the point at which the pharmaceutical corporations gave up (at least) their legal resistance against the Act, which finally came into force in March 2003. The government is currently about to establish the price committee as planned,[272] but there are no plans at the moment to set up facilities for producing generics and/or importing cheaper preparations.

Quite obviously, the TRIPS Agreement is being used again and again to undermine the options and capabilities of producing much cheaper but equally effective generic versions of medicines patented in industrialised countries in India, Thailand, Brazil, South Africa, and other states. Apart from the fact that this practice merely serves to fortify the monopolies held by gigantic transnational pharmaceutical corporations in contravention of the dogma of free trade on which WTO law is based, it also conflicts with the fundamental needs of people plagued by diseases and epidemics who live in poor countries, where governments find it difficult to comply with their obligations under the human-rights conventions to which they have acceded. On the other hand, the story of the legal dispute in South Africa and its surprising outcome shows that it is

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[268] On this and further TAC activities, see M. Heywood (2001), pp. 7ff.

[269] *Amicus Curiae* (Lat. friend of the court) is a term in Anglo-American procedural law that describes a person or organisation with a strong interest in a legal dispute which participates in the proceedings without being either plaintiff or defendant. By law, an *amicus curiae* must be admitted by the Court with the consent of the party he will be supporting.

[270] On strategy considerations regarding this step, cf. M. Heywood (2001); J. Berger (2002).

[271] Under the headline 'The Call that Won the Drugs Battle', the Sunday Times reported on April 22, 2001, that UN Secretary General Kofi Annan had called President Thabo Mbeki on the phone and told him 'he had five of the biggest drug companies in the world knocking at his door, asking him to untangle them from a three-year court battle with the South African government … The case had been deeply damaging to the pharmaceutical industry, casting it in a role of evil empire to thwart the Third World's efforts to get affordable medicines.'

[272] According to oral information by Debbie Pearmain, Johannesburg.

obviously the political problems that are ultimately more difficult to overcome than their legal counterparts.

Although it was not created for the purpose of solving these health and poverty problems, the TRIPS Agreement was given so many 'fail seams' that it cannot effectively oppose governmental obligations to provide care and services. Art. 7, Art. 8 Par. 1 and 2, and Art. 30 and 31 of TRIPS contain far-reaching exceptions that merely need to be utilised fully and aggressively. The objective laid down in Art. 7 of TRIPS, for instance, that patents should be protected to 'contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge' applies to India, Brazil, and South Africa, as well as to the EU states and the US. However, strictly protecting patents for a term of 20 years merely serves to concentrate technological progress wherever it is currently at home, preventing its transfer to those countries which still have to create the necessary environment, and even draining labour and technology from countries like India. Although no judgement has been forthcoming in South Africa, the very fact that the content and purposes of TRIPS have been debated at large proves its integration in the system of human rights. Adopted six months after the legal dispute in South Africa ended in favour of governmental health policy, the Doha Declaration shows what political options are open to governments, if they only were prepared to seize them.[273] While the fact that only three diseases of epidemic character, namely AIDS, tuberculosis, and malaria are mentioned in the Declaration does constitute a defect, it offers an opportunity to extend the catalogue to other diseases that spread with similar rapidity and can only be controlled with the aid of medicines that are protected by patents and therefore unaffordable.

At least in South Africa, the political problems raised by the question of how to deal with the epidemic are of greater dimensions. Even after its victory over the pharmaceutical industry, the government refrained from declaring a 'national emergency or other circumstances of extreme urgency' which would have enabled it under Art. 31 of TRIPS to switch to imported or locally-produced generics and parallel imports of medicines protected by patents. The policy pursued by the government is quite obviously different. After the retreat of the pharmaceutical industry had been announced, Health Minister Dr. Tshabalala-Msimang made the following statement:

> 'It does not mean, because you do not produce antiretrovirals and administer them, you are not treating people who are HIV positive. I think this must be clear.' She went on to say, 'The issue of the affordability of medicines is still with us. These medicines are not affordable. I think all of us sitting here, if we care to read newspapers like the Mail and the Guardian that have demonstrated – beyond any doubt – that they are very much unaffordable… they are not affordable as far as we are concerned.'

Sketching out the concept of the government, she said,

> 'This is why South Africa has actually opted the way of using medicines for managing opportunistic infections. Because we know that if you manage opportunistic infections, and if you attend to the nutritional status of people living with AIDS, you improve their lives.'[274]

[273] Uganda's treatment programme, which is obviously exemplary, cannot be discussed within the framework of this study.
[274] O. Quist-Arcton (2001), p. 4.

What is more, the government's strategy vis-à-vis major transnational corporations rather relies on negotiations so as to avoid being leaned on in other areas. In this context, the price committee is to play an important role.

This is not the proper framework for discussing the propriety and potential success of this policy. Both COSATU and TAC as well as a number of foreign NGOs, such as Médecins sans frontières, confessed themselves disappointed at the government's response, reiterating the criticism which they had been levelling at the government's AIDS policy for a long time.[275] They saw no reason to abandon their demand for an HIV/AIDS treatment plan which, first and foremost, should provide for the nationwide supply of cheap antiretroviral drugs.[276] In August 2001, a coalition of groups of which TAC was a member sued the central government as well as all eight provincial governments for refusing to supply Nevirapine within the framework of the public-health system, a drug which Boehringer Ingelheim had meanwhile agreed to provide free of charge and which has proven effective in preventing the transmission of AIDS by mothers to unborn children. The various governments claimed that the drug was poisonous, to which the TAC responded by citing a number of expert opinions. Following the evidence submitted by the plaintiffs, the Supreme Court in Pretoria in a sentence pronounced on December 14, 2001 instructed both the central government as well as the provincial governments to arrange for the issue of Nevirapine to pregnant mothers and develop a comprehensive national programme to combat the transmission of AIDS in the womb.[277]

Against this decision, the governments appealed to the Constitutional Court, which reversed the sentence of the Supreme Court but replaced it by another sentence on July 5, 2001, which essentially imposed the same obligations on the governments but predicated compliance with these obligations on the availability of economic resources.[278] The Constitutional Court had dealt

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[275] Cf. e.g. J. Berger (2002), pp. 595ff. Berger also comments on the programmes to prevent mother-to-child transmission mounted by some provincial governments, pp. 601ff. At a conference on HIV and AIDS held in Braamfontein from November 30 to December 1, COSATU formulated detailed demands on the management of HIV/AIDS.

[276] Cf. S. Power (2003), pp. 54ff. The treatment plan was to cover the following aspects: 'Provision for voluntary counselling and testing; treatment of opportunistic infections; mother-to-child transmission prevention programmes; post-exposure prophylaxis for rape survivors and health-care workers; better treatment of sexually transmitted infections (e.g. acyclovir must be made available to treat Herpes in all clinics) and antiretroviral treatment for people living with HIV/AIDS. As part of a treatment plan, the government must implement community treatment programmes with antiretroviral therapy in every province by March 2003. One hundred thousand people should be on antiretroviral treatment by March 2004.' Equal treatment, Newsletter of the Treatment Action Campaign, Vol. No. 9, November 2002.

[277] The tenor of the decision was this: '1. It is declared, that the first to ninth respondent (federal and provincial governments) are obliged to make Nevirapine available to pregnant women with HIV who give birth in the public health sector, and to their babies, in public health facilities to which the respondents' present programme for the prevention of mother-to-child transmission of HIV has not yet been extended, where in the judgement of the attending medical officer, acting in consultation with the medical superintendent of the facility concerned, this is medically indicated, which shall at least include that the woman concerned has been appropriately tested and counselled.
2. ...
3. It is declared that the respondents are under a duty forthwith to plan an effective comprehensive national programme to prevent or reduce the mother-to-child transmission of HIV, including the provision of voluntary counselling and testing, and where appropriate, Nevirapine or other appropriate medicine, and formula milk for feeding, which programme must provide for its progressive implementation to the whole of the Republic, and to implement it in a reasonable manner.
4. ...'

[278] Constitutional Court of South African Minister of Health and Others v. TAC and Others, Case CCT 8/02:
'1. The orders made by the High Court are set aside and the following orders are substituted.
2. It is declared that:

with demands relating to the enforcement of social and economic rights, which are guaranteed by the South African Constitution to a considerable extent, on several previous occasions.[279] The first Case, Grootbom, was about claims to shelter and accommodation under Art. 26,[280] while the Soobramoney as well as the AIDS Case was about claims to health care under Art. 27.[281] The court left no doubt that these rights are adjudicable at all events, the only question being whether and to what extent the government may have failed to meet its obligations and what the scope of its obligation to take certain steps might be.[282] In the Grootbom Case, judge Yacoob outlined

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a) Sections 27 (1) and (2) of the Constitution require the government to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV.
b) The programme to be realised progressively within available resources must include reasonable measures for counselling and testing pregnant women for HIV, counselling HIV-positive pregnant women on the options open to them to reduce the risk of mother-to-child transmission of HIV, and making appropriate treatment available to them for such purposes.
c) The policy for reducing the risk of mother-to-child transmission of HIV as formulated and implemented by government fell short of compliance with the requirements in subparagraphs (a) and (b) in that:
i) Doctors at public hospitals and clinics other than the research and training sites were not enabled to prescribe Nevirapine to reduce the risk of mother-to-child transmission of HIV even where it was medically indicated and adequate facilities existed for the testing and counselling of the pregnant women concerned.
ii) The policy failed to make provision for counsellors at hospitals and clinics other than research and training sites to be trained in counselling for the use of Nevirapine as a means of reducing the risk of mother-to child transmission of HIV.

3. Government is ordered without delay to:
a) Remove the restrictions that prevent Nevirapine from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV at public hospitals and clinics that are not research and training sites.
b) Permit and facilitate the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV and to make it available for this purpose at hospitals and clinics when in the judgement of the attending medical practitioner acting in consultation with the medical superintendent of the facility concerned this is medically indicated, which shall if necessary include that the mother concerned has been appropriately tested and counselled.
c) Make provision if necessary for counsellors based at public hospitals and clinics other that the research and training sites to be trained for the counselling necessary for the use of Nevirapine to reduce the risk of mother-to-child transmission of HIV.
d) Take reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV.

4. The orders made in paragraph 3 do not preclude government from adapting its policy in a manner consistent with the Constitution if equally appropriate or better methods become available to it for the prevention of mother-to-child transmission of HIV. …'

[279] The following decisions are most generally known: Soobramoney v. Minister of Health, KwaZulu-Natal, 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC); and Government of the Republic of South Africa and Others v. Grootbom and Others, 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC).

[280] Art. 26:
'1. Everyone has the right to have access to adequate housing.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

[281] Art. 27: '1. Everyone has the right to have access to health care services, including reproductive health care; sufficient food and water; and social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
2. The state must take reasonable legislative and other measures, within available resources, to achieve the progressive realisation of each of these rights.
3. No one may be refused emergency medical treatment.'

[282] TAC (Note 268), p. 18.

very clearly the specific problems relating to the implementation of constitutional rights that exist in South Africa:

> 'This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the State to act positively to ameliorate these conditions. The obligation is to provide access to housing, health care, sufficient food and water, and social security to those unable to support themselves and their dependants. The State must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done.
> I am conscious that it is an extremely difficult task for the State to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the State is not obliged to go beyond available resources or to realise these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the State to give effect to them. That is an obligation that Courts can, and in appropriate circumstances, must enforce.'[283]

These statements, which apply to all social and economic rights enshrined in the Constitution of South Africa, were linked by the court to the so-called 'minimum core' concept that was developed by the United Nations Committee on Economic, Social and Cultural Rights (CESCR) on the basis of Art. 2 Par. 1 of the Social Covenant. This regulation obliges states in each and every case to ensure and guarantee the provision of minimum services, however difficult it may be to define the minimum in each case. In its General Comment No. 3 of 1990, the Social Covenant Committee explained that:

> 'A State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être. By the same token, it must be noted that any assessment as to whether a State had discharged its minimum core obligations must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps "to the maximum of its available resources". In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.'[284]

In its General Comment No. 14 of 2000, the Committee gave a more precise definition of the substance of the right to health laid down in Art. 12 of the Social Covenant, making particular mention of the governmental obligation to promote health research, open up access to affordable treatment and especially affordable medication to those suffering from diseases that are particularly widespread in poorer countries, such as tuberculosis, malaria, and HIV/AIDS, to implement national programmes to secure the right to health, to clarify international obligations, etc.[285]

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[283] Grootbom (Note 279), No. 6 Par. 93-94.
[284] Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3, The Nature of States Parties' Obligations (Art. 2.1), December 14, 1990, Par. 10.
[285] Cf. CESCR, General Comment No. 14, E/C. 12/2000/4 of May 11, 2000.Cf. also: Commission on Human Rights (2001) pp. 10ff.

Art. 26 and 27 oblige states to take steps of a different nature. While Par. 1 obliges states to guarantee specific rights of their citizens, Par. 2 obliges states to 'take any reasonable legislative or other steps within the framework of available resources' in order to 'achieve the gradual realisation of these rights'. These two norms only appear to contradict each other. For, as the Constitutional Court explained, the two paragraphs need to be read together, so that any rights guarantees as per Par. 1 cannot exceed in scope that permitted by their gradual realisation within the framework of available resources. In the Soobramoney Case, the court ruled:

> 'What is apparent from these provisions is that the obligations imposed on the State by sections 26 and 27 in regards to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources.'[286]

The court concluded from this that a state can hardly be obliged to provide certain minimum services immediately and without delay, for instance.[287] Moreover, states should be given an opportunity to pick and choose from a wide range of political alternatives that which is considered most suitable to meet its obligations:[288]

> 'We therefore conclude that section 27 (1) of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27 (2). Sections 27 (1) and 27 (2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the state to "respect, protect, promote and fulfil" such rights. The rights conferred by sections 26 (1) and 27 (1) are to have "access" to the services that the state is obliged to provide in terms of sections 26 (2) and 27 (2).'[289]

Being structured as they are, all these social obligations offer alternative options of implementing them in concrete terms, and any attempt to define the 'minimum core' and/or the exact point at which a state fails to comply with its mission remains difficult. Even a criterion such as that of 'reasonableness' (Art. 26, 27 of the RAS Constitution: 'reasonable legislative or other measures') are fairly inadequate instruments to resolve these problems, as the Constitutional Court admits:

> 'The question is always whether the measures taken by the state to realise the rights afforded by section 26 are reasonable. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights is most in peril must not be ignored. If the measures, though statistically successful, fail to make provision for responding to the needs of those most desperate, they may not pass the test of reasonableness.'[290]

In none of the cases it had to deal with, the court left any doubt that despite the difficulties of applying the 'test of reasonableness', the government's obligation to take action is legally binding

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[286] Soobramoney (Note 279), No. 6 Par. 11.
[287] TAC (Note 268), p. 24.
[288] These opinions conform to the ruling of the German Federal Constitutional Court on the obligations of the government to take action under the social state principle; Cf. BVerfGE 33, 303ff.
[289] TAC (Note 268), p. 26.
[290] Summary of Grootbom (Note 279), pp. 1ff.

and ultimately definable. Thus, it ruled that health authorities had not only failed to comply with the general duties resulting from Art. 27 of the Constitution, but had also failed to implement relatively concrete steps, from protecting mothers and children from the transmission of AIDS in the womb to easier access to specific medicines and the provision of comprehensive consultation and services.[291] Even so, this decision did nothing to change the fundamentally dismissive attitude of the government towards commercial antiretroviral medicines, at least for the time being.[292]

[291] Cf. the tenor of the TAC Decision, Note 268 above. The decision fully agrees with the report by the UN High Commissioner on the relationship between the TRIPS Agreement and the right to health, Commission on Human Rights (2001), Par. 29ff, pp. 10ff.

[292] Cf. S. Power (2003), pp. 26ff. At the end of March, 2003, Finance Minister Trevor Manuel said that antiretroviral drugs were nothing but 'voodoo' remedies, whereas the Treatment Action Campaign (TAC) has launched a campaign of civil disobedience. Several South African companies have already begun to finance the treatment of their sick employees with these drugs, arguing that this made more sense in economical terms than to keep on recruiting more employees.