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The Transfer of Data Abroad by Private Sector Companies: Data Protection Under the German Federal Data Protection Act

By Jutta Geiger*

A. Introduction

Private sector companies face a major challenge in ensuring compliance with the many detailed data protection rules that can apply. The compliance burden is further increased if a business enterprise operates in several countries with different data protection rules. This may complicate the exchange of data within the enterprise. The purpose of this article is to plot a path through these rules governing the transfer of personal data abroad.

German law distinguishes between the general provisions on the protection of personal data for private sector companies under the Bundesdatenschutzgesetz (BDSG – German Federal Data Protection Act)¹ and the specific data protection provisions specified in numerous enactments and regulatory provisions (e.g., Teledienstedatenschutzgesetz [Teleservices Data Protection Act], the Telekommunikationsgesetz [Telecommunications Act], and the Medien-undienste-Staatsvertrag [Interstate Agreement on Media Services]). Where specific data protection provisions apply, they take precedence over the provisions of the BDSG.²

The BDSG only applies to information concerning the personal or material circumstances of an identified or identifiable individual (personal data); it does not cover information relating to legal entities.³ The BDSG applies to private sector companies to the extent that they process or use personal data by means of data processing systems or collect data for such systems. It also applies to private sector companies in so far as they process or use personal

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² Section 1 (3) of the BDSG.
³ Section 3 (1) of the BDSG.
data in or from non-automated filing systems or collect data for such systems.\textsuperscript{4} A non-automated filing system is any non-automated collection of personal data which is similarly structured and which can be accessed and evaluated according to specific characteristics.\textsuperscript{5}

The requirements as to the collection, processing and use of personal data by private sector companies are provided for in sections 27-31 of the BDSG. In addition, compliance is required in respect of the general provisions in sections 1-11 of the BDSG.

B. Obligatory Registration and the Data Protection Official

As a rule, private sector companies have to notify the competent supervisory authority prior to putting automated personal data processing procedures into operation.\textsuperscript{6} There are two exceptions to this rule. First, registration is not required if the controller has appointed a data protection official (this is obligatory if more than four employees are concerned with the collection, processing or use of personal data).\textsuperscript{7} Secondly, provided that no more than four employees are concerned with the collection, processing or use of the data, registration is also not required if the controller processes or uses personal data for its own purposes and either consent has been obtained from the data subject or the collection, processing or use serves the purpose of a contract or a quasi-contractual fiduciary relationship with the data subject.\textsuperscript{8}

Neither exception applies, however, if companies store personal data in the course of business for the purpose of transfer, irrespective of whether the data is transferred in anonymised form (e.g., credit inquiry agencies, or market and opinion research institutes).\textsuperscript{9} In those cases they have to register automated processing procedures irrespective of the number of employees concerned with data processing and irrespective of the appointment of a data protection official.

The details to be provided in the obligatory registration are evident from the registration form. Registration forms are available from the competent supervisory authorities. All private sector companies are supervised by authorities of the \textit{Länder} (Federal States)\textsuperscript{10} – for example in Hesse, these are the \textit{Regierungspräsidien} (Regional Councils) – with the exception of postal and telecommunications companies which are supervised by the \textit{Bundesbeauf-}

\textsuperscript{4} Section 1 (2) no. 3 of the BDSG.
\textsuperscript{5} Section 3 (2) sentence 2 of the BDSG.
\textsuperscript{6} Section 4d (1) of the BDSG.
\textsuperscript{7} Section 4d (2) of the BDSG.
\textsuperscript{8} Section 4d (3) of the BDSG.
\textsuperscript{9} Section 4d (4) of the BDSG.
\textsuperscript{10} Section 4d (1) in connection with section 38 (6) of the BDSG.
tragter für den Datenschutz (Federal Commissioner for Data Protection). Registration cannot be effected online.

As mentioned above, private sector companies where more than four employees are occupied with the collection, processing or use of personal data are required to appoint a data protection official within one month of commencing their activities. If data is not collected, processed or used automatically, there is no such obligation if less than 20 persons are permanently employed for this purpose. A data protection official is to be appointed irrespective of the number of employees if special types of personal data, as defined in section 3 (9) of the BDSG (e.g., information on a person’s racial and ethnic origin, political opinions, religious or philosophical convictions, union membership, health or sex life) or personal data that is intended to appraise the data subject’s personality are automatically processed. The same applies if personal data is collected, processed or used in the course of business for the purpose of transfer or for the purpose of transfer in anonymized form. The appointment of the data protection official must be made in writing.

The data protection official shall – if necessary, upon consultation with the competent supervisory authority – do his or her utmost to comply with the provisions pertaining to data protection. To that end, he/she must monitor the proper use of the data processing programs and familiarize the persons dealing with data processing with the relevant provisions. In addition, he/she is responsible for providing information on stored data and to address complaints in connection with the collection, storage and use of personal data. Finally, in the event of supervisory measures, the data protection official is the contact person for the competent supervisory authority.

The data protection official shall be directly subordinate to the head of the private sector company. He or she shall not, however, be bound by instructions given by management in his/her limited tasks of monitoring and rendering advice.

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11 Section 4d (1) of the BDSG.
12 Section 4f (1) sentence 3 of the BDSG.
13 Section 4f (1) sentence 6 in connection with section 4d (5) of the BDSG.
14 Section 4f (1) sentence 6 of the BDSG.
15 Section 4f (1) sentence 1 of the BDSG.
16 Section 4g (1) sentences 1 and 2 of the BDSG.
17 Section 4g (1) sentence 3 of the BDSG.
18 Section 4g (2) sentence 2 and section 4f (5) sentence 2 of the BDSG.
19 This may be inferred from section 38 (5) sentence 3 of the BDSG.
20 Section 4f (3) of the BDSG.
The data protection official must possess the requisite expertise and reliability to perform his or her duties. This requires that the data protection official is familiar with data processing processes within the business enterprise and has basic knowledge of the relevant data protection law. Requisite reliability is always lacking if the data protection official is at the same time entrusted with tasks which may result in a conflict of interests. For this reason, the head of the personnel department or the head of the EDP (electronic data processing) may not be appointed as data protection official. The data protection official need not be employed in the business enterprise, i.e., external data protection officials may also be appointed.

C. Permissibility of Data Processing

Pursuant to section 4 of the BDSG, the collection, processing and use of personal data is permissible only if the Act or another legal provision so allows or stipulates or the data subject has consented to it. Personal data is generally to be collected from the data subject who is to be informed about the identity of the controller and the purpose of the collection, processing and use of personal data.

For private bodies, the statutory permission to collect, process and use personal data is found in sections 28-30 of the BDSG and – as regards the transfer of data abroad – sections 4b and 4c of the BDSG.

The requirements as to effective consent are provided for in section 4a of the BDSG. Consent shall be effective only when based on the data subject’s free decision. This requires that the data subject was informed in advance of all relevant circumstances for the purpose of making his or her decision.

Furthermore, consent must be given without the data subject being put under duress. In this regard, a relevant consideration is whether the data subject was, due to a certain situation (e.g., in an employment relationship) under social or economic duress to give its consent.

As a rule, consent must be given in writing to be effective, i.e., it requires the hand-written signature or a qualified electronic signature in accordance with the German Signaturgesetz (Digital Signature Act). Opinion is divided as to the circumstances in which, in exceptional cases, those requirements may be waived. Special urgency justifies a waiver of the written form requirement. As an alternative to the written form requirement or an elec-

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22 Section 4a (1) sentence 2 of the BDSG.
tronic signature, only express oral consent can be considered.\textsuperscript{27} For instance, in opinion polls conducted over the telephone, consent given over the telephone is deemed to be sufficient if written consent is unable to be obtained or if the interviewer’s work would be rendered unreasonably more difficult.\textsuperscript{28} Consent given implicitly is insufficient and consent may not be replaced by the granting of a right of revocation.\textsuperscript{29}

D. Transfer of Data Abroad

With the revision of the BDSG by an amending Act dated 18 May 2001, German law for the first time prescribed the circumstances in which private bodies are permitted to transfer personal data abroad. In doing so it implemented the provisions of the Data Protection Directive of the European Community.\textsuperscript{30}

In relation to the provisions governing the admissibility of data transfer abroad, a distinction is made between those countries in which the EC Data Protection Directive is applicable – in addition to the Member States of the European Union (EU), they include the Member States who are signatories to the Treaty on the European Economic Area (EEA), i.e., Liechtenstein, Norway and Iceland – and other countries (third countries). Transfers within countries in which the EC Data Protection Directive applies are deemed to be “within the country”, i.e., the cross-border transfer of data is subject to the same conditions as the transfer of data between bodies domestically (general transfer conditions).\textsuperscript{31} On the other hand, additional conditions must be complied with in respect of transfer of data to third countries unless those third countries provide for a comparable level of data protection.\textsuperscript{32}

I. Definition of Data Transfer

The concept of transfer is defined in section 3 (4) no. 3 of the BDSG. It means the disclosure to a third party of personal data stored or obtained by means of data processing either through transmission of the data to a third party or through the third party inspecting or retrieving data held ready for inspection or retrieval. The decisive factor in the case of data transfer is not whether the recipient stores the data.\textsuperscript{33}

Pursuant to section 3 (8) of the BDSG, a “third party” is any natural person or legal entity other than the controller with the exception of the data subject and the persons and bodies

\begin{itemize}
\item \textsuperscript{27} Gola/Schomerus, BDSG, Kommentar, 7th edition 2002, section 4a, note 13.
\item \textsuperscript{28} Gola/Schomerus, BDSG, Kommentar, 7th edition 2002, section 4a, note 13.
\item \textsuperscript{29} Gola/Schomerus, BDSG, Kommentar, 7th edition 2002, section 4a, notes 14 and 20.
\item \textsuperscript{30} Directive 95/46/EC, Official Journal L 281 p. 31.
\item \textsuperscript{31} Section 4b (1) of the BDSG.
\item \textsuperscript{32} Section 4b (2) of the BDSG.
\item \textsuperscript{33} Schaffland/Wiltfang, BDSG, Kommentar, last update: March 2003, section 3, note 57.
\end{itemize}
commissioned to collect, process or use personal data in Germany, in another Member State of the European Union or in another state party to the Agreement on the European Economic Area.

By use of the wording "other than the controller", the law focuses on the legal rather than the economic entity. Accordingly, data exchange between separate legal entities which are economically affiliated (groups of companies), or the disclosure of personal data by a legally independent body of a business enterprise to another legally independent body of the same business enterprise, constitutes a transfer. A parent company is thus a third party in relation to its subsidiary.

On the other hand, there is no transfer if the data is disclosed within the same legal entity (e.g., from one department or branch to another). If the branch is, however, situated in a third country and governed by that law, it may, in the opinion of some commentators, be deemed to be a third party because otherwise personal data could be transmitted from the European Community, in which there is uniform data protection, without any inspection being conducted.

Commissioned collection, processing and use of personal data is governed by section 11 of the BDSG. Where data is commissioned to be processed, responsibility for compliance with the relevant statutory provisions rests with the principal. The agent, who may process the data only as instructed by the principal, is treated as part of the principal and not as a separate entity. As agents situated in third countries are deemed to be third parties, the disclosure of personal data to them is governed not by section 11 of the BDSG, but by the provisions on data transfer to third countries.

II. General Transfer Conditions

If personal data is collected from the data subject for the purpose of transfer, the controller is obliged pursuant to section 4 of the BDSG to inform him or her of the categories of recipients in so far as the circumstances of the individual case provide no grounds for the data subject to assume that data will be transferred to such recipients. The admissibility of the transfer of personal data is subject to the general requirements of sections 28-30 of the BDSG.

Section 28 (1) of the BDSG regulates the collection, storage, modification or transfer of personal data or their use as a means of fulfilling one's own business purposes. Section 28 (2) and (3) of the BDSG regulate the permissibility of transfer of personal data for another purpose (among others, for purposes of advertising, market and opinion research, where the data is compiled in lists or is otherwise combined concerning members of a group of persons). Pursuant to section 28 (4) of the BDSG, data transfer for the purposes of advertising

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or market and opinion research is prohibited if the data subjects object. Section 28 (5) of the BDSG concerns the proposition that a recipient of personal data can only use it for the purpose for which it was transferred. Section 28 (6)-(9) of the BDSG prescribe the conditions under which the collection, processing and use of special types of personal data (sensitive data) is permitted. Section 29 of the BDSG concerns the collection and storage of data in the course of business for the purpose of transfer and section 30 of the BDSG concerns the collection and storage of data in the course of business for the purpose of transfer in anonymised form. Section 31 BDSG states that personal data stored for data protection control, security or the operation of processing systems is only to be used for such purposes.

Section 28 (1) of the BDSG, which relates to the processing of data as a means of fulfilling the controller's own business purposes, is the most relevant of these three provisions because it applies to the transfer of personal data of employees or customers. The following discussion is therefore limited to this provision.

Section 28 (1) of the BDSG specifies three situations in which the transfer of personal data is permitted.

First, in the event that a contractual relationship or a quasi-contractual fiduciary relationship exists between the controller processing the data and the data subject, transfer of data is permitted provided it serves the purpose of that relationship. In this regard, a contract may specifically contemplate the disclosure of data to third parties such that there would be no difficulty in establishing this requisite purpose (e.g., a travel agent selling flights will have to disclose personal data of customers to the airlines to book the flights). Similarly, the purpose of a quasi-contractual fiduciary relationship (for instance, prior to entering into an agreement), may contemplate the disclosure of data, e.g., in relation to obtaining information on the credit worthiness of the customer.

Secondly, the transfer or use of personal data for another purpose is permitted to the extent that it is necessary to safeguard the legitimate interests of the controller and there is no reason to assume that the data subject has an overriding legitimate interest in his data being excluded from transfer. A data controller is therefore required to consider whether its own interests in transfer are overridden by the data subject's interests in the data not being transferred, bearing in mind that the interests of each must be "legitimate", which entails a reasonable assessment of the circumstances giving rise to the interests and the effect which a transfer could have on both sides' interests. In this context, one may note that the transfer of personal data within the framework of a due diligence during a corporate acquisition may be permitted. However, the transfer of such data may equally be prohibited if the information requirements of the potential purchasers can be met by a transfer of data in anonymised form.

Thirdly, data may be transferred if the data is generally accessible or if the controller would be entitled to publish it, unless the data subject's legitimate interest in his data being ex-

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cluded from transfer clearly outweighs the justified interest of the controller of the filing system.

Section 28 (1) of the BDSG states further that in connection with the collection of personal data, the purposes for which the data is to be processed or used are to be specified in concrete terms. Although that specification need not necessarily be made in writing to be effective, a written specification is advisable to avoid any doubt. Because the legislation requires a concrete and thus unambiguous specification of purposes, the controller of the filing system is to be held responsible in cases of doubt, i.e., in cases of doubt, a change of purpose is to be assumed. If a data controller does change or broaden the purpose of transfer, it can and ought to check whether the transfer is permissible under section 28 (2) and (3) of the BDSG.

III. Legal Requirements for the Transfer of Data to Third Countries

The transfer of personal data to third countries is permitted only if, in addition to the general transfer conditions, (section 4 and sections 28-30 BDSG), the additional requirements of sections 4b, 4c of the BDSG are satisfied.

Pursuant to section 4b (2) sentence 2, the transfer of data to a third country is permissible only if there is an adequate level of data protection there. If that is not the case, one needs to consider whether the exceptions in section 4c (1) of the BDSG apply. If those exceptions do not apply, the competent supervisory authority may authorise individual transfers of data or certain types of transfers of personal data to bodies in third countries as per section 4c (2) of the BDSG if the controller provides evidence of adequate safeguards with respect to the protection of privacy and the exercise of corresponding rights, such safeguards resulting from contractual clauses or binding corporate regulations.

IV. Adequate Level of Data Protection

Pursuant to section 4b (2) sentence 2, the transfer of data to a third country ought not be effected if the data subject has a legitimate interest in excluding the transfer, in particular if an adequate level of data protection is not guaranteed. Section 4b (3) of the BDSG contains a non-exhaustive list of the circumstances to be taken into account when considering the adequacy of the recipient's data protection. Particular consideration shall be given to the nature of the data, the purpose, the duration of the proposed processing operation, as well as the country of origin, the recipient country and the legal norms, professional rules and security measures which apply to it.

Pursuant to section 25 (4) of the Data Protection Directive of the European Community, the European Commission may determine that a third country does not guarantee an adequate level of data protection. Pursuant to section 25 (6) of the Directive, the European Commission may determine that a third country guarantees an adequate level of data protection on the basis of its national legal provisions or international obligations. Those determinations are binding on EU Member States. To date, the Commission has only issued a general posi-
Data Transfer

In addition, the Commission issued a decision stating that there is a sufficient level of data protection in relation to personal data which is transferred from a Member State to the United States of America if principles of “safe harbor” in relation to data protection attached to the decision as schedule I are complied with. Those principles implement the “Frequently Asked Questions” (FAQ), attached to the decision as schedule II, contained in guidelines issued by the U.S. Department of Trade & Commerce on 21 July 2001. The U.S. Department of Trade & Commerce or a body nominated by it keeps a list of the organisations which are obligated to adhere to the Safe Harbor Principles. This can be accessed by the public on the Internet.

Finally, the Commission determined that the standard contractual clauses, attached as a schedule to its decision of 15 June 2001, ensure adequate guarantees for the transfer of personal data from Member States of the EU to third countries. The decision obliges Member States to recognise that business undertakings or organisations which use such standard clauses in agreements on the transfer of personal data to third countries, guarantee an adequate level of data protection. Another decision of 27 December 2001 contains standard contractual clauses for the transfer of personal data by data controllers in the EU to a recipient merely functioning as an agent in a third country.

V. Data Transfer to Third Countries Without an Adequate Level of Data Protection

Section 4c (1) sentence 1 of the BDSG prescribes the conditions, or exceptions, under which a transfer of data to bodies in third countries is, in exceptional cases, also permitted notwithstanding that an adequate level of data protection cannot be guaranteed.

First, the provision states that the transfer is permitted if the consent of the data subject has been obtained. As the Act already contains the general rule that consent is sufficient to allow the transfer of personal data this provision simply clarifies that that general rule also applies to the transfer of data to third countries without an adequate level of data protection. In such a case, consent is only effective if the data subject has not only been informed about

41 www.export.gov/safeharbor.
44 Section 4 (1) BDSG.
the scope and purpose of the transfer of data, but also about the potential inadequacy of data protection on the part of the body receiving the data.  

Second, the transfer of data to third countries is permitted if it is necessary for the conclusion or performance of a contract between the data controller and the data subject. This condition may be fulfilled, for example, if an employment contract includes a clause according to which the employee has to perform a part of his or her duties with an affiliated company in a third country. However, if it is not evident from the employment contract that the contract also relates to the affiliated company, a transfer of personal data to this company is only permissible with the consent of the employee.

The transfer of data is also permissible if the transfer is necessary for the conclusion or performance of a contract which has been or is to be entered into in the interest of the data subject between the controller and a third party. If, for example, a data subject concludes an agreement for a trip to a third country, the travel agent needs to arrange for accommodation in the third country and may transfer the requisite data of the data subject there for that purpose. Should the data in the third country also be given to a tour operator on site for the promotion of tour offers, the transfer of data is not necessary to perform the agreement and thus requires the consent of the data subject.

Furthermore, data may also be transferred if the transfer is necessary on important public interest grounds, or for the establishment, exercise or defence of legal claims or if the transfer is necessary to protect the vital interests of the data subject. Important public interests are unlikely to exist in the private sector. Vital interests may be deemed to exist if medical data is required to be transferred and the data subject is unable to give his or her consent. Finally, it is permissible to transfer data from public registers, such as from the Commercial Register in a third country with an inadequate level of data protection.

The recipient body is to be informed that the transferred data may be processed or used only for the purpose for which it has been transferred.

VI. Official Authorization


50 Section 4c (1) sentence 2 of the BDSG.
If none of the exceptions in section 4c (1) of the BDSG applies, the competent supervisory authorities may approve individual transfers or certain categories of transfers of personal data pursuant to section 4c (2) of the BDSG if the controller provides evidence of adequate safeguards with respect to the protection of privacy and exercise of corresponding rights. For the transfer of data within globally active groups, it is advisable to establish an internal level of data protection by way of "Codes of Conduct" which apply across the group.\textsuperscript{51}

E. Summary

A transfer of data exists if the stored data or personal data obtained by data processing is disclosed to a natural person or legal entity other than the controller or is stored for inspection or retrieval. The internal disclosure of data within the business enterprise to another department or branch does not constitute a transfer of data whereas the disclosure of data to an affiliated business undertaking – unless such affiliated business undertaking is commissioned to process the data – does constitute a transfer of data.

In the case of the transfer of data abroad, a distinction must be made between countries in which the Data Protection Directive of the European Community is applicable (Member States of the EU, Liechtenstein, Norway and Iceland) and other countries (third countries). The transfer of data to third countries is subject to special requirements.

In the case of a transfer of data to third countries, in addition to the general transfer conditions in sections 4, 28-30 of the BDSG having to be fulfilled, the requirements of section 4b of the BDSG (adequate level of data protection), a fact constituting an exception as provided for under section 4c (1) of the BDSG or an official authorisation pursuant to section 4c (2) of the BDSG must also be fulfilled.

However, to the extent that specific conditions for transfer cannot be met, personal data may be transferred if the data subjects’ free consent, either in writing or by way of qualifying electronic signature, can be obtained.

The Principle of Democracy: Watered Down by the Federal Constitutional Court

By Florian Becker

A. Background to the Constitutional Court’s Decision from 5 December 2002

For historic reasons, the parliamentary legislator of North-Rhine-Westphalia assigned important public responsibilities concerning water supply and distribution in the areas of the rivers Lippe and Emscher to the public-law bodies Lippeverband and Emschergenossenschaft. By law the compulsory members of theses bodies are the Land (federal state) North-Rhine-Westphalia, the municipalities situated in the respective territories, as well as private companies involved with water distribution or usage as well as companies profiting from the bodies’ work or making it more difficult. In 1990 the organizational structure of the two bodies was reformed and participation rights of the respective work forces were introduced. They were granted the right to name representatives to the bodies’ supervisory boards (councils) and the boards of directors, but not for the most powerful organs, the assemblies of the bodies’ members.

In order to understand the constitutional implications of this organizational reform it is necessary to shed some light on the legal structure of the principle of democracy as it is laid down in the German Basic Law.

B. The Principle of Democratic Legitimation in the Basic Law

Article 20.2.1 of the Grundgesetz (Basic Law) says that “The Federal Republic of Germany is a democratic and social Federal state. All state authority emanates from the people. It is exercised by the people by means of elections and voting and by separate legislative, executive and judicial organs.” The importance of these structural provisions for the German state is underlined by Article 79.3 of the Basic Law, which prohibits any amendment or alteration of the principles laid down in Article 20. Despite the obvious importance of the

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1 Decision of 5th December 2002 (2 BvL 5/98 und 2 BvL 6/98) (see: www.bverfg.de). In the following text I refer to the decision by citing its paragraphs.


3 The provisions are also binding for the state structure of the Laender (Article 28.3 of the Basic Law); see BVerfGE 9, 268 (281); 83, 60 (71); 93, 37 (66).
principle of democracy, it has taken German scholars and courts quite a long time to start a broad discussion about its detailed structures. But conflicts about subject matters such as the establishment of governmental departments not submitted to ministerial instructions, electoral rights of foreigners and worker participation in the public service have ignited a fierce dogmatic discussion about the principle of democracy and its shape under the Basic Law. The outcome of this discussion has been strongly influenced by several decisions of the Federal Constitutional Court and a famous article written by one of its distinguished judges.

By establishing that all state authority emanates from the people, the Basic Law imposes a demanding concept of legitimation for the state’s exercise of public power or for the exercise of public power that has been delegated by the legislator to other actors.

In order to understand this concept, one has to distinguish between the object and the subject of democratic legitimation. As for the first point, democratic legitimation has at least to be established for all amtliches Handeln mit Entscheidungscharakter (“official acts” making final and binding conclusions). This notion does not only comprise binding acts directed by the state and its branches towards individual citizens, but also acts internally preparing those binding decisions and participating in them (object of legitimation). There has to be an “unbroken chain of legitimation” from “the people” to the individual or the group of individuals finding the authoritative decision as representatives of public power. Hereby, legitimation is not a static concept, but it can be fulfilled to greater or to a lesser degree.

In order to evaluate the degree to which democratic legitimation is fulfilled in a concrete decision, two factors have to be taken into account: the personal and the factual aspect of

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7 BVerfGE 44, 125; 47, 253; 83, 37 and 60; 89, 155; 93, 37.


9 See BVerfGE 83, 60 (73); 93, 37 (67).
democratic legitimation. This mixture reflects the conclusion that any public decision-making is made up of two components: It is exercised by an individual or individuals on the basis of a conferred legal power (an entitlement which is regularly conferred upon the decision-maker by statute). While the first aspect demands that the decision is made upon a legal basis, being itself (or in the case of delegated legislation or by-laws legislated on the ground of) a parliamentary statute, the latter aspect makes it necessary that the deciding individual be appointed to his office by another individual closer to parliamentary control than the appointee. This chain of personal legitimation has to end with an official (a minister) immediately responsible to the parliamentary forum. This closes the link between the appointment of every single individual exercising public power and the will and control of “the people”. The parliamentary forum, to which the individualized end of the chain of legitimation is responsible, consists of Members of Parliament elected by “the people” as it is meant in Article 20.2.1. This notion refers to the totality of all citizens. At the same time it limits the electorate rights to them since any voting rights for non-citizens would diminish the influence “the people” as a whole have on the outcome of elections and furthermore on the composition of the parliamentary forum. Thus, by stating that all state authority emanates from “the people” the Constitution negatively expresses that there is no other source of legitimation for the exercise of state authority. If a public official is elected by a body only partially consisting of officials who are democratically legitimated themselves, it is necessary, in order to prevent the chain of legitimation from being cut off, that he be elected by a majority of democratically legitimated persons who are in the majority in the electing body (principle of double majority10). The two strains of democratic legitimation, the personal and the factual aspect, may even out each other, but they cannot wholly substitute each other (For example, when the chain of legitimation between the parliament and the actual official is quite long because there is a multitude of officials between them, this deficit can be compensated by a dense statute provision conferring legal power on this “last” official, though not leaving too much discretion to him).

C. The Principle of Democratic Legitimation and Self-Administrating Bodies

While there is no direct indication in the constitution that the demands of the principle of democratic legitimation would not have to be met in every single branch of public power (unless there is a constitutional justification for deviating from this concept), the Constitutional Court now claims that – although this principle has to be understood strictly in general – it applies to state and municipal administration in the first place, while up to now it has been left open whether, for the branches of “functional self administration”11 the constitution leaves some scope for a less stringent form of democratic legitimation brought about by the influence of individuals and organs not personally legitimated themselves.12

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10 See BVerfGE 93, 37 (67 et seq.).

11 About this topic see only Winfried Kluth, Funktionale Selbstverwaltung (1997).

12 Para. 161 et seq. and para. 167 of the decision.
Entities of self-administration in general are public-law bodies which are organizationally independent from the system of state administration but are nonetheless an organizational part of the state and do exercise public power conferred upon them by the state, *vis a vis* their members. These bodies are characterized by the fact that certain public affairs are self-administered by those individuals who are interested in them to a higher degree than the rest of “the people.” The state only has to ensure that the self-administering body complies with its legal frame work. The right of self-administration with regard to the municipalities is expressly guaranteed by Article 28.2.1 of the Basic Law. It is characterized by the fact that all people living together in a certain area should rule themselves with respect to all affairs of their community as long as the state has no prevailing interest for uniform rules. Hence this kind of territorial self-administration is linked to territorial concern by those submitted to it. In contrast to this, functional self-administration is based upon a concern for a certain subject matter shared by all obligatory members of the body. For instance, all business-people are organized by law in a local chamber of commerce, or all manual workers are organized in a local trade association.

The entities at the core of the dispute – the Lippeverband and the Emschergenossenschaft – are granted the right to self-administrate questions in connection with water supply in the area of the two rivers within their legal framework. Although the possibility of establishing self-administering bodies is not mentioned expressly in the Basic Law, it is beyond any doubt that they do not cause any constitutional problems in general – although their coherence with the principle of democratic legitimation has always been under discussion. In the judgment issued on 5th December 2002, the Federal Constitutional Court had to say something about the conditions the constitution sets out for the establishment of self-administering bodies in general. The Court was also confronted with the fact that the work forces of the two self-governing bodies had been granted participation rights with regard to the bodies’ work. Both aspects build up tensions with respect to the principle of democratic legitimation as set out in Article 20.2.1 of the Basic Law.

It is not evident under which conditions the parliament is allowed to establish a self-administering body and make membership obligatory for a certain group of individuals that are united by a certain common interest. The Federal Constitutional Court assumes that the parliament has wide discretion on this point. But in any case, there is a constitutional duty to regulate the internal organization of the body such that all organized interests have a

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13 Peter Unruh, 2001 VerwArch p. 531 (542).
16 Para. 170 et seq. of the decision.
chance to be considered adequately. Furthermore, it is only sometimes contested that
the parliament is not allowed to confer the administration powers upon the body concerning
questions that are “essential” for the exercise of the body’s members’ fundamental rights. 17
For reasons of democratic responsibility, those affairs have to be regulated by the parliament
itself. The Court itself stated, in an earlier decision, that only those tasks may be conferred
upon self-administrating bodies that the state does not have to perform itself through its own
administration. 18 As far as it was argued that all questions concerning water supply and
distribution were to be administered under the direct influence of the state, 19 the Court was
right to reject that idea. This is primarily because there are only a limited number of subjects
that have to be exclusively governed by the state in a narrow sense – for example, defense or
foreign policy. 20 But this is also because the tasks in question have traditionally been widely
administered by such bodies and no problems have arisen. 21

The establishment of self-administrating bodies is understood to create a certain tension
with respect to the principle of democratic legitimation set out above: as the latter is based
upon the idea that the starting point of all democratic legitimation is that every citizen has
the same right to determine all public affairs by casting his vote for the parliament, self-
administrating bodies privilege a certain group of people, whose affairs are not (or not in a
full scale) submitted to the determination of the general electorate. In contrast to the idea of
democratic equality, the bodies’ members are allowed to live under their own rules as long
as they do not infringe upon outsiders’ rights. Due to the limiting meaning of Article
20.2.1 of the Basic Law, it is quite clear that the individuals organized within a self-
administrating body are not “the people” in the sense of the wording used in that provision.
Hence, they are not a valid source of democratic legitimation for the decisions of the bodies
of which they are members. 22 Although these decisions are emanations of state power con-
ferred by law upon those bodies, their decisions are not made by personally legitimated
individuals since these are elected by the bodies’ assemblies (and not by another personally
legitimated individual ranking higher in the “chain of legitimation”). They have no personal
democratic legitimation in the constitutional sense.

17 See BVerfGE 33, 125 (158 et seq.); 34, 136 (192); 49, 89 (127); 83, 130 (142) and Hans Herbert v. Arnim, 1987
DVBl. p. 1241; Juergen Staup, Parlamentsvorbehalt und Delegationsbefugnis p. 136 et seq.; Dieter C. Umbach,
Dieter, in Festschrift Hans-Joachim Faller p. 111 (Wolfgang Zeidler / Theodor Maunz / Gerd Roellecke eds.,
1984).

18 BVerfGE 38, 281 (299).

19 That was said by the Bundesverwaltungsgericht which had laid the decision before the constitutional court; see
BVerwG 106, 64 (77 et seq.).

20 Hendler at p. 318, supra note 14; Hans Hugo Klein, in Festschrift fuer Ernst Forsthoff zum 70. Geburtstag p. 165
(179, note 71) (Roman Schnur ed., 1972); Ulrich Scheuner, in Gedaechtnisschrift fuer Hans Peters, p. 797 (815)
(Helmut Conrad / Hermann Jahreif / Paul Mikat / Hans Carl Nipperdey eds., 1967).

21 See e.g. BVerfGE 10, 89 (103); 24, 367; 58, 34; BVerwG 3, 1.

22 See the text at notes 33 et seq. of this article.
D. The Decision of the Court

In its decision the Federal Constitutional Court states that the principle of democratic legitimation, being established for state and municipal administration in the first place, may be “open” and “adjustable” in other contexts of public power. Hence, although self-administrating bodies (e.g. by making by-laws) regularly are emanating state power conferred upon them, the principle of democratic legitimation is not to be applied as stringently as in connection with state and municipal administration. Opposing the idea of a tension between democracy and self-administration, the Federal Constitutional Court is of the opinion that these two complement each other since both concepts realize the idea of the self-determining individual in a liberal constitutional order. Furthermore, the Court tries to strengthen its argument by pointing at the fact that self-administrating bodies are established by the central instrument of democratic government - the parliamentary statute. Carrying further its train of thought about the “openness” and “adjustability” of the principle of democratic legitimation, the Court comes to the conclusion that even the rules about the codetermination by the work force does not breach the principle of democratic legitimation, as both are likewise attached to the idea of “participation”.

In the concrete organizational shape of the bodies’ organs, the representatives of the work force have no majority for their own, as they only form a third of the boards’ members and a number of basic decisions are conferred on the assemblies of the bodies paying membership. The work force sends its representatives only to the board of directors and to the councils of the bodies that inter alia elect the boards of directors. Insofar as the workers’ representatives participate in decisions infringing private rights (for example, by issuing an order about the use of private land), they are in a minority position, and they are bound by the legal framework applicable for such an action. Furthermore such decisions are embedded in a complex system of controls, supervised by other institutions of the bodies in which the work force is not represented.

Obviously the Court sees that the work forces are not “the people” and thus are not a source of democratic legitimation, as referred to in Article 20.2.1 of the Basic Law. By sending representatives to the board of directors and the council, they take part in the exercise of the state power conferred to the self-administrating bodies without personal democratic legitimation. Nonetheless, according to the Court, a limited participation of the work force – in order to voice its needs and to influence its working conditions – can be justified under the

23 Para. 167 of the decision.
24 Expressly conceded in Para. 172 of the decision.
25 Para. 168 of the decision.
26 It has to be noted that the representatives of the working forces in the bodies organs are not directly elected by their fellows. A proposal of candidates has to be made by the regular workers representation body (existing in every branch of the public administration) consisting twice as many candidates as posts are to be staffed. Finally, the representatives of the working forces are elected by the assembly of members.
Independent Government Agencies

constitution. Although the work force is not originally responsible for the public tasks attached to the self-administrating bodies (the responsibility lies with its members), at least they participate in their fulfilment. Sending workers’ representatives to the boards of directors and the councils and hereby influencing the bodies exercise of public power may improve the efficiency of the bodies’ work. The parliament saw co-determination as a specific instrument to transfer knowledge from the work force to the executive level of the body. But it is neither entirely clear how this argument can justify anything other than the establishment of information channels between those two levels nor why co-determination comprises all subject-matters upon which the boards have to decide rather than being limited to those matters related to the working conditions of the work force. Thus, the parliament also stressed that co-determination means co-responsibility and that the latter improved the efficiency of the bodies work as well as industrial peace. Since the will of the parliament, as formulated in a statute, only becomes effective when implemented, anything strengthening this will by making its implementation more efficient is most welcome under the auspices of the principle of democratic legitimation.

For the constitutional court, these motives of the parliament are within its discretionary scope – although the decision gives a hint that the parliament may not go any further in varying the original sense of the principle of democratic legitimation. There is a certain degree of contradiction within the Court’s train of thought. One the one hand, it stresses the importance of workers’ representation within the managerial structure of the bodies for its performance. On the other hand, it tries to play down their influence on the bodies’ decisions. In contrast to the findings of the Court, it has to be claimed that the decision raises serious doubts on different levels.

E. Critique

First of all, the reasoning of the decision does not make entirely clear the degree to which the object of democratic legitimation (here: the decisions of the bodies) has any influence on the mode and level of the legitimation that the constitution demands. The Court distinguishes between acts of the state administration and the municipal administration, on the one hand, and decisions made by the bodies of functional self administration, on the other hand. It should have become obvious that the concept of self-administrating bodies does not entirely comply with the concept of democratic legitimation as it is laid down in the Basic Law in general. By claiming the opposite, it seems that the Court does not distinguish between the principle of democratic legitimation in a constitutional sense and the political idea of democracy and individual self-determination on. It may be true that – since the central idea of establishing self-administrating bodies in cases in which the constitution does not make it obligatory anyway (such as 28.2.1 of the Basic Law) is the idea of participation – this may lead to a close relationship between the democratic principle and the con-

27 In Para. 184 of the decision the court says that this organisational modification of the self-administrating bodies is still within the framework of the constitution.

cept of self administration. Viewed this way, the concept of self-administration may even be understood as a way to implement and realize democracy, because there are evident parallels between the two of them. In particular they both aim at political participation in subject matters of interest for the individual. But the idea of self-administration, as far as it is based upon the political or even philosophical concept of democracy, is wrapped up in the democratic constitution of the state and is only meaningful for the distribution of competences among the several branches of state power.

Even more, by referring to the establishment of the self-administrating bodies by statute as a realization of the democratic principle, the Court mingles the personal and the factual aspects of democratic legitimation. But since neither the members of the self-administrating bodies or its workforces are alternate sources of democratic legitimation as demanded in Article 20.2.1 of the Basic Law, nor is there a another (autonomous) source of such democratic legitimation, the establishment of self-administrating bodies can only be justified by a modification of the principle of democracy, which may be based upon other constitutional

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29 Similarly Emde, supra note 14.


33 By doing so, the court follows a new explanatory pattern for the democratic legitimation of self-administrating bodies established by W. Kluth at p. 373 et seq, supra note 11. If the idea of personal democratic legitimation rests upon the fact that the individual any public power is conferred upon has to be selected personally by another individual ranking higher in the chain of democratic legitimation, acts of self-administrating bodies Kluth sees this act of selection already made by the establishing statute in an abstract manner. But his concept rests upon the idea that the parliament is allowed to waive its competences (“Verzichtstheorie”, see Peter Badura, in Bonner Kommentar zum Grundgesetz, Art. 38 para 31 et seq. (Rudolf Dolzer / Klaus Vogel / Karin Grallhoff eds. 1966); Klein at p. 197, supra note 4; against this theory: Emde at 309 et seq., supra note 14). Furthermore, it mingles the concepts of personal and factual democratic legitimation without justifying this step properly.

34 It has been brought forward that the individuals united as members of such a body may be an alternate source of democratic legitimation as being a “people” in the sense of Article 20.2(1) of the Basic Law; see for this Brohm at p. 243 et seq., supra note 30; Emde, at p. 383 et seq., supra note 14; Herzog at para. 58, supra note 15; Kleine-Cosack at p. 117 et seq., supra note 30; Oebbecke at p. 88 et seq., supra note 4. Comprehensively against that idea: Jestaedt at p. 216 et seq., supra note 14.

35 As the members of the bodies are not personally legitimated themselves they cannot transfer any personal legitimation to the representatives of the working forces even if they get elected by the members’ assembly and not by the working forces themselves.
provisions. Taking this into account, the most convincing solution seems to be that the framers of the Basic Law knew about the existence of a wide variety of self-administrating bodies in Germany with deep roots in the constitutional history and that there is no hint that they were to be abandoned - even more so as they are expressly mentioned in the text of the constitution (see, e.g. Article 87.2(1) of the Basic Law). Thus, the establishment of these bodies and the loosened framework of the principle of democratic legitimation in that subject matter is – under certain conditions – justified by the constitution itself and not by any “openness” or “adjustability” of the principle in general.

But if the Court would have followed this train of thought, it would have had serious difficulties because it uses “openness” or “adjustability” as an “emergency exit” for not having to test workers’ co-determination against the principle of democratic legitimation. The constitutional acknowledgment of self-administrating bodies does not comprise any worker co-determination, as this was not known at the time of the drafting of the constitution. Thus, while the establishment of self-administrating bodies is compatible with the principle of democratic legitimation, under certain conditions any further modification of the principle, such as workers’ co-determination, has to be justified by other constitutionally valid reasons.

In an earlier case dealing with a statute to expand workers’ co-determination in the state administration of one Land, the Court found that the co-determination of decisions that are in need of democratic legitimation is possible but that there are two limits to it. On the one hand, co-determination may only apply to internal decisions within the administration as far as it is justified by the interests of the work force that are implied in their working relationship. On the other hand, the principle of democratic legitimation demands, for all decisions relevant for performance of the public functions, that the ultimate responsibility for decision-making power lies with those officials that are within the chain of personal democratic legitimation. The less a decision touches upon the performance of the public task assigned to the administrative branch and the more it touches upon the interests of its work forces, the further its co-determination may reach.

To make this scale more operable, the Court specified its reach by a threefold distinction. Firstly, there are decisions concerning the internal sphere of the working relationship, typically not having any repercussions on the performance of the public task. Obviously, in this case the possibility of co-determination is far-reaching, allowing for a merely factual democratic legitimation by the law, under the condition that a personally legitimated official is granted possibilities for intervention. Secondly, there are decisions concerning the internal sphere of the working relationship but also having effects on the performance of the public task. Here it is always necessary that, in the last resort, the decision be taken by a personally


37 BVerfGE 93, 37 (69).

38 BVerfGE 93, 37 (71 et seq.).
legitimated individual (or a respective group of individuals). In these two categories the principle of double majority comes into play, since the parliamentary accountability implied in this context can only be realized when the deciding organs are structured according to that principle. But even that does not always help: even if the majority of individuals comprising an organ are personally legitimated, some of them may cooperate with the workers’ representatives and hereby at least prevent a decision. Thirdly, there are decisions primarily concerned with the performance of the public task, but inevitably, at the same time, having an effect upon the interests of the work force. In that respect the parliamentary accountability must not be substantially restricted. As a consequence, any workers’ co-determination may only take place in a non-binding manner.

In that specific decision the Court did not finalize the grounds on which this structure of the workers’ co-determination in administrative branches is admissible as a limitation of the principle of democratic legitimation. There is no constitutional obligation to establish a system of co-determination in the administration, especially not for reasons of equality between the public and the private sector – the latter being submitted to intensive rules of co-determination – since those two simply cannot be compared. It seems that it would be sensible to argue from two points: on the one hand, the principle of the welfare state (Sozialstaatsprinzip) as laid down in Article 20.1.40 of the Basic Law has the same normative value as the principle of democratic legitimation, although it is not as structured in a dogmatic sense as the former and thereby not a very good basis for deriving the constitutional duties of the parliament. But at least it can be used as an argument for the admissibility of co-determination, even in the public sector. On the other hand, the fundamental freedoms of the work forces’ members (such as Articles 1.141 and 2.142 of the Basic Law) may also point in that direction43 insofar as they prevent any individual from being treated by the state and its branches like an object, i.e. without regard to his or her interests and needs. But the specific design of the colliding rules – the principle of democratic legitimation, on the one hand, and the constitutional provisions bringing arguments to bear on co-determination, on the other hand – makes it necessary to find a solution equally respecting all concurring principles. From that point of view, there is no justification at all for any limitation of the principle of democratic legitimation by integrating individuals into the organisational structure of the bodies’ organs if they are not a member of the work forces - as it is possible in the Lippeverband and the Emschergenossenschaft. Furthermore, it is difficult to understand why the Court allowed the parliament to deviate from the graded system of co-

39 Lecheler at p. 1081 et seq., supra note 6.
41 „The dignity of man is inviolable.“.
42 „Everyone has the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral code.“.
43 See only Ossenbuehl at p. 15 et seq., 26 et seq., supra note 6.
determination in the administrative sector invented in its earlier decision. The representatives of the work forces in the Lipperband and the Emschergenossenschaft do not only promote the social interests of their fellows, they also participate in the decision-making of the body. This far-reaching participation can neither be justified by the workers’ fundamental freedoms nor by the principle of the welfare state. It has to be said that any co-determination in the respective areas shifts the work forces from being the executors of the bodies’ decisions to being its creators. This is why the system of co-determination as established in the Lipperband and the Emschergenossenschaft does not comply with the demands of democratic legitimation. The Court was wrong to decide the opposite.
Anti-discrimination as a Program of Private Law?

By Eduard Picker

I. The State of Opinion and the State of Strategy

The controversy over the planned anti-discrimination laws in Germany, specifically the new provisions in private law to be discussed here, rages on unabated. Publications on this planned law are numerous. And, whether Pro or Contra, they turn out notably more engaged and heated than is suited to the lawyers’ traditional temperament. The fact that the formal discussions and rounds of debate, which were long ago extended to non-lawyers, continue to multiply shows symptomatically to just what extent the topic is now able to get experts and laypeople alike worked up. The principle of equality of human beings, for centuries “one of the pillars of European democracies”, is about to gain currency in new fields of significance: it now aims beyond the binding of states, to bind their citizens as well.

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The original German version of this article first appeared in German in 57 JURISTENZEITUNG 540-545 (2003) and was translated by Morag Goodwin and Betsy Röben, Editors for Legal Culture and International Law of GERMAN LAW JOURNAL. A shorter version was published in German in the FRANKFURTER ALLGEMEINE ZEITUNG on 7 July 2003. Professor Picker’s article is a welcome contribution to the continued coverage by GERMAN LAW JOURNAL of the intensive debate concerning the planned and, meanwhile failed, law against discrimination in the private sphere, launched by the Federal Government in 2001 (see note 1, infra). See already the contributions by Nicola Vennemann, Karl-Heinz Ladeur and Viktor Winkler in 2 GERMAN LAW JOURNAL Nos. [3, 5 and 6], and by Andreas Engert, in 4 GERMAN LAW JOURNAL No. 7 (1 July 2003), available at http://www.germanlawjournal.com, and by Susanne Baer, Matthias Mahlmann and Rainer Nickel in 1 ANNUAL OF GERMAN & EUROPEAN LAW (Russell Miller/Peer Zumbansen eds. 2003, forthcoming), Berghahn Books: Oxford & New York.


3 See, as pars pro toto, the preceding footnote.

4 Urlesberger ZAS 2001, 72 points correctly to this.
The current state of opinions and recommendations also evidences a pattern typical to controversies whose object “gets under the skin” of the general public: here, too, one finds the usual opposing camps, both of which imagine themselves to have a monopoly on the truth – the one with Manchester-like insensitivity to what are portrayed as unfamiliar situations of urgent need, the other with an ideologically motivated urge to create a better world. And here, between these self confident and worldly antagonists, the majority of those reflecting and doubting, also struggles to be heard: in a remarkable split between moral scruples and real-life misgivings as to actual consequences, this majority swings between supporting and rejecting the new law. For it abhors all discrimination and for that reason it is ready to oppose its manifestations. Yet it nonetheless suspects a strict and strictly monitored prohibition of discrimination in the area of private law as well. For it fears that such a morality-enacting encroachment into these zones of original self determination could sooner or later transform the state – founded on individual freedom – into a virtue-based state suppressive of liberty.

It appears as though such concerns have since begun to bother even their originalator: recently the press has reported conspicuously often on political placating. The Federal Ministry of Justice recently evaluated the comprehensive anti-discrimination law it inherited with the assessment that “everyone would then be protected against everything”. And presumably this evaluation could also be an allusion to the opposite conclusion: that nobody is then any longer protected against anything. In any event, it was expressly made clear that the realization of this plan would “annul private autonomy in broad areas”. Thus clearly, the core problem with the proposed revision is met increasingly with cognizance, and even recognizance.

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5 The first catch, which understandably is barely ever communicated in writing, appears not infrequently at the mentioned formal discussions. As evidence at least for the general direction of the latter position, one can point to the piece by Baer ZRP 2002, 290. There, not only is personal liberty in the original sense of freedom to “Will-Kür” – that is, to act arbitrarily or by will – almost never considered as its own value and object of legal protection (see on this point Globig ZRP 2002, 530). Also especially tangibly evident is the specifically persuasive association with the basic dilemma of every anti-discrimination, which by necessity always discriminates differently (the rather unlikely situation for German circumstances, described by Urlesberger ZAS 2001, 75, is clear). The certainty, free from gnawing doubt, is clear that the deciding party knows which part of the population to benefit and which to disadvantage (see e.g. Baer ZRP 2002, 293)

6 This concern is the consistent tone of the works named in Fn. 2 above, specifically those of Adomeit, Braun, Globig, Picker, Säcker and Urlesberger.

7 Cited according to the FRANKFURTER ALLGEMEINE ZEITUNG (FAZ) of 8 March 2003 [“Die Privatautonomie in weiten Bereichen aushebeln”], p. 12; also see Fn. 15 below.
Anti-discrimination as a Program of Private Law?

Thus it can no longer be entirely precluded that this perfectionist German better-
ment of the world, which was originally foreseen as “modern societal politics”, will
cease to be a desirable goal.\(^8\) It is nevertheless advisable to continue to direct cri-
tique at the draft published to date.

For one, it has since become notorious, that Berlin’s announced innovations are not
always implemented “one to one” – not even the announcements of changes to
such announcements! And further, according to recent empiricism, it does not even
appear to make sense to have an investigative committee establish later how honest
the announcement was meant to be in each case. In addition, the new modesty with
which one henceforth – perhaps! – will approach this difficult problem does not
always dispel concerns. Indeed, an anti-discrimination program that is only par-
tially defused does not appear to clarify sufficiently the pivotal problem. And fi-
nally it is enough to recognize the leading “spirit” at present, to see the plans which
after all prospered into draft laws, which thus were decisively volitional and which
prevent only the coincidence of altered proportional representation of parties – still
perchance and possibly only initially. For a social-political impetus of such mis-
sonary conviction, once set loose, does not lose its élan overnight. This also makes
contemporary political voices graphically clear.\(^9\)

II. Critique of the Proposed Law

1. The amalgamation of law and morality

The planned law declares war on a particularly ugly social phenomenon. For this
reason, the idea of anti-discrimination can be assured of the widest support. But
inconveniently, for any idea to make a difference, it first has to be implemented in
reality. And this is often more complicated and intricate than the realm of ideas.
Because the real world by no means always coincides with the world which all
responsible and just people imagine as “will and vision”. It does not even give way
to the ideal of a lawmaker bent on improving the world. Rather, realities often let
“the good” be reduced to “the well meant”, especially by intervention in the market

\(^8\) Stünker ZRP 2003, 18.

\(^9\) Thus, the programmatic position statements of Stünker ZRP 2003, 18, and Montag ZRP 2003, 19, both
members of the German Bundestag, know nothing of the curtailment of the original plans. And, at a
conference of the Federal Bar Association (Bundesrechtsanwaltskammer) on 20 March 2003 in Berlin,
Member of Parliament Scheve-Gerigk announced for the Green Party a decided opposition to such inten-
tions.
which, as is known, in our bleak but indeed real world not infrequently means “the bad”.10

This fact, certainly hardly encouraging, cannot be overlooked in connection with the planned anti-discrimination legislation. And outside the circles of those who are occupied with it and those into whom it is breathing new life, one also appears at the least to sense it. For as already mentioned, the planned law – exceptionally – is not only criticized by professionals. It also gives rise to society-wide concerns and even fears, that threatening consequences lurk beyond the promised noble and good effects: one widely distrusts an amalgamation of law and morality. And one therefore fears a danger to liberty in this prescribed new humanity, either intuitively or reflectively.

With this, and thinking historically, the legislative project appears to revive a basic experience for which humanity has to thank in particular the Jacobites and their countless reincarnations: it calls back to life the empiricism, that a state which requires public virtue of its citizens, which thus suspends precisely the classic separation of law and morality and thus of state and society as the guarantor of individual liberty, encroaches directly into the sphere of personal liberty of the individual as the core domain of the person. It stirs up the fear that this conflict threatens the variety of individual shapes, styles and forms of life. It thus establishes more firmly the concern that it disposes with that pluralism in which the most diverse human preferences or reservations, and sympathies or antipathies, especially their desire for closeness or distance, for sociability or solitude, can develop peacefully and to the fullest extent, because precisely such a pluralism balances these opposites as in a market.11 And thus at the deepest level the planned law awakens in the collective public consciousness a living fear, that the state that can be expected from it will in the natural course of things sooner or later develop into a totalitarian state.12

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10 Fastricht, RdA 2000, 81, states aptly „obligations of equal treatment, as interventions in the market, have in common with other market interventions the problem that the desired effects often do not correspond to the intentions“. See also Globig ZRP 2002, 530.

11 Adomeit NJW 2002, 1623, says rightly that it is a “comfort” for the injustice of many individual decisions, that “on the average the hundreds of thousands of contracts made daily balance everything out”.

12 Also see on this point above all the works cited in Fn. 6 above. Baer ZRP 2002, 292, Fn. 23 identifies to this extent encouraging impartiality that the “fascist legal theory” rejected freedom of contract and instead decreed obligations.
2. Goals and means of fighting discrimination as limits on private autonomy

a) Indeed, the new law does give occasion for such concern. This is evidenced even in the moral pressure to which it owes if not its coming into being, at least its organization.

The German implementation of the European specifications through Directive 2000/43/EG of 29 June 2000\(^\text{13}\) planned until now appears clearly to exceed the Directive’s goals. It wants to be more “European” than “Europe”.\(^\text{14}\) For it decisively affirms the question, which is by no means determinative, of whether there is still any need at all for special rules, or whether German legislation, together with the highest judicial law, does not already sufficiently ensure the specified targets. And – in keeping with the tendency to German thoroughness – it far exceeds the requirements from Brussels: It extends the prohibition of discrimination beyond the scope of “race” or of “ethnic origin” to also include “sexual identity”, “handicap” and – here things begin to get shaky\(^\text{15}\) – to those of “religion”, of “\textit{Weltanschaung}” and “age” of human beings. In substance it thereby adopts the much broader scope of application of Directive 2000/78/EC of 27 November 2000\(^\text{16}\) establishing a general framework for equal treatment in employment and occupation: it has the goal, in an appropriate manner of also securing “access and provision of goods and services that are available to the public, including living space”\(^\text{17}\). In keeping with its socio-political goals it thereby strives – always in the version to date – for a seamless equal treatment and placement of all those participating in private law: it sees in this the command by a basic maxim that has been transferred from morality into law.

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\(^\text{13}\) Official Journal EC, Nr. L 180 of 19 July 2000, also printed as insert to NJW Vol. 37, 2001; to be implemented by 19 July 2003.

\(^\text{14}\) Because there was no agreement between the Member States, but also notably because it did not recognize any necessity, the Directive refrained from adopting the immediately approved material named in the text, which is also seen as being in need of regulation for labor law, see \textit{Schwarze/Holoubek, EU-Kommentar}, 2000, Art. 13 Annotation 6; \textit{Säcker ZRP} 2002, 287, Fn. 11; see in comparison the Discussion Draft by the Federal Ministry of Justice [BMJ] (\textit{supra} Fn. 1), p. 22 ff.

\(^\text{15}\) See on this point the news reports e.g. in \textit{Der Spiegel}, Nr. 12, 2002, p. 18.


\(^\text{17}\) See Discussion Draft of the Federal Ministry of Justice [BMJ] (\textit{supra} Fn. 1), p. 1 [“den Zugang und die Versorgung mit Gütern und Dienstleistungen, die der Öffentlichkeit zur Verfügung stehen, einschließlich von Wohnraum”].
b) In addition, this impulse to fulfil a German Übersoll or super-goal also comes to light in the means that are chosen:

aa) This is evident in the painstaking and voluminous yet nonetheless in many cases extremely vague prohibited elements, which attempt to catalogue comprehensively the “direct” and “indirect” disadvantages as well as any kind of “harassment” (§§ 319a et seq.). It is further made evident in the rules of evidence, which impose the probatio diabolica on the “suspect” to disprove the suspicion of discrimination, which thus does not require his conviction but rather his self-dismissal from every suspicion (§ 319c). And last but not least it illustrates the legislator’s over-eagerness, when it places not only requirements of omission and of “disadvantage-free treatment” on the actual or merely suspected delinquent, but when it in fact obligates him to provide an appropriate monetary compensation (§ 319e), – when it thus opens for the potentially discriminated party the chance quasi of extra income, which he will rarely reject.

But finally, and above all, the virtuous fervour and regulatory frenzy of the law’s architects in their planning comes to light in the pursuit of the stated goals – to be sure, until now only in the case of entrepreneurs – through the right of legal action taken by an association (Verbandsklagerecht) under the law on applications for an injunction. ¹⁸ From now on the defence against discrimination or suspicion of discrimination shall not only be incumbent upon the victim. As early as the investigative stage, it can be carried out professionally by associations. And indeed, here a high level of professionalism can be expected. For precisely because these professional pursuers derive both the justification and guarantee of their existence from yet-to-be-discovered attempts to discriminate, it can be predicted without any prophetic talent that they will proceed with the commensurate readiness to detect. And moreover: it is in addition no less surely predictable, that in this detective work they will not always exactly respect the boundaries of the potential victim’s intimate sphere. For, because the law requires corresponding plausibility, as just shown, they must not only investigate external facts but by necessity the victim’s disposition as well.

In order completely to comprehend the significance of this regulation, one must also consider that these associations will have at their disposal their own right of complaint. ¹⁹ They shall thus be able to proceed independently of the victim’s will. As

¹⁸ See the Discussion Draft of the Federal Ministry of Justice [BMJ] (supra Fn. 1), p. 12 f., 59 ff. The extension also to non-entrepreneurs was “considered” (p. 60). The limitation to “practices …, which should broadly and generally be suppressed”, should not change any of the concerns set out in the text.

a result, they shall be authorized to prosecute discrimination even when the victim does not feel he is being discriminated against. And, in the case of success, that is, there where the suspect cannot adequately and convincingly show the lack (!) of intent to discriminate, they shall even be able to effectuate his being sentenced to a prison term. In brief, what is imminent is: that monitoring and inquisition committees of truly Robesperrian character shall guarantee the new morality in private law.

bb) One example can perhaps illuminate the consequences of this situation: even someone who advertises for tenants in the harmless form of a want ad in a newspaper is subject to the new law. He must for this reason basically accept the otherwise “discriminated” applicant who, for example, wants to rent an apartment in the same two-story house in which the landlord dwells: the landlord cannot decline to contract with him on the grounds that he does not wish to share his narrow personal sphere of existence with a cohabitant who possesses the characteristics named in the law. But equally little can this landlord deny the same applicant an apartment in a distant high-rise which he owns as an investment property. He may not rely on the apprehension that with such a tenant the “milieu” would be changed and thus also the attractiveness of the object and with his level of income. Also the reference to the fact that – completely randomly – in the interests of a new social reason, a high special fee could possibly be demanded of him, would as a result of this new condemnation authority thus no longer be accepted.

c) The perplexity of the law’s addressee can be seen by bluntly exaggerating the consequences for the sake of clarity: if the group of otherwise generic applicants includes, for example, a handicapped female transvestite of foreign origin, advanced in age and of a non-Christian belief and who, in addition, indulges in an esoteric philosophy. To reject her co-offer would exceed the limits of foolhardiness. Under the new law, her complaint and its success would be as good as assured. And also the recently announced concession that Einliegerwohnungen (a separate apartment built into a one-family house) are likely to be excluded from the law’s application, will bring much further disagreement in light of the creative capacities of architects but scarcely any greater liberty.


22 According to state secretary Hartenbach of the Federal Ministry of Justice at the conference referenced in Fn. 9 above.
c) The practical relevance of this legislative reform thus cannot be overestimated: the amendment will effect the “large” as well as the “small” members of the legal community, the private individual as much as the businessman. It will have consequences even in the intimate sphere. And it will determine legally relevant behaviour in ordinary daily situations: it will inspire those predisposed to complain. And it will have the effect of pushing all potential discriminators wishing to conclude a contract from the outset into busily documenting all conceivable evidence against them – at least in fields touching upon employment law whole filing-cabinets will be filled. Above all, the reform will thus emphatically encourage those members of the legal community permanently under suspicion of discriminating to camouflage their capabilities, to deliberately develop deceptions and dishonesty in the future. The Federal Minister of Justice understands this issue correctly when she doubts “that one [is able] to change a society through legal policy (Rechtspolitik)” and when she fears that “that leads only to false excuses and rather will be made ridiculous”.23 However, she sees the likely effects perhaps still as too relaxed and harmless, as negative consequences are more likely than absurdity, that this mandated virtue is likely to prepare the field for society-piercing lies and deceptions: to lies and deceit as self-defence in the maintaining freedom!

3. Incompatibility with the existing order

In order that the decisive objections are made clear:

a) The aims that the reform strives for – which is newly stressed here as an unambiguous concession alongside however their restrictions and most important objections24 – the aims appear as such undoubtedly an overly individual value system. They are therefore to be recognised and welcomed as the correct and indisputable limits for the conduct of the State. It is doubtful, however, whether the State is allowed to impose its “official” moral values upon the conduct of private citizens as well. To phrase the question more concretely, whether private, and in particular, civil law as the legal realm in which free individuals are free and thus act together in the literal meaning of the word arbitrary (“will-kürlich”), is the proper place in which to achieve the sought-after morally “better world”. For if the established aims were enacted in civil law, an obligation upon all would be created in these areas – as in state conduct – towards equality and equal treatment of all. The authority of the freedom to act according to one’s will alone would then be superseded: civil law would thus no longer set merely the legal boundaries for the citizen’s actions. It would provide him with the content as well. In particular, the law

23 Quoted from the FAZ, at footnote 7; the first quote is indirect and the second is directly reproduced.

Anti-discrimination as a Program of Private Law?

here under discussion in fact weakens the last bastion of contractual self-determination. It is not satisfied any more with stipulations ordering the content but determines more or less the actions of the contractual partners as such. Thereby, it almost entirely narrows and suppresses private autonomy with regard to self-determination in private law. As noted, private autonomy stands, however, as nothing other than a legal synonym for freedom. And freedom is always the freedom of the individual, his life to live and to direct according to his personal and purely subjective particular interests and preferences: “Stat pro ratione voluntas” – will, not reason determines the action –, this is the traditional basic organising principle of private autonomy and freedom!\(^{25}\)

b) This prioritising of the subjective will over an “objective” one, even a state-decreed “reason”, is however not some expression of individual extravagance and social decay. It does not turn liberalness into libertinage. Rather the opposite, that it is anthropologically, legally and economically founded:

The principle authority to regulate the actual details of one’s legal position by self-determination and Willkür, springs from the primeval human will. This is, as mentioned, manifested in the multiplicity of individual ways of life, from phenomena ranging from sharing an apartment (Wohngemeinschaft) through to a Szene-Café or a club. Thus, private autonomy respects only the fundamental principle of humanity. Accordingly, this authority of the people is assigned through the constitution as well as by ordinary law. It thus forms the basis of the existing order as fundamental value decision and at the same time also precedes it. Moreover, freedom is legitimated not only by self-determination but also economically. For, human experience has shown that nothing can mobilise the strength and abilities, the creativity and the innovativeness of a population so enduringly as the vision of gaining freedom and thereby allowing for the maximisation of profits.

c) All these elemental bases and aims of freedom in the private realm are threatened by the planned laws. If this is the case, a simple comparison at the end demonstrates this:

One puts in the place of incriminated actions merely the following words: he who proclaims his conviction that Germany takes too many foreigners, that “the boat” is “full”, might display behaviour of little virtue or moral standing. Nonetheless, the expression of his opinion through his freedom of opinion is protected by the constitution: the Basic Law (Grundgesetz) embraces the idea that, in the consciousness that there is not a single, objective truth, progress is made by the struggle over the “correct” solution, even by the undesired, the “politically incorrect”, and indeed

morally reprehensible comments. It allows the pointed political and ideological statement – up to despicable and libellous polemic, even including the incitement to boycott.  

The planned new law on the other hand denies this freedom. It, if enacted, indirectly but radically neuters Article 5 Grundgesetz. It wants to compel those citizens expressing such undesirable opinions to precisely the opposite behaviour. Thus, it forbids the citizen to live out his personal beliefs, which remain to be protected by his freedom of opinion, in his private realm: it thus treats him if he makes such statements as guilty of discrimination. The law thereby forces him only to enter into a contract with those that he – legally protected – might not favour as his fellow citizens. The intended reform therefore threatens to render the exercise of the freedom of opinion punishable by connecting it with a duty to contract (Kontrahierungszwang). It removes therefore the congruence of word and action in enacting freedom. And it renders itself thereby legally and otherwise ad absurdum.

III. Rudiments of a Solution

1. The necessity of a reduction of freedom in private law

With this critique the direction in which a solution to the difficult problematic must be sought is, admittedly, at the same time at least recognisable in principle. While it is worth on the one hand to safeguard the described freedom, so it is on the other hand – and no less so! – worth heeding the following basic reality:

No freedom – and also no private autonomy – exists without limitations. Rather, private autonomy has precisely the heteronomy of the legal order as correlation to its condition. So long as there are more than one person, freedom consequently must always be conceived within certain boundaries. Freedom and responsibility are like “soup and salt”: too much of either waters down or ruins the entire product. It thus depends on the ideal mixture! The problem raised by the Anti-discrimination Bill is indeed that of finding the appropriate measure.

2. The basic facts of the matter

a) In reality, and we can in the following merely indicate the direction of our argument, there are basically two fields where the legal order is called upon to draw a limit to the otherwise granted freedom in private law to act according to one’s free will (“Will-Kür”). It must be noted, however that we are in neither field

\[26\] This is correctly underlined by Säcker, ZRP 2002, 288. In contrast hereto, Baer, ZRP 2002, 294, fails to see this point because she does not draw a distinction between political-state and personal-private (autonomous) action.
concerned with rendering a moral objective into a binding rule. Instead, we ought to be concerned with either safeguarding the ethical minimum of a civilized living together or, the (effective) confrontation of market failures.

b) The first area is concerned with cases in which otherwise tolerated unequal treatment - because of special circumstances or conditions - offends accepted norms ("gute Sitten"). It concerns also those cases in which because of the insulting or the inciting character of the act, it meets the particular conditions of sections 138 and 826 of the German Civil Code (Bürgerliches Gesetzbuch - BGB). The clear cut example might be provided, say, by a sign on the restaurant door stating, “foreigners not welcome here!”. An example, which might even be aggravated if we imagine the sign to read that foreigners would be admitted only because of the anti-discrimination legislation.28

c) The second area of unacceptable discrimination even in private law is demonstrated by an example in which in a situation of restricted resources, there is rationing of certain goods. This, in other words, concerns situations in which because of a war or an emergency, a monopoly or a similar position of power, the certain interests cannot be realized on the marketplace at all or find themselves reduced to an unacceptable level. We are thus concerned with situations that might require the assessment of special exceptions, in which an - always government-directed distribution – perhaps in the form of a duty to enter into a contract (Kontrahierungszwang) – or a duty to balance the ownership of resources – seem appropriate or unavoidable. Paradigmatic in such situations is the necessity of providing housing for certain groups in the population. Depending upon the level of social development, it will be particularly difficult to legally assess those actually existing conditions where the law is called upon to open up equal market opportunities for those groups that are actually or constitutionally disadvantaged: we may think of those in search of an occupation, those of the disabled or of women. Precisely these problematic areas are legally dogmatic and technically difficult to regulate, because they are so difficult to grasp in their social dimension from a legal perspective. The amount of literature on these issues already illustrates this point.29 This exception- alness, however, speaks against rather than for the intended law. Such social and economic conditions, exceptional in their nature and at the same time existential, may only be treated appropriately within an arrangement that allows to adequately address the so numerous as well as complex and difficult factors that are in constant change and that need to be perceived in their interrelationship. What is

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28 This example is taken from Neuner, JZ 2003, 65.

29 See recently, e.g., Neuner, Privatrecht und Sozialstaat, 1998; see also Neuner’s arguments in JZ 2003, 59 ff.; Busche, Privatautonomie und Kontrahierungszwang, 1999, each with comprehensive references.
needed therefore is an method of ordering which is adequate in relation to this complexity: such an arrangement can in fact not be gained by those providing laws or guidelines that readily wish to jump at cutting Gordian knots. Justice here cannot be served by a sweeping, politically-motivated act of legislative action. It requires rather the tentative, constantly newly tested search for a solution. It requires therefore those forms of regulation that ensure the sensitive registering of changes and the apt correction of mistakes or outdated elements.

3. Fundamental consequences

Critique and typical conceptions can therefore be summed up under three basic outcomes:

a) Firstly, it is necessary to recognize and accept: freedom-orientated societal and economic systems are inherently discriminatory! The freedom to engage in unequal treatment then, is in the case of choosing one’s partner to a contract as an expression of private autonomy a basic principle of private law. Prohibiting discrimination within private law thus introduces – in contrast to those cases addressed by public law – an alien concept endangering the system. They are therefore only to be put forward in exceptional situations of need, i.e. concretely in cases of clear violation of public order (“gute Sitten”) and in the context of compulsion of the rationing of restricted resources.

b) Secondly: As exceptional and emergency situations these cases elude secure planning. They are also, in accordance to their nature, subject particularly to continual change with respect to values. Less than with other issues, solutions to these cases can be clear cut from the outset. They can therefore not sensibly be regulated by casuistic facts. Instead, the task consists in identifying the appropriate solution each time from within the specific facts of the case at hand. The approach taken by the BGB, in its sections 138 and 826, of addressing these issues by general clauses is thus more adequate than the enaction of individual norms – an approach that had in fact been taken at the early planning stages of the Anti-Discrimination Act.30

Such an arrangement would admittedly have placed the concrete decision to a large extent in the hands of judges. But this would be more an advantage than a disadvantage in this particular field. It is worth remembering not only the still valid justification by the First Commission for the stipulation of Section 138 BGB, whereby “in light of the conscientiousness of the German judicial official … it can be trusted unthinkingly, that by and large the regulations will be applied only

within the meaning in which they had been given.”

It is of particular importance to recall at this point that Judges are specifically suited to take such decisions. For even where one does not deny the educational function of norms, that is where embraces the fundamental interdependence of law and legal consciousness, the following is necessary to understand: according to the prevailing maxim of private law, the law itself (i.e. the written norm) should not authoritatively decide questions regarding the alleged contravention of the public order (“gute Sitten”) or, even less, arbitrate the eventual incompatibility of a situation with a “good social state of affairs”. Rather, “current social consciousness”, as it were, should be statistically authoritative. This sub-legal value structure should render concrete the “blanket law” that is expressed in the general clauses. The judge himself is called upon – ex professo – to reach a decision, because only he is in the position to interpret the established “current social consciousness” in a case-by-case approach as a measure stick for his judgments. Only the judge can transform the hereby established moral data into binding law. This wise competence order is, however, turned into its opposite by the procedure adopted in the anti-discrimination draft: its advocates attempt to ordain a never before developed “current social consciousness” by way of legislative decrees. They do not want thus to “observe” moral understanding, but to create it themselves.

c) Finally, the third category remains to be spelled out: all of the general clauses – adequate as such –, are as written and unwritten principles always already inherent to law. As a consequence, anti-discrimination legislation is thus in truth unnecessary in German private law: if interpreted appropriately, this law is already fulfilling the European demands in this respect!

One should therefore in the future try to confront a respective Directive by legal means if prior attempts to amend or to altogether avoid this European hegemonic legislation failed. Individual experiences of little or no success in this regard should not dampen readiness in the future: a nation which is proficient in bringing its undesired laws without delay before the German Constitutional Court (Bundesverfassungsgericht – BVerfG) should not suddenly in the face of European Directives, that it finds undesirable in both form and substance, exercise forms of fatalism alien to its own mentality.

Taken together, these observations allow for a decisive conclusion as to the motives and aims of the so far officially planned Anti-discrimination legislation:


32 See the adequate description by Dernburg, Die allgemeinen Lehren des bürgerlichen Rechts des Deutschen Reiches und Preußens, Vol. I, 3rd Ed. 1906, § 125 II, p. 421; see the critique raised e.g. by Planck/Flad, BGB, Vol. I., 4th Ed. 1913, § 138 Annotation I 1 a, which only addresses the limitation to this definition.
this reform, which – as we have seen – reflects a striking ignorance of the state of current law as well as of its normative capacities, and moreover, which goes well beyond the actual requirements erected by European legal measures, in reality wants more: it desires in its regulating furore, to replace the free individual with the "good" one. In the interest of basic societal and economic freedom, for the protection of the basic constitution of the current order, it is thus necessary to warn against the realisation of these legislative plans.
Taking stock of the European Convention
What added value does the Convention bring to the process of treaty revision?

By Johannes Jarlebring

Introduction

According to Article 48 of the Treaty on the European Union (TEU), the founding treaties of the Union can only be amended through a three-step procedure. First, the Council calls an Intergovernmental Conference (IGC), after having consulted the European Parliament (EP) and the Commission. Second, within the framework of the IGC, representatives of the governments of the Member States negotiate and sign the amendments to the treaties by common accord. Third, the agreement is submitted to national ratification procedures. When all three steps are concluded, each Member State having ratified the amendments to the treaty, the changes enter into force.

However, recent developments have shown that the legal text of Article 48 does not fully reflect the political reality of treaty revision. Since the end of February 2002, a so-called European Convention, composed of 105 full members, representing the EP, national parliaments, the Commission and national governments, has been discussing how the basic treaties should be reformed. The result of the discussions, a draft constitutional treaty intended to replace the current treaties, was formally submitted in June at the Tessaloniki European Council by Convention President Valery Giscard d’Estaing. The draft treaty will constitute the starting-point for an IGC, beginning this autumn and finishing next spring, before the next elections to the EP.

The potential importance of these developments can hardly be overestimated. By letting a body composed of a majority of parliamentarians elaborate a draft treaty,

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1 Admittedly, the departure from the formal procedure used for treaty revisions is no complete novelty. Previous IGCs have been prepared by different kinds of ad hoc bodies, such as the Reflection Group before the 1996 IGC and the group of Wise men before the Nice IGC. But the European Convention brings these informal arrangements to a completely new scale, being much larger and with much more political weight than previous bodies.
governments have already, for all intents and purposes, come to share their traditional prerogative to draft international treaties with European and national legislatures. Moreover, many actors now work actively for an institutionalisation of the Convention method by integrating it as a formal part of the treaty revision procedure. Should the Convention method be institutionalised as such, national governments will have permanently reduced their freedom and power as “Masters of the Treaties”. However, it should be noted that the Member State governments still have the last word, for, as it stands, the destiny of the Convention method and the draft constitutional treaty still rest entirely in the hands of the IGC. Indeed, it remains an open question whether this new institution is really necessary in the already complicated architecture of the EU. What value does the Convention in fact add to the procedure used for treaty revision? Only when we know the answer to this question, can we really discuss the future of the Convention method and the draft constitutional treaty.

This article will assess the Convention method’s added value by examining its contribution to the process of treaty revision from three different perspectives: (I) rule by the people; (II) rule for the people; and (III) acceptance by the people. As will be argued throughout the article, all these aspects are of fundamental importance for the good functioning of the EU. If the Convention adds significant value along any of these parameters, this would strongly support the use of the new method also for future treaty revisions. The conclusion of the article will sum up of the assessment and discuss possible reforms of the treaties’ revision clause.

I Rule by the people

Since the EU treaties indicate that the Union is “founded on the principle of democracy” (Art 6 TEU), an important role should be given to popular input in the process of treaty revision; if the fundamental process of treaty revision is not democratic, the Union’s democratic credentials would appear seriously undermined indeed. As the EU is a very large political system, the popular input can realistically only take place indirectly, through the intermediary of representatives. For such representative democracy to work properly, it is crucial that the decision-making

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2 A study from a Swedish think-tank for example concludes that “the Convention method has come to stay.” (Johansson (2003:74)

3 As Robert Dahl (1989) has showed, representative democracy replaced direct democracy though the “second transformation” of democracy, resulting from the increased size of the State. Although some people look for a “third transformation”, resulting in something else than representative democracy, little concrete evidence has been presented to support that this is actually possible without losing what is actually ”good” with democracy.
Taking stock of the European Convention process is transparent and that there are procedures through which the representatives can be held accountable. To what extent, we must ask, are EU treaty revisions carried out by elected representatives who are accountable to the citizens?

The traditional process of treaty revision, as described in Article 48 TEU, is based mainly on indirect representation of the citizens, through the intermediary of national governments. In an IGC, government representatives meet regularly throughout a given period of time to negotiate on the basis of instructions, or “national positions”. The instructions are normally thoroughly prepared internally in the government structure and, at least in some cases, rather broadly based within the national institutional system. Furthermore, the procedure described in Article 48 is characterized by a rather high level of accountability. As mentioned above, agreements reached in the IGC have to be ratified according to the constitutional provisions of the different Member States. This normally implies either that it must be accepted by a directly elected parliament, or by the national citizens in a referendum.

Arguably, the weakest point in the traditional revision process is transparency, since IGCs are normally very secretive. But even though it might be difficult for the national parliaments or the citizens to know exactly what is happening in an IGC, they know at least that their government can block any decision with its veto. In principle, this means that citizens and the national parliaments can hold their governments accountable for all decisions made by the IGC.

Now, the question is whether the integration of the Convention method in the treaties’ revision procedure strengthens the ideal of “rule by the people”. At first sight, this seems to be the case. To 69% composed of parliamentarians, the Convention is arguably more representative of the European citizenry than an IGC. In contrast to an IGC, the Convention includes 16 representatives from the EP, drawn from all different political groups. Moreover, each national parliament has two representatives in the Convention, which opens up the possibility for national opposition parties – a group that is normally excluded from an IGC - to participate in the discussions. Turning to the criterion of transparency, the Convention also seems to meet relatively high standards. Not only were the Convention’s plenary meetings open to the public, but debates could also be followed on the internet and there were verbatim records from all the plenary meetings, covering the debates word for word. Finally, a great amount of work was invested in keeping the Convention website updated. Virtually all the documents that the Convention members sent in were published more or less immediately on the website. Even the speeches held in

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the plenary were published. The website also includes a search engine, which makes it relatively easy for citizens to find information about the Convention.\(^5\)

However, when it comes to the crucial criteria of accountability, the Convention suffers from some serious flaws. To understand this, one has to look closer at the decision-making procedures in the Convention, characterised by the dominating role of the presidium and the vagueness of the decision-making rules. The presidium was an exclusive twelve-member group, responsible for leading the whole Convention process.\(^6\) Its tasks included planning the work of the Convention; the establishment of an agenda for the meetings; the setting up working groups for dealing with different topics; the chairing of these working groups; and – most importantly – the drafting of the treaty text, on the basis of the contributions from the Convention members.\(^7\)

In other words, the presidium was a very powerful and exclusive group within the broadly composed Convention. Moreover, in contrast to the transparent Convention, it met behind closed doors, which meant that the other Convention members often did not know what it was doing or how different decisions had been made.\(^8\) From the perspective of “rule by the people”, the situation was also made worse by the fact that the Convention took all its decisions through “consensus”. This concept is normally taken to mean something in between simple majority and unanimity, but as the exact meaning of the concept was never established in the Convention, it implied a great freedom of manoeuvre for the presidium – and especially for its president – to “weigh” the voices of the different Convention members in the way it found suitable. In practice, there were no accountability mechanisms to ensure that the presidium kept to the view endorsed by the Convention plenary.

In sum, the Convention’s qualities in terms of rule by the people are largely reduced by its decision-making procedures. In fact, it is practically impossible to hold

\(^5\) See the Convention’s website: http://european-convention.eu.int/bienvenue.asp?lang=EN&Content=

\(^6\) To be more precise, the presidium was composed of nine Convention members drawn from the Convention’s four different components – two national parliamentarians, two MEPs, two commissioners and three government representatives (from the three countries holding the presidency during the Convention’s work). The tree last presidium members were the “troika”, composed of President Valery Giscard d’Estaing and the two Vice-Presidents Guillaume Amato and Jean-Luc Dehaene.

\(^7\) CONV 9/02, Note on working methods.

\(^8\) For example, Jens-Peter Bonde, MEP, complained that he “is not informed by Hänsch and de Vigo about what happens in the presidium,” and that, consequently, “we don’t even know what is going on in the presidium and can’t take part in the real negotiations.” (Lecture by Jens-Peter Bonde, 24 March 2003).
Taking stock of the European Convention

the Convention members accountable for the output of the Convention since it is unclear who actually made the final decisions and, therefore, was responsible for them.\textsuperscript{9} When compared to the traditional Article 48 Procedure, the convention’s contribution to rule by the people must therefore be considered to be very modest.\textsuperscript{10}

II Rule for the people

In the literature, rule \textit{for} the people is often seen as something distinct from rule \textit{by} the people. While the latter implies that the decision-makers should address the concerns of the citizens, the former means that the decisions should deal with the given problems in the best possible manner, taking account of all relevant facts. Notwithstanding the obvious difficulties associated with assessing the quality of decision-making in a satisfying manner, it seems quite clear that weaknesses in terms of “rule by the people” have become a serious problem for the traditional revision procedure. One trouble is that the need to reach common accord among governments - negotiating on the basis of rigid national positions - reduces the quality of the deliberations in the IGC, as well as the quality of its output.\textsuperscript{11} Another difficulty appears to be that governments feel little incentive to engage in negotiations during most of the IGC.\textsuperscript{12} The lack of serious discussions during the prepara-

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  \item \textsuperscript{9} For another opinion see Hoffman, who argues that “due to the Convention’s inherently transparent character and the fact that submitted document are made public in the name of the Convention's members, the level of accountability is undoubtedly higher than in an IGC.” However, he seems to have a rather peculiar view on accountability, since he also states that “Convention members hold their position only temporarily, which has the great advantage that they do not have to perform in a way that ensures their re-election or re-nomination”. (Hoffman, 2002:18)
  \item \textsuperscript{10} To be fair, it should be admitted that the Convention included a certain measure of direct participation. In particular, there was an internet based “Forum” established in parallel to the European Convention, through which civil society organization could publish their contributions. The Convention also dedicated one day (24-25 June 2002) to the hearing of representatives from civil society organizations. However, there is little reason to believe that the civil society organisations had an important direct influence on the outcome, beyond that of normal “lobbying”.
  \item \textsuperscript{11} de Witte (2002: 44). See also Louis (2001: 89), who describes IGCs as the combination of an exaggerated “search for the emergence of areas of consensus, with a minimum concern for their actual content and their coherence with some global principles”.
  \item \textsuperscript{12} In an account of the Amsterdam IGC, Bobby McDonagh (1998) describes how virtually all the important issues to be dealt with were left to the final weeks, since the successive presidencies wanted to avoid submitting draft texts that risked being attacked by “the jackal pack waiting to tear it apart the moment it faltered in its stride.” Jean-Victor Louis (2001: 88) confirms that there was “little real negotiation during a large part of the [Amsterdam IGC]” and that there was a “feeling of absence of time constraint during parts of the Conference.”
\end{itemize}
tions helps to explain why IGCs tend to finish in the middle of the night, under fairly chaotic forms and extreme time pressure.¹³

Considering the problems facing the traditional IGC, there seems to be quite some room for improvement of the treaty revision procedure. Arguably, a large part of this room can be filled by the European Convention. To begin with, the Convention spent rather lot of time to discuss the various problems of the EU’s way of functioning. Starting with a long “listening phase”, lasting during the spring and summer 2002, the Convention then spent several months split up in 11 different working groups, discussing topics such as “Subsidiarity”, “External Action” and “Social Europe”. Once the working groups had presented their recommendations to the Convention during the last quarter of 2002, the presidium started drafting treaty articles, which were then submitted to the plenary for discussion. The Convention members then proposed amendments to the presidium’s texts, which were then revised and submitted another time to the plenary. Finally, during the last week of the Convention, its three main components – national parliamentarians, MEPs and government representatives – met separately to try to find some kind agreement on the final deal.

The Convention’s elaboration of a draft constitutional treaty has several important implications for quality of the “rule for the people” in the process of treaty revision. The most obvious consequence is that the IGC that will follow the Convention will be facing a less immediate time pressure, as it will have a worked through proposal to fall back on. Put another way, the existence of the draft constitutional treaty implies that the outcome of the IGC will probably be rather constructive and productive. Several of the Convention’s important proposals will almost surely live through the IGC: just to mention a few examples, the draft treaty reduces the number of legal instruments; the EU is given a single legal personality; the national parliaments are given a role to play in the check of the subsidiarity principle, including the possibility to refer the case to the Court of Justice; the competences of the EU is written more clearly into the treaty; and a post of Foreign Minister, located within the Commission but with instructions from the Council, is created. On all these important points, the agreement in the Convention was mainly the consequence of discussions in the working groups, most of which seem to have been remarkably fruitful. In fact, virtually all available sources indicate that there has been a good

¹³ See, for example, Stubb’s and Gray’s (2001) account of the Nice IGC.
and constructive debate in the Convention. These positive judgements stand in stark contrast to the negative ones often made about the debate in IGCs.

The superior quality of the debate is arguably linked to the fact that there was a “wide-spread perception among the members of the Convention that their mandates are personal and not binding”. This flexibility surely facilitated the process of discussion and problem-solving, as the Convention Members could be open to the arguments of the others and change their position whenever proven wrong in the debate. In the Convention, even the government representatives sometimes adopted a rather personal view, which they could change without consulting the capital. However, three other factors surely also contributed to the relatively constructive result. First, the coordinating and leading role of the presidium was clearly a necessary condition for producing a substantive output; all the presidium members were experiences politicians, all of which had extensive academic backgrounds, often including legal studies. Second, the role played by the Convention secretariat was arguably crucial for the success of the exercise. Composed of skilful civil servants and experts from different European and national institutions, the secretariat guided both the working groups and the presidium in the drafting exercise. Finally, a certain importance should be referred to the hearings that were

14 See, in particular, Johansson, 2003: 65 and Magnette 2002. The good quality of the debate is also confirmed by interview with Klaus Hansch and Jens-Peter Bonde MEPs; Costa Pereira, assistant to Andrew Duff, MEP; and Jacques Santer, Bobby McDonagh and Gisela Stuart, government representatives.

15 For example, it has been claimed that IGCs “unhappily combines a narrow consultative base, a protracted timescale and a procedure which encourages negative criticism rather than constructive debate” (Walker, quoted in de Witte, 2002:57)

16 Johansson (2003: 49). An illustrative example of this is Jacques Santer, the representative of Luxembourg’s Prime Minister, who explained in an interview that: “Je représente le premier ministre à titre personnel. Mais je ne reçois pas de mandat impératif. Je suis entièrement libre de faire ce que j’entends, ayant naturellement en vue l’intérêt luxembourgeois. [Le Premier ministre] n’intervient pas du tout, mais je le tiens au courant.”

17 As Neyer (2002) argues, deliberation on the basis on flexible positions has certain advantages, compared to bargaining on the basis of fixed positions.

18 For example, a report from a parliamentary committee in Sweden explains that the government did not in its internal work prepare Swedish positions in the same way as usual, involving all departments. Rather, the government representative could use the government’s all resources, but chose herself what she wants to say. In the report it is even argued that it is “logic that the members of the Convention perceive their mandates as open and see the Convention as a possibility to discuss solutions that are not anchored in national negotiation positions”.

19 See se bibliographical notes on the Convention’s website, http://european-convention.eu.int/bienvenue.asp?lang=EN&Content=

20 ibid
held in the different working groups during the early stages. These hearings attracted people with great knowledge of the various topics under discussion and were arguably of great importance for pointing out different weaknesses in the current treaties.\footnote{It is interesting to note that some experts were called by several working groups. For example, no less than four different groups (Subsidiarity, Charter/ECHR, Legal Personality, Simplification) heard Michel Petite and Jean-Claude Piris, Director Generals of the Commission’s and the Council’s legal services, respectively. The working group on complementary competences is the only one that does not report about any hearings.}

III Acceptance by the people

So far, it has been argued that the Convention adds to the rule for the people in the process of treaty change, while it does not strengthen the rule by the people.\footnote{Often, these two notions are considered from the perspective of legitimacy, and are then called input and output legitimacy (see for example Sharpf, 1999). Using that terminology, it has been argued that the Convention adds a fair amount of output legitimacy, but does not significantly contribute to the input legitimacy.} Yet, we have not examined if the Convention strengthens the link between the EU and the citizens. Just as a political system may be accepted by the citizens without embodying a rule by and for the people,\footnote{In some cases, people may come to accept or reject decision-making out of habit or tradition. In other cases the fact that a decision is made or defended by a charismatic leader may be enough to create acceptance.} a democratic and efficient system may sometimes be incapable of winning the hearts and minds of the citizens.\footnote{To use Joseph Weiler’s (1997:251) words, “there is no necessary connection between the objective strands of legitimacy/illegitimacy and its social manifestations.”} It should therefore be of great interest to examine, separately to the issues discussed above, if the Convention can make the EU more popular in the eyes of the citizens.

Social acceptance is of particular importance for the process of treaty revision. During the last decade, lacking popular support has been a repeated obstacle for treaty change. In 1992, the Danish rejected the Maastricht Treaty in a referendum, and in 2001 the Irish refused to endorse the Nice Treaty in a referendum. In fact, the popular scepticism towards the EU and the critique directed against the last treaty revisions should be seen as major justifications for creating the European Convention. When the heads of State or Government took the decision to set up a Convention, during the Leaken Europan Council in December 2001, they stressed the need to bring the EU closer to the citizens. In the Lacken declaration, the Convention itself was justified by the need to prepare the next IGC “as broadly and openly as possi-
ble”. Did these hopes in the Convention method materialise; did the Convention bring the EU closer to the citizens?

Although it might be too early to determine the impact of the Convention before the IGC has even started, is must be noted that little evidence so far supports the idea that the Convention would increase popular acceptance in a significant manner. Arguably, an institution can strengthen popular acceptance only if the citizens hear about the institution in question. However, roughly two months after the Convention had been launched, in April 2002, only 28% of persons interviewed by the Eurobarometer claimed to have heard about the Convention. In October 2002, this level of awareness had not changed. These poll results can be compared to polls made during the early stages of the Amsterdam IGC. Asked if they had heard about the IGC in the media, 17% of European citizens gave a positive answer in October 1994. However, in April 1995, just after the launch of the IGC, this figure had risen to 31%. According to the Eurobarometer, this indicated that “as the public debate intensifies so public awareness has increased.” In sum, these statistics indicate that the Convention does not reach more citizens than an IGC.

This result might appear surprising since the Convention is a very transparent institution, deals with matters of great importance and includes both European and national parliamentarians. However, the low level of public awareness is explained when examining the legal status of the Convention, and its internal decision-making process. According to the Laeken declaration, the Convention was not to change the treaties, but merely “consider various issues” and draw up a final document “which may comprise either different options, indicating the degree of support which they received, or recommendations if consensus is achieved. (emphasis added)” The fact that the Convention could only make recommendations if it reached consensus meant that it faced a dilemma if it wanted to attract the media. On the one hand, it would have very little influence, and thus limited attention, if its proceedings were characterised of a high level of conflict. On the other hand, the interest of the media would be fairly limited even if it did reach consensus, since there would be no great conflict to report about.

25 See the Conclusions of the presidency on the Laeken European Council: http://europa.eu.int/council/olvi/conclu/index.htm
26 Standard Eurobarometer nr 57 and 58
27 Standard Eurobarometer nr 43 and 44
28 See the Conclusions of the presidency on the Laeken European Council: http://europa.eu.int/council/olvi/conclu/index.htm
The European Convention ended in consensus rather than conflict. Consequently, when President Giscard d’Estaing presented the final draft, after an extended process of compromise in which proposals had been made and adjusted several times already, it was not given great attention in the media.\textsuperscript{29} In comparison, IGCs - and especially their endgames, during which the heads of State or Government make the final deal – are considerable media events. For example, according to some sources, over 3000 journalists were present during the end-game of the Amsterdam IGC.\textsuperscript{30}

Conclusions: what next?

This article has presented a rather mixed assessment of the Convention’s added value, including both negative and positive results. To start with the negative results, we have found no evidence that the Convention has managed to bring the EU closer to its citizens, which was the original intention with the setting up of the Convention. On the contrary, certain statistics indicate that the European Convention has not reached more citizens than a traditional IGC. This is clearly a disappointing result for those who had hoped that the Convention would guarantee that the constitutional treaty would not be rejected in a popular referendum in any of the Member States. There is still a real risk that, say, Poland or Denmark, which have both declared that they will organise referendums to ratify the constitutional treaty, will reject the treaty and thereby block the whole revision process.

The second negative result is that the Convention does not really contribute to strengthening the democratic ideal of “rule by the people”. The internal decision-making procedures in the Convention are simply too vague to allow a sufficient level of accountability. The fact that the powerful presidium worked behind closed doors and that its president was rather free to interpret the notion of consensus in a way that suited him, makes it very difficult to hold the Convention members responsible for the output of the Convention. However, it should be stressed that the traditional revision procedure, as described in Article 48 TEU, already meets rather high standards in terms of representation and accountability. On the one hand, this means, that it is no disaster if the Convention does not add value in this regard. On the other hand, it implies that the IGC, and the ratification procedures to which it is

\textsuperscript{29} The main exception seems to have been British media which had extensive coverage, most of which, however, had very critical or nationalistic twist.

\textsuperscript{30} Grünhage, in Monar & Wessels, 2001:23. In sum, if a journalist is to write an article about the Convention, he is likely to find a great deal of interesting information, but will find it hard to make an article that catches the attention of the reader. A journalist who is to write an article about the IGC, on the other hand, will have a more difficult time finding out the details about the negotiations, but will rather easily produce a story that is easy to understand and catches the readers’ attention.
Taking stock of the European Convention

 intimate linked, must continue to be part of the treaties’ revision procedure. The proposals that have been put forward by some to let the Convention replace the IGC do thus not seem acceptable.31

Yet, the assessment carried out in this article also identified one very positive aspect of the Convention method. The debate in the European Convention was of relatively high quality and the various reform options were discussed during an extended period of time. This can be contrasted to the sometimes very hasty work conducted during the IGC end-games; when the heads of State or Government bargain until they are too exhausted not to agree on the final document, they sometimes hardly know themselves what has been agreed. Given the widespread critique of the output from the last IGC’s,32 it seems necessary to prepare the conference more thoroughly. Since the methods were used to prepare the last IGCs failed to make a lasting impression on the subsequent negotiations,33 it would appear reasonable to give this preparatory role to the Convention in the future. Indeed, the evidence presented in this article indicates that the Convention can significantly strengthen the “rule for the people” in the process of treaty revision.

However, it should be noted that all this does not necessarily mean that the Convention method should be institutionalised. Just as today, it can be used “informally” without basis in the treaties. Moreover, a very difficult question is what exactly should be regulated in the treaty. If the treaty only mentions that an unidentified Convention should prepare IGCs, one could question why it should be mentioned at all. At least in theory, the governments would be free to manipulate the Conventions’ composition and working methods as they wish. On the other hand, it might be dangerous to specify too much in the treaties, since there will be a need

31 Another proposal that has circulated in the debate (most notably in a proposal from the European University Institute (2000)) is to reduce the IGC to one single meeting of the European Council. The heads of State or Government, would then in principle only say “yes” or “no” to the Convention’s proposal. It should be noted, however, that this solution would radically increase the risk for rejection of the whole package by one of the governments. This would not increase efficiency, but, on the contrary, only block the whole revision procedure.

32 To mention only one example, it has been said about the Amsterdam Treaty that “For a Treaty intended to bring the EU closer to its citizens, [it] is a caricature of all that is wrong with the EU. More than 50 pages long, littered with arcane language and unexplained references to existing treaty provisions, and including numerous protocols and declarations, the Treaty is unlikely to endear itself or the EU to a sceptical public.” (Dinan, 1999:305)

33 According to McDonagh (1998), the importance of the Reflection Group that prepared the Amsterdam IGC was “historic” once the IGC started. Stubb and Gray (2001) report that, at the beginning of the endgame in Nice, “it seemed as if 18 months of preparation had been thrown out of the window and the negotiations started from scratch.”
for flexibility in the future. In any case, it might seem premature to discuss the exact wording of the new revision clause before the IGC has even started discussing the draft constitutional treaty. As it stands, the national governments still have the last word when it comes to reforming the constitutional treaty, including the revision of the revision clause itself.

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The Proposal for a new Directive concerning Credit for Consumers

By Kristin Nemeth/Helmut Ortner

A. Introduction

Since 1995 the Commission has repeatedly reviewed the operation of directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the member states concerning consumer credit.\(^1\) This was regarded to be necessary mainly for two reasons: firstly, even at the time of the enactment of the original directive its level of protection was lower than in most member states;\(^2\) secondly, the Commission repeatedly emphasised several changes, which had taken place in regard to the credit services sector in recent years.\(^3\) Whereas the previous directive was targeted at the two most common “products” at that time, namely hire purchase agreements and instalment credit and reflected the cash-based society of that time, the range of products presently offered is much more colourful.\(^4\)

Although these developments have led to some changes in several national laws, there exists no common standard of protection on the European level. Consequently, consumers lack confidence and there is scarcely any cross border business.

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\(^1\) Cf. 1987 L 42/48; Cf. COM (95) 117 final; COM (96) 79 final; COM (97) 465 final.

\(^2\) COM (2002) 443 final 3. The European legislator was obviously aware of this fact; cf. Art. 15 dir. 87/102/EEC: “This Directive shall not preclude Member States from retaining … more stringent provisions to protect consumers …”.

\(^3\) Cf. COM (2002) 443 final 25: “… for some years now the range of credit available has been growing …”; COM (2002) 443 final 2: “… the reports and the consultations show that there are enormous differences between the laws of the various member states in relation to … consumer credit…”. Interesting enough, the same reason was mentioned in the statement of reasons of directive 87/102/EEC: “whereas there has been much change in recent years in the types of credit available to and used by consumers; whereas new forms of consumer credit have emerged and continue to develop”.

\(^4\) Cf. Art. 20 of the proposal (credit agreements providing constitution of capital) and Art. 21 (credit agreement in the form of an advance on a current account or a debit account); cf. COM (2002) 443 final 3; Amparo San José Riestra, The new consumer credit directive: a feasible attempt to harmonisation? (http://www.ceps.be/Commentary/Oct02/SanJose.php).
Needless to say, this phenomenon also constitutes a serious obstacle to the completion of the single market. The Commission was aware of this problem: in a discussion paper from July, 2001, several interest groups such as the credit services sector as well as consumer friendly organisations were invited to comment on the necessary changes. The result of this consultation process was the publication of six guidelines on a necessary revision of the old directive. On 11 September 2002 the proposal for a new directive concerning credit for consumers was finally presented.

B. Implementation of the “old” Directive

Two examples shall illustrate how the 1987-directive was implemented. Whereas the German legislator chose to enact only one statute, the Verbraucherbankkreditgesetz (Consumer Credit Act), Austria tried to blend the directive provisions into its existing laws. This multilevel implementation, in the Austrian Konsumentenschutzgesetz (Consumer Protection Code), the Bankwesengesetz (Statute concerning banking business), the Versicherungsaufsichtsgesetz (Statute regulating public insurance law) as well as the Verbraucherbankkreditverordnung (administrative regulation concerning consumer credit), led to several problems such as overlapping scopes of application and information problems for consumers about the state of the law. Although – as has been mentioned above – Germany only enacted one statute, leaving the remaining issues to be addressed by the general Bürgerliches Gesetzbuch (BGB – German Civil Code), the legal situation there was also accused of unsurpassable complexity.

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7 VerbrKrG, dBGBI I 1990, 2840 as amended. In the meantime most special statutes were implemented into the German Civil Code (BGB). The relevant provisions concerning consumer credit can be found in sections 491 et seq. BGB.


9 BWG, oBGBl 1993/532 as amended (oBGBl I 2001/97).

10 VAG, oBGBl 1978/569 as amended (oBGBl 1999/194).


12 Mülbert, ÖBA 1993, 105.
C. The most important new Provisions

This section shall illustrate the most important changes between the old and the new directive. Thereby it should be kept in mind that the Commission primarily aimed at modernizing the existing body of law and creating more consumer confidence. The following analysis shall show whether this aim has been achieved. It should be mentioned, however, that the credit services sector has already massively criticised the new provisions. In their opinion, regulating consumer credit as stringently and in such detail as foreseen in the proposal patronizes consumers in a way which is not necessary. They also point to the fact that the new regulations will lead to a considerable increase in credit costs, which will eventually be passed on to the consumers. These, in consequence, will change their behaviour, particularly causing them to take out fewer loans and, in the end, spend less money. Because of the disastrous effect this would have on overall demand, some experts even talk of a leverage effect on economic growth. Nonetheless, one might doubt the credibility of the industry’s critique considering their clearly interested motive: after all, it is mainly the lenders who suffer from an increase in costs and consequently lower profits. Additionally, they might also fear that the burden of more duties of disclosure and the principle of responsible lending might lead to more liability on their side.

I. Scope of Application of the New Directive

The first obvious change concerns the planned new directive’s scope of application: This relates to both, its personal as well as its substantial scope. However, the Commission refrained from redefining the meanings of the central terms: con-
sumer, creditor and credit agreement.\textsuperscript{17} Substantially new is that the proposal now also covers surety agreements.\textsuperscript{18} These are ancillary agreements to a credit agreement, whereby a consumer as the "guarantor"\textsuperscript{19} promises to guarantee the fulfilment of any form of credit granted to natural or legal persons.\textsuperscript{20} It is, however, not a necessary prerequisite that the contract guaranteed for is a consumer contract.

As we will not deal with surety agreements in more detail in this article, the relevant provisions shall only be mentioned briefly. Art. 23 protects the guarantor by stating that a surety agreement with respect to an open-end credit agreement can only be concluded for a period of up to three years at the utmost and can solely be extended when the guarantor specifically agrees.\textsuperscript{21} Furthermore the guarantor is only liable to the second degree\textsuperscript{22} and his or her liability is basically limited to the outstanding balance of the total amount of credit.\textsuperscript{23}

Most of the proposal’s provisions also apply to credit intermediaries.\textsuperscript{24} Except in Art. 29,\textsuperscript{25} these are in general stated together with the obligations of the creditor and therefore do not require separate mentioning.\textsuperscript{26}

Art. 3 para. 2 of the proposal constitutes another remarkable novelty. The number of exceptions to the scope of application has been reduced substantially. One of the most eye-catching changes is the abolition of the present thresholds.\textsuperscript{27} From now on

\textsuperscript{17} Art. 20-22 cover specific credit agreements and modalities which partially also justify certain exceptions of other directive provisions (cf. Art. 16). They shall not be looked at in detail. See, Art. 2 lit a, b and c of the proposal.

\textsuperscript{18} Art. 3 par 1 of the proposal.

\textsuperscript{19} Art. 2 lit f of the proposal.

\textsuperscript{20} Art. 2 lit e of the proposal.

\textsuperscript{21} Art. 23 para. 1.

\textsuperscript{22} Art. 23 para. 2.

\textsuperscript{23} Art. 23 para. 3.

\textsuperscript{24} For a definition of the term see Art. 2 lit d. See, It should not be forgotten that also Art. 3, 12, 14 of the Directive 87/102 are applicable to credit intermediaries; cf. Knobl, ÖBA 1995, 667 (section 3.1.).

\textsuperscript{25} Concerning advertisement of the intermediary and fees granted to him.

\textsuperscript{26} Such as e.g. Art. 6 par 1 (exchange of information in advance and duty to provide advice), Art. 10 (information that must be included in credit and surety agreements), Art. 26 (registration of creditors and credit intermediaries), Art. 33 (burden of proof).

\textsuperscript{27} Art. 2 par 1 lit f of the Directive 87/102 states that the directive shall not apply to credit agreements involving amounts less than ECU 200,-- or more than ECU 20.000,--. This will have to lead to an
any credit agreement covered by the proposal shall be regulated by the directive’s provisions, regardless of the amounts involved.

It needs to be mentioned in this context that Art. 5 of the proposal prohibits the negotiation of a credit or a surety agreement outside business premises. This was harshly criticised as doorstep selling is already subject to detailed European legislation and its prohibition is prone to only “increase costs and in no way consumer protection”. Moreover, also the 2001 judgement of the European Court of Justice in Case 481/99, Heininger, points in the opposite direction as the Court stated that directive 87/102/EEC on consumer credit did not restrict the application of Directive 85/577/EEC on doorstep selling.

II. Duties of the Creditor and/or Credit Intermediary

One of the principal aims of the proposal is described in number four of the six guidelines: “... more comprehensive information for the consumer and any guarantors”. The proposal, however, does not impose a single, all-embracing clause covering all various aspects of duties of disclosure. Instead they are divided into pre-contractual (Art. 6), contractual (Art. 10) as well as other duties.

Art. 6 of the proposal – titled “exchange of information in advance” – immediately attracts one’s attention as it is obviously not only the creditor who shall be obliged to meet certain duties of disclosure preliminary to the conclusion of the credit agreement (par 2), but also the borrower. The latter has to provide the creditor with information which is relevant to him “with a view to assessing [the consumer’s] financial situation and [the consumer’s] ability to repay”. Despite these mutual duties the main idea behind Art. 6 still seems to be protection of the consumer as amendment of the respective Austrian provision in the Consumer Protection Code as well. Also the present directive has already led to changes within the Austrian Consumer Protection Code concerning the respective thresholds stated in § 16 par 1 and § 26b applicable to instalment plans and the sale of periodicals – They were then increased from ATS 150,000,-- (now approx. € 11,000,--) to ATS 310,000,-- (now € 25,000,--).


29 Cf. the French Association of Specialised Credit Establishments (supra footnote 13; Arnaud de Marcellus, chairman of ASF’s Surety Committee).


32 Art. 6 para. 1.
the “… creditor may request of a consumer … only such information as is adequate … and not excessive”. However, thinking of systematic interpretation, it is irritating that the obligation of the consumer is mentioned first.

Art. 10 of the proposal, titled “information that must be included in credit and surety agreements” can be identified as the central provision with regard to the contractual duties of disclosure. Otherwise various other provisions of the proposal must be looked at to fully grasp the information concept of the directive: such as Art. 21, 23 para. 3, 24 para. 1 lit. d and Art. 25.

It has already been mentioned that these extensive duties of disclosure were severely criticized. They were said to be “unclear, unrealistic and not adapted.” The credit services sector especially criticized the lack of clear guidelines as to how to perform the duties. Moreover, some of them were simply seen to be impossible to fulfil. Another argument brought forward was that too much information would not contribute to more autonomy of decision-making but rather result in the opposite.

The next core provision of the proposal is Art. 9, which contains the concept of “responsible lending”. This principle is also reflected in Art. 6 para. 3, which states that the creditor “shall seek to establish among the credit arrangements [he] usually offer[s] or arrange[s], the most appropriate type and total amount of credit …” for the consumer. This novelty seems to be the biggest bone of contention for the credit services sector. Indeed it remains unclear what the creditors really have to do to meet the requirements arising from this concept. The proposal seems to be contradictory. Art. 8, titled “Central Database”, indicates that the concept of responsible lending only requires the creditor to consult the central database before concluding

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33 Titled credit agreement in the form of an advance on a current account or a debit account. Art. 21 of the proposal proposes a standard method for providing information during the term of the credit agreement.

34 … which stipulates a duty to inform the guarantor in time before he is made liable.

35 This clause states the creditor’s duty to hand over a detailed statement of account in case of the consumer’s non-performance with his obligations or early repayment, allowing him to verify the charges and interest claimed.

36 Information that has to be given in the case of overrunning of the total amount of credit.

37 Cf. the French Association of Specialised Credit Establishments (supra footnote 13; Michel Lecomte, Chairman of ASF).

38 Cf. the French Association of Specialised Credit Establishments (supra footnote 13).

39 Cf. the French Association of Specialised Credit Establishments (supra footnote 13) with regard to the obligation to state three different kinds of rates, which in their opinion “can only confuse consumers”.
a credit agreement with a consumer. On the other hand, Art. 9 itself states that the creditor has to use “any means at his disposal” to assess whether the consumer can reasonably be expected to discharge his obligations under the credit agreement. The wording of the latter provision suggests that these duties comprise more than just checking the database. Furthermore, Art. 6 par 3 quoted above obviously further substantiates the general concept. Understanding the concept of “responsible lending” completely therefore requires careful interpretation.

The proposal also increases the lender’s liability in cases of bad performance of the financed contract. Whereas directive 87/102/EEC only stipulates a subsidiary responsibility of the creditor in cases where the purchase of a good and its financing are closely connected, the proposal takes this a step further by establishing joint and several liability on the part of the supplier and the creditor, as long as the former acts as a credit intermediary. The consumer therefore has the option of going to court against one or the other or against both at the same time.

The preamble of the new proposal emphasises the principle of proportionality as the “principle element linking all the articles in the chapter of non-performance of a credit agreement”. Despite its fundamental relevance it is neither explicitly mentioned in any of the proposal’s articles nor in any of the 30 recitals as a general concept. The only trace of it can be found in Art. 24 par 1 a) with respect to measures of the creditor to recover amounts due in the event of credit or surety agreements. This – in our opinion – does not adequately express the general importance of the principle. Art. 24 et seq. then explicitly lay down the creditor’s obligations and rights in cases of non-performance of the consumer. The creditor can only de-

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40 Art. 11 par 2 of Directive 87/102. It should be mentioned that the Austrian implementation of Art. 11 (§ 18 KSchG) only stipulates the consumer’s right to refuse repayment as long as the supplier has not performed his duties.

41 Art. 19 par 2 of the proposal.


43 Recital 28 thereby only refers to the general meaning of the principle of proportionality with respect to Art. 5 EC, i.e. with respect to measures taken by the Community and not specifically to contractual obligations between creditors and consumers.

45 According to Art. 24 par 2 this is not necessary if the consumer is accused of fraud or acting against his obligations arising from the credit agreement; however, it is the creditor who has to provide the evidence for such circumstances.
mand immediate full payment if he gives a prior default notice and grants the consumer a reasonable period of time to comply with his duties.\footnote{Art. 24 par 1 b) of the proposal.}

It should only briefly be mentioned that a few provisions remained unchanged in comparison to directive 87/102/EEC, such as Art. 23 on the assignment of the creditor’s rights to a third party.\footnote{Formerly Art. 9 of Directive 87/102.} In such a case the consumer shall be entitled to plead against that third person any defence which was available to him against the original creditor.

\section*{III. Rights of the consumer}

The duties of the creditor described in the previous section often constitute corresponding rights of the consumer. However, a few more provisions concerning consumer rights have to be mentioned separately.

Art. 11 stipulates a \textit{right of withdrawal} for the consumer. He shall have a period of fourteen calendar days to withdraw his acceptance of the credit agreement without having to give any reason.\footnote{Cf. supra footnote 30 (Heininger).} This is another provision criticized in strong terms by the economy.\footnote{“Credit providers have neither the means nor services to manage restitution of goods … [This provision] entails a dramatic increase of internal costs for specialised credit establishments, and therefore, at the end of the day, of expenses borne by the consumer…The Directive shows a severe lack of understanding of what actually goes on in the field …” (Cf. supra footnote 13).}

Just as in directive 87/102/EEC, the new proposal contains the consumer’s right of \textit{early repayment}. A comparison between Art. 8 of directive 87/102/EEC and Art. 16 of the proposal is, however, very surprising Art. 8 of the directive states: “The consumer shall be entitled to discharge his obligations under a credit agreement before the time fixed by the agreement. In this event, in accordance with the rules laid down by the Member States, the consumer shall be entitled to an equitable reduction in the total costs of the credit”.\footnote{The statement of reasons of directive 87/02 makes clear that both elements of Art. 8 were of importance: “Whereas the consumer should be allowed to discharge his obligations before the due date; whereas the consumer should then be entitled to an equitable reduction in the total cost of the credit.”} Art. 16 para. 1 of the proposal, on the other hand, only states the right to early repayment itself without referring to the right of an equitable reduction in credit costs. Also the proposal’s preamble (“examination of the articles”) does not mention this right of reduction anymore. This
irritates even more as Art. 16 contains a new paragraph 2 which seems to only emphasize creditor’s interests by entitling the creditor to require an early repayment indemnity from the consumer to offset his charges and lost investment. However, this new provision must not only be interpreted according to its wording: An examination of the preamble shows that Art. 16 actually aims at improving the consumer’s situation. The Commission thereby refers to its legal opinion that the “old” Art. 8 of directive 87/102/EEC did not stand in the way of requiring such indemnity but that this indemnity, for the time being, was only justified in the very limited circumstances now mentioned in Art. 16 para. 2. On the other hand the Commission does not restate the consumer’s right to have the credit costs reduced. This is not only curious but might even be dangerous as the provision now seems to only protect the creditor.\(^{51}\)

As a last point it should not be forgotten that all provisions in favour of the consumer are not subject to \textit{party autonomy}.\(^{52}\) The proposal makes clear that its provisions are imperative and that the rights granted to consumers and provided by the proposal may under no circumstances be surrendered.

\textbf{IV. Conceptual Novelties of the Proposal}

Next to the substantive changes described in the previous chapters the proposal also contains conceptual novelties that need further examination:

\textit{1. The concept of maximum harmonization}

The first conceptual novelty, which strikes the reader’s attention, is the switch from minimum to maximum harmonisation.\(^{53}\) Whereas directive 87/102/EEC allowed member states to adopt or maintain more stringent provisions to protect consumers\(^{54}\) – which has been the traditional way of regulating consumer protection issues...

\(^{51}\) Which becomes even more delicate because of the principle of maximum harmonisation; cf. infra [17ff].

\(^{52}\) Art. 30 par 2 and 4 of the proposal.


\(^{54}\) Art. 15 of Directive 87/102.
Art. 30 para. 1 of the proposal confirms the principle of total harmonization. Member States shall not be entitled to provide for a higher level of protection unless otherwise stipulated.\(^{55}\)

It surprises that, in line with the new proposal, no official reasons for this remarkable change are given. The trend, however, was foreseeable. In its paper on Consumer Policy of 7 May 2002 the Commission already pointed in this direction, but again without an official justification.\(^{56}\) In our view a plausible explanation seems to be that the Commission no longer considered the older concept of minimum harmonization appropriate for producing optimal results in line with the completion of the single market. Considering the principle of minimum harmonization more closely, and particularly in regard to the reasons mentioned in the various preambles, led us to the conclusion that this principle was conceptually misleading right from the beginning. Minimum harmonization can, in effect, never really promote European economic integration. First of all it cannot be explained from the suppliers’ point of view, as they are still confronted with fifteen different member state laws. But also scrutinizing the demand side does not lead to a satisfying explanation one might conclude that minimum harmonization in this respect at least bears the advantage of being able to rely on a common minimum standard of protection; the consumer is confronted with a legal situation which is only different in so far as it is more favourable to him or her. We doubt, however, that this latter presumption can be upheld because the consumer is only familiar with his or her own national legal situation and not with the minimum standard of the directive, he or she still risks a loss in protection when entering the market of another member state, if his or her home member state provides for a higher level of protection than the latter. In our view it is therefore doubtful that consumer cross border activities are really enhanced by a concept of minimum harmonization.

The real reason for this development therefore seems to be a political one. When harmonization in the field of consumer protection started, minimum harmonization seems to have been the lowest common denominator and therefore the only consensus to be reached.\(^{57}\) The foregoing analysis shows, however, that it did not constitute a real step towards more integration, although it should not be forgotten that it definitely initiated a process, which now culminates in the new concept of maximum harmonization.

\(^{55}\) National provisions concerning maximum or exorbitant annual percentage rate of charge or any other type of setting or evaluation of maximum or exorbitant rates continue to apply, as these specific aspects are not dealt with in the proposal.

\(^{56}\) Quoted supra note 53.

It remains to be seen if this new concept will be able to reach its ambitious goals rather than eventually weakening consumer protection. In this respect it is important to keep in mind that, because powerful pressure groups resist many provisions of the proposal, it seems unlikely that the high level of protection presently granted by its regulations can be maintained. If substantial cutbacks must be made, the concept of maximum harmonization may well have a boomerang effect, as half-hearted maximum harmonization – this time the lowest common denominator from a substantial point of view – would then lead to a loss of the high protection level granted in some member states, as they would not be allowed to introduce additional provisions. Since consumer credit and consumer protection in general constitute highly sensitive political issues, the outcome is hard to predict. All elements of the proposal are expected to be extensively discussed.

It must be mentioned that there are two exceptions to the principle of maximum harmonization. The first is the optional “positive registry” mentioned in Art. 8 para. 4. Art. 8 states that Member States shall make it compulsory to maintain a central database holding “negative data” recording late payments. This final paragraph, however, allows the member states to go further by setting up central “positive databases” recording all consumer commitments relating to credit. The creditor would thus have at his disposal an instrument that is more reliable than a negative database. This would offer him the chance to check, whether a consumer, or possibly a guarantor, has concluded other credit or surety agreements that have not yet been subject to litigation but constitute an obstacle to further credit.

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58 Similar reasons seem to constitute the background for the European Parliament’s fears that the concept of maximal harmonisation could lead to a decline in consumer protection (this is e.g. mentioned by María Sornosa Martínez in an outline for the European Parliament of November 2002, PE 319.393). Another potential problem in regard with the principle is mentioned by the European Mortgage Federation in an official letter regarding the Position Paper on the Green Paper on European Union Consumer Protection (http://www.hypo.org): Despite welcoming the concept (“The efficiency … clearly depend[s] on the condition that it is based on the full (maximum) harmonisation principle, thus eliminating the fragmentation which results from the minimum clause”), it calls into question the possibility to achieve the aim strived for by stating that it still remains unclear if the existing fragmentation resulting from a wide range of often very specific and detailed national legislation really can be suppressed.


60 Art. 30 par 1 a) and b) of the proposal.

61 This is indicated by the wording: “The central database … may include the registration of credit agreements and surety agreements.”

62 The creditor would thus have at his disposal an instrument that is more reliable than a negative database. This would offer him the chance to check, whether a consumer, or possibly a guarantor, has concluded other credit or surety agreements that have not yet been subject to litigation but constitute an obstacle to further credit.
second exception relates to the burden of proof. Art. 34 states, that member states may provide that the burden of proof lies with the creditor or credit intermediary in various respects.

2. The restriction of a free choice of law

Secondly the proposal follows the examples of former consumer directives and introduces a private international law clause restricting the free choice of law in Art. 30 para. 5. The consumer cannot be deprived of the rights granted by the directive on the grounds that the law applicable to the credit or surety agreement is that of a third country.

V. Sanctions

As far as the sanctions to be provided for are concerned, Art. 31 requires the member states to “lay down infringements of national provisions adopted in application of [the proposal] and .... [to] take all necessary measures to ensure that these are enforced ....” According to the “examination of articles” possibilities include penalties as well as the withdrawal of the creditor’s licence. In our opinion it would be necessary to provide for the nullity of contracts or at least of the clauses contrary to the directive’s provisions, as this is the only way to really protect the consumers. The creditor’s duty to pay a penalty, on the other hand, is of no use to the consumer if the latter is still bound to fulfil an illegal contract.

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63 Art. 33 of the proposal.

64 Similar provisions can be found in other consumer protection directives (really more than the one mentioned), such as e.g. Art. 15 of Directive 2002/65/EC on the distance marketing of consumer financial services modifying Council Directives 90/916/EEC, 97/7EC and 98/28/EC.


66 However, par 5 makes clear that for this rule to apply, it is important that the agreement has a close link with the jurisdiction of one or more member states.

67 It is explicitly stated that circumvention of the application of the directive shall be prevented (Art. 30 par 3), both substantially as well as by choosing the applicable law (Art. 30 par 5).

68 Art. 30 par 3 of the proposal explicitly admonishes the member states to make sure that the provisions of the proposal cannot be circumvented.

D. Concluding Remarks

The foregoing analysis has shown that many aspects of the proposal constitute a big step towards more consumer protection. Others, however, are problematic and quite a few have been harshly criticized by the credit services sector.

The future will show if all proposed measures will actually pass the co-decision process in the European Parliament; for the time being this is seriously doubted. Having to transpose a new directive into national law could, however, constitute a chance for the national legislators to correct former inadequacies such as the ones discussed above,\textsuperscript{70} which would in the future help consumers to access the law more easily.

\textsuperscript{70} Cf. supra section II.
A. Introduction

During the process of the establishment of the International Criminal Court (ICC), a voluminous set of rules was elaborated to ensure that the Court will become an effective instrument for the enforcement of international law.¹ These rules and provisions were drafted and approved in the abstract, but how would they actually work in practice? – We hear that the USA has undertaken an enormous diplomatic effort to limit the jurisdiction of the ICC. To what extent would the outcome of these efforts create an obstacle for the Court to exercise its jurisdiction? – The new ICC Prosecutor has just been sworn in, and several hundred incidents have been reported to the Court where crimes falling under the Rome Statute of the International Criminal Court² might have been committed. Still, it might take some months, if not years until the Court sees its first indictment or trial and until the statute and rules of the Court are applied for the first time.

At a recent seminar on international criminal law at Würzburg University (Germany),³ participants had the chance to take a trial-run at the functioning of the Court’s legal foundations and at the practical impact of US attempts to undermine its jurisdiction. For this purpose, a “simulation exercise” of a hypothetical case before the ICC was staged. The organizers of the seminar had the good fortune of securing the support of Roy S. Lee⁴ for this exercise. Roy Lee not only provided the


² Cf. Article 5 para. 1 of the Rome Statute (n. 1).


⁴ Roy S. Lee: LL.M., Ph.D.; Special Senior Fellow, UNITAR; Adjunct Professor, Columbia University, New York; formerly director of the Codification Office of the Office of Legal Affairs, United Nations; Executive Secretary of the Rome Diplomatic Conference for the Establishment of an International Criminal Court (1998).
“Blueland and Whiteland Scenario” upon which the exercise was based and which he had originally developed for his class at the Columbia University Law School (New York), but he also agreed to oversee the simulation in person.

The seminar, which was organized by the European Law Students’ Association (ELSA), assembled about 100 law students and young professionals from twelve European countries. ELSA, a Europe-wide organization with over 20,000 members, has been involved in the process leading to the establishment of the ICC since the Rome Diplomatic Conference in 1998. As a non-governmental organisation with UN special consultative status, ELSA delegates attended the sessions of the Preparatory Commission for the ICC. A number of working groups carry out research on topics related to international criminal law, and a handbook on the ICC was published. For these reasons, there is a high awareness of the development of international criminal law within ELSA and among its members. Most of the participants were familiar with the legal foundations of the ICC, which made it possible for them to act out the roles of prosecutor, defence counsel, counsel of the victims and judges during the simulation exercise.

However, the “simulation exercise” was not intended to be just another moot court where law students can experiment with their oral presentation skills. In the words of Roy Lee, the simulation exercise aims at achieving a “legal discussion” among the participants, allowing them to become familiar with certain aspects of the Statute and rules of the ICC, and maybe to find out the legal questions which the first judgements of the Court will have to deal with.

B. The Scenario

The case was based on a scenario which sounded all too familiar: a failing state (Sweetland) is weakened by tribal disagreement and descends into anarchy; eventually a truce is agreed to between the warring factions, and the UN sends in a peacekeeping mission to oversee its implementation. However, the ASNA, an insurgent group, breaks away from the coalition government established by the truce agreement. A terrorist attack by an unidentified rebel group kills several UN peacekeepers of Whiteland and Blueland nationality whereupon Whiteland and Blueland decide to stage their own attacks on the territory under the control of ASNA in retaliation. These unilateral attacks result in a large amount of “collateral damage”

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5 For further information on ELSA and its projects related to international criminal law, please visit www.elsa-pinil.org (ELSA Project on ICC National Implementation Legislation).

6 The materials for the simulation exercise can be obtained from the authors of the present article. Authorisation by Roy Lee should be sought before use.
in the form of 300 civilian deaths and destruction of farmland and civilian property. ASNA captures five of the pilots flying these attacks and decides to surrender them to the ICC for trial. Neither Sweetland, a State Party to the Rome Statute, nor any neutral third country shows an interest in bringing the pilots before a court. Whi
teland and Blueland threatened ASNA with military attacks if the pilots were not released immediately. Through the good offices of the UN Secretary-General they were eventually surrendered to the International Criminal Court in The Hague.

The question which the parties now had to argue (and the judges to decide) was whether the ICC was entitled to exercise jurisdiction, given that the principle of complementarity normally entitles a state to try its own nationals if willing and able to do so. The scenario also pointed out that additional questions of admissibility were raised by the existence of a Security Council Resolution dated 12 July 2002 granting a one year immunity to all UN peacekeepers as well as a Bilateral Immunity Agreement between Whiteland and Sweetland prohibiting Sweetland from ever surrendering to the ICC any Whiteland nationals. Even without these additional pointers, most participants had no difficulty in identifying Whiteland and Blueland as the US and the UK.

Alongside these procedural questions, the parties also had to focus their attention on arguments in relation to substantive international criminal law: had the pilots committed crimes against humanity; did the attacks constitute a widespread or systematic attack on a civilian population and had the pilots had knowledge of the extent and nature of the attacks; and, had they committed war crimes and if so, which particular ones? These questions required careful consideration and a detailed analysis of the facts.

C. The Preparations

The participants had been divided into groups and had been given the opportunity to prepare arguments for their particular roles before their arrival in Würzburg. At the seminar, separate workshops were held to allow participants to meet their teams and settle between themselves their motions for the next day. Professor Otto Triffterer from the University of Salzburg supervised the group of judges, Ekkehard Withopf, Senior Trial Attorney at the Office of the Prosecutor of the ICTY, oversaw the group of prosecutors, Dr. Heiko Ahlbrecht, an ICTY defence counsel himself, aided those individuals who had taken it upon themselves to fight for a fair trial for the five pilots, and Türkmen Teczan, a Pupil Barrister from Nuremberg.

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7 Para. 10 of the Preamble of the Rome Statute (n. 1).
assisted the victims counsel in formulating their additional arguments to remind the Court of the plight of those who had suffered the most by recent events.

D. The Proceeding

During the exercise, the parties were positioned so that the Bench had the Defence on its left and the Prosecution and Victims’ Counsel on its right. This allowed a proper advocacy match to ensue between the Prosecution/Victims’ Counsel and the Defence who were effectively facing each other. Roy Lee conducted the exercise from the centre of the “court room” and provided the participants with useful information where necessary. He emphasised that the parties were not rigidly bound by the facts of the case but were allowed a certain discretion in their interpretation and could fill in the lacunae with their submissions. This allowed new aspects to appear and to challenge the spontaneity of the participants.

I. First Phase: Jurisdiction and Admissibility

The first phase of the exercise consisted of a hearing before the Pre-Trial Chamber under Article 19 of the Rome Statute. The Chamber had to decide whether the ICC had jurisdiction in the present case and whether the case was admissible.

1. Jurisdiction and Admissibility, Articles 11-19 of the Rome Statute

In its initial statement, the Prosecution alleged that the ICC had jurisdiction to try the pilots under Articles 11-15 of the Rome Statute, whereas the Defence rejected this submission on the grounds that Whiteland was not a State Party to the Rome Statute and that, in any case, both Whiteland and Blueland would carry out their own investigations into the matter and prosecute the pilots if necessary, and that the Prosecution bears the burden of the proof to establish that Whiteland or Blueland were “unwilling or unable genuinely to carry out the investigation” (Article 17 (1) (a) of the Rome Statute). After an argument between the Victims’ Counsel and the Defence over the right of the former to participate in the proceedings according to Rules 89 to 91 of the Rules of Procedure and Evidence of the ICC, the Victims’ Counsel supported the point made by the Prosecution.

In response to the earlier challenge by the Defence, the Victims’ Counsel retaliated by questioning if Whiteland was in fact submitting to the jurisdiction of the Court by sending legal representatives. However, the Defence convincingly stated that they were first and foremost representing the accused pilots as nationals of Whiteland and Blueland. Whiteland and Blueland, however, were also participating in the arguments since they had a legitimate interest in contesting the ICC’s jurisdic-
tion (and were entitled to do so under Article 19(4) of the Rome Statute); this was in no way to be read as a submission to its jurisdiction.

When the Prosecution alleged that it had commenced the investigation *propru motu* in accordance with Article 15 (1) of the Rome Statute, it stepped into a trap set by the Defence: the Defence asserted that neither Blueland nor Whiteland had been notified of the investigation and that their rights under Article 18 (1) of the Statute had therefore been violated. Further, the Prosecution had not sought the authorization of the Pre-Trial Chamber to proceed with the investigations. This raised the question whether these procedural mistakes would have an impact on the admissibility of the case. With regard to Article 18 (1), the Prosecution argued that Whiteand and Blueland had not been substantially prevented from initiating their own investigations. It was also put forward that a ruling of the Pre-Trial Chamber on the admissibility of the case under Article 19 would make up for the lack of authorization.

2. Security Council Resolution 1422

Security Council Resolution “1234” of 12 July 2002 seemed to create the major obstacle to the admissibility of the case. Again, the real background of the case was quite obvious and the resolution could easily be identified as the rather infamous Security Council Resolution 1422\(^8\) which was adopted in July 2002 after strong US pressure on the Security Council to exempt its military personnel participating in UN peacekeeping missions from prosecutions before the ICC. The Prosecution, supported by the Victims’ Counsel, stated that the Security Council Resolution “1234” of 12 July 2002 was void, since the Security Council had not made a determination that one of the situations referred to in Article 39 of the UN Charter existed.\(^9\) The resolution was also said to be inconsistent with Article 16 of the Rome Statute;\(^10\) it followed clearly from the drafting history of this provision that it could only be used for temporary deferrals on a case-by-case basis in situations where an investigation by the ICC prosecutor would e.g. endanger the conclusion of a peace agreement.

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\(^8\) Security Council Resolution 1422 of 12 July 2002. Please note that the Resolution has just been renewed for another year on 12 June 2003 (Resolution 1487) with 12 votes in favour and France, Germany and Syria abstaining.

\(^9\) Article 9 UN-Charter: “The Security Council shall determine the existence of any threat to the peace, breach of the peace or act of aggression…”

\(^10\) Article 16 of the Rome Statute reads as follows: “No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the council under the same conditions.”
Reference was also made to a separate opinion of Ad Hoc Judge Lauterpacht in the Bosnia and Herzegovina case. In this case, Bosnia and Herzegovina claimed that Security Council Resolution 713 (1991), which imposed an arms embargo on that country, necessarily assisted genocide by preventing the victims from defending themselves and, therefore, violated *ius cogens* provisions. Judge Lauterpacht concluded that the Security Council did not have discretion in such a case and that the resolution was therefore without effect and *ultra vires*.\(^{11}\) In the case at hand, the Prosecution argued that Resolution “1234”, seeking to prohibit states, in effect in perpetuity, from taking steps to repress crimes under international law that violate *ius cogens* prohibitions severely endangered the enforcement of these prohibitions and was therefore equally invalid and should be disregarded by the Court.

Even if the Security Council had not acted *ultra vires*, it was argued that the resolution would in any case not be applicable to the case at hand, since it only applied to “UN authorised missions”. The retaliatory attacks by Whiteland and Blueland, however, were not covered by the mandate of the peacekeeping mission.

While the Prosecution could rely on a wide range of excellent publications challenging the legality of Resolution 1422,\(^{12}\) the Defence was in a much less favourable position. Still, they vigorously opposed the arguments of the Prosecution. They contended that the wording of Article 16 of the Rome Statute in no way precluded the interpretation that was given to it by the Security Council. The Defence also emphasized that the resolution had been adopted unanimously. Since several States Parties to the ICC had voted in favour of it, it was a clear indication of a certain state practice prevailing over arguments drawn from the drafting history.\(^{13}\) Further, the ICC had to respect the discretion exercised by the Security Council in the adoption of its resolutions. If Security Council resolutions were to be reviewed by the ICC, the current international legal order would be put at risk.


\(^{13}\) Compare Article 31 para. 3 lit. b) with Article 32 of the Vienna Convention on the Law of Treaties (1155 UNTS p. 331).
3. “Article 98 Agreement”

The Bench then asked the Defence to comment on the “Article 98” Bilateral Immunity Agreement between Whiteland and Sweetland. Again, the agreement had a real background since it reflected the agreements that the United States has sought to conclude with almost all states in order to prevent them from surrendering its nationals to the ICC. The Defence contended that the agreement was of relevance in the proceedings and should prevent the Court from exercising jurisdiction as the surrender of the accused had been illegal in the first place. The Prosecution vigorously argued that the Agreement should never have been concluded in the first place as it went against the spirit of the Rome Statute and was therefore in breach of Sweetland’s international obligations. The Prosecution further argued that, in any case, the Immunity Agreement was not binding on the Court and that even if it was binding, it could not have imposed a specific obligation on Sweetland in this regard, as the accused had been in the custody of a rebel group outside of Sweetland’s official control.

At the end of the first phase the Bench delivered its decision. It announced that, in general, the Court did have jurisdiction over the case. However, the case was held not to be admissible, as there was not sufficient evidence that Whiteland and Blue-land would not properly investigate their nationals before their own respective national institutions. As a moot point, the Court held that the Security Council Resolution was of advisory value, but not binding on the Court. Furthermore, in relation to the Article 98 Agreement, the Court held that it had no effect on the Court. In any case, the Agreement was not in accordance with the Rome Statute and had therefore been concluded in breach of international law.

Since the exercise was supposed to be rather a discussion than a moot court, a vote was taken at the end of the first phase on all the issues in dispute. It was interesting to observe how the participants’ analysis of these issues in their private capacity differed from the position they had taken during the proceedings.

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14 The wording of these agreements seems to be more or less identical in each case. For the purpose of the simulation exercise, the text of the USA-East Timor agreement was used (signed 23 August 2002).

15 53 participants (with no dissents) were of the opinion that the Court had jurisdiction over the case. 42 participants (with three dissents) opined, however, that the case would not have been admissible. 41 participants thought that the Security Council Resolution could not bind the Court, whereas 18 thought it could. Only three participants thought that the Article 98 Agreement should have had any binding effect on the Court.
II. Second Phase: Substantive Criminal Law

Even though the Court had held the case to be inadmissible, for the sake of argument, the proceedings continued on the assumption that the case had gone on to full trial.

1. Character of the Conflict

The Prosecution and Victims’ Counsel submitted that the accused had committed crimes against humanity and war crimes. Arguments were put forward in relation to whether or not the conflict had been of an international or national character. This distinction was necessary to determine which of the war crimes under the Rome Statute were applicable. While the Prosecution argued that ASNA was to be considered as a local de facto regime enjoying the protection of Article 2 (4) of the UN Charter, the Defence contended that Whiteland and Blueland had been invited by Sweetland and that the ASNA had broken with the coalition government just shortly before the attacks and could therefore not be considered a stabilised de facto regime.

2. Crimes Against Humanity, Article 7 of the Rome Statute

The Prosecution and Victims’ Counsel submitted that the different bombings were a continuous, rather than a separate event, to support the view that there had been a “widespread and systematic attack” (Article 7 of the Rome Statute) and to prevent any possibility that parts of the attacks (which had commenced on 10 July 2002 and ended on 20 July 2002) could possibly fall under the immunity granted by the Security Council Resolution as of 12 July 2002. In relation to the actual culpability of the accused, the Defence acknowledged that the acts which the pilots were blamed of had taken place, but rejected that they were crimes under the Rome Statute. They denied that an “attack on a civilian population” had taken place, and in any case, that it had been “widespread or systematic”. This raised the question of how many people would have to suffer death to consider the attack a “widespread” one.

3. War Crimes, Article 8 of the Rome Statute

In relation to war crimes, the Prosecution submitted that crimes were committed under Article 8 (2)(a)(i) and 8 (2)(b)(i), (ii) and (iv) (for international conflicts) or 8

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16 While Article 8 (2) lit. (c) and (e) of the Rome Statute apply to non-international conflicts, the much more extensive lit. (a) and (b) apply to international armed conflicts.

17 Article 8 (2) (a) (i): Wilful killing; (b) (i): Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (b) (ii): Intentionally directing
(2)(c)(i), and 8(2)(e) (i) and (ii)\(^8\) (for internal conflicts). The accused had intended to kill or had at least been grossly reckless as to whether or not civilians would get killed. The Defence countered by contending that no wilful killing or intentional attack against civilians had taken place, and that all attacks had been legitimate. The Prosecution replied that committing such acts in full knowledge of the consequences indicated that the accused also had the necessary intent (i.e. the voluntary element in the terms of Article 30 of the Rome Statute).

4. Acquittal in Exchange for Compensation to the Victims

Attention then moved to the Victims’ Counsel who, in accordance with a Rule 94 request sent previously to the ICC Registrar, requested $30 million in reparation for a group of identified victims. This sum, they argued, was little in comparison to the $3 billion paid by Whiteland and Blueland for the war. The reparation was to be forthcoming from the accused or, failing the availability of sufficient funds, from the ICC’s Victims’ Trust Fund. At this stage, the legal representatives of Whiteland and Blueland intervened and offered that their governments make a contribution to the Trust Fund of $10 million if the charges against the accused were withdrawn. The Victims’ Counsel, however, scoffed at this suggestion and insisted on a payment of $30 million, a mine clearance programme, an official apology and a statement of intent to investigate the superior commanders involved in the attack. They also requested security by way of payment into the Court under Art 75(4), 57 (3) (e) in connection with Rules 87 and 99 of the Rules of Procedure and Evidence.

To the surprise of the Victims’ Counsel, the Prosecution was in any case not willing to drop their charges. Stressing once again the gravity of the crimes committed and the lack of co-operation from the accused, they requested terms of imprisonment of 12 years for each accused. They did not, however, request the imposition of a fine in addition to imprisonment in accordance with Article 77 (2) (a) of the Statute and Rule 146 of the Rules of Procedure and Evidence. This sanction seems rather designed for the key officials of rock states who, apart from ordering the commission

\(^8\) Article 8 (2) (c) (i): Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (e) (i): Intentionally directing attack against the civilian population as such or against individual civilians not taking direct part in hostilities; (e) (ii): Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law.
of crimes falling under the Statute, had accumulated considerable riches while being on power. The Defence insisted on the innocence of the accused, whilst stressing that Whiteland and Blueland were upholding their offer of an out of court settlement of $10 million and an official press conference to admit their mistakes.

The judges held that the conflict in question had been of an international character, and that the attacks on ASNA had been a continuous event. However, they held that no crimes against humanity had been committed, as the acts complained of lacked the seriousness and scale required. The judges admitted having been divided on the issue of whether or not war crimes had been committed, but in the end had narrowly agreed that the accused had committed war crimes under articles 8(2)(b)(i), (ii) and (iv) in that they had been at least grossly reckless as to whether their acts would result in death of civilians or destruction of civilian property. The Court reserved judgement on the length of the sentence imposed on the accused. The Court felt that the victims had the right to compensation and reparation in the sum of $30 million. The Court would not, however, seize any property of the accused in order to guarantee at least part of this sum. Instead, it strongly urged the national governments of the accused that they ought to make a payment into the Victims’ Trust Fund equal to that sum.

E. Conclusion

19 Note that section 43a of the German Criminal Code, which provided for the imposition of fines in addition to imprisonment similar to Article 77 (2) (a) of the Rome Statute, was declared null and void by the German Federal Constitutional Court (Bundesverfassungsgericht) in its decision 2 BvR 794/95 of 20 March 2002 (105 BVerfGE (2003) p. 135 et seq.), since it was seen to be in violation of the principle of nulla poena sine lege certa (Article 103 para. 2 of the German Basic Law). In contrast to German law, however, Rule 146 of the ICC Rules of Procedure and Evidence contains a detailed catalogue of criteria which the Court has to take into account in determining whether to order a fine and in fixing the amount of the fine. This catalogue would probably meet the concerns of the German Federal Constitutional Court.

20 Again, it was interesting to observe the participants’ analysis of the issues in dispute in their private capacity. The final results mirrored the decisions taken by the judges. 26 participants thought the conflict was of an international character, 16 thought it was internal. 37 participants were of the opinion that the attack had been continuous, only eight thought the bombings starting on 10 July and those on 20 July were separate events. In relation to the individual crimes, only four participants thought that crimes against humanity had been committed, whereas 23 thought that war crimes in an international conflict had been committed, one thought war crimes in an internal conflict had been committed and three thought that war crimes in both an international and internal conflict had been committed. Lastly, 40 participants believed that the victims had the right to claim reparation regardless of culpability, and two thought that the Court should take interim measures to seize property of the defendants in order to guarantee compensation. 38 participants felt that an amount in excess of $10m should be paid to the victims for death and injury and loss to farmland, whereas 17 felt that the pilots should be fined.
The Participants agreed that the simulation exercise had been a success, that any onlookers had observed impressive instances of advocacy and academic arguments and that many valuable lessons about the ICC had been learned. They warmly thanked Roy Lee for developing this exercise and for his skilful co-ordination. Roy Lee concluded that it was his intention to make young lawyers understand the Rome Statute better by giving them the opportunity to work with this outstanding instrument for the enforcement of international law.

Due to time constraints, the question of the *concursum delictorum* had to remain unanswered. The crimes under Article 8 (2) (b) (i) and (iv) as well as between No. (ii) and (iv), of which the accused were held accountable, seem to be at least partly overlapping. To date the question appears to be rather unsettled and certainly deserves further academic analysis.
A. INTRODUCTION

This year’s 6th Joint Conference held by the American and Dutch Societies of International Law and organised by the T.M.C. Asser Institute in The Hague focused on the increasing importance of the role of non-state actors in international law and at the same time provided an opportunity for American and European lawyers to address recent differences between the U.S. and Europe, e.g. on the use of force in Iraq. Consequently one of the three major issues of the conference was the response to international terrorism, while other issues included the role of international organizations as well as transnational corporations in international law.

After a Reception and a speech by the Chairman of the Hague Joint Conference, Rein Jan Hoekstra, the conference was opened by ASIL president Anne-Marie Slaughter who called upon the Bush administration to return to the United Nations “not just in name, but also in spirit” and drew the attention of the participants to a first in U.S. Legal History, which went almost unnoticed in Europe: On 26 June 2003 the U.S. Supreme Court ruled in Lawrence and Garner v. Texas that a Texas statute outlawing sodomy was unconstitutional, for the first time citing the European Court of Human Rights in a majority opinion.  

Introductory remarks by the Dutch Minister of Justice Piet-Hein Donner, and Theo van Boven (NVIR / University of Maastricht) were followed by two keynote addresses. Judge Kooijmans (ICJ) addressed the role of non-state actors from the point of view of a Judge at a court that only allows states to bring claims. Taking up the

1 U.S. Sup Ct Case No. 02-102, decided 26 June 2003, judgment available online at http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&navby=case&keyvol=000&keyvol=02-102#opinion1 (last visited 14 July 2003).
recent order in Congo-Brazaville v. France, Kooijmans elaborated on the possibility of opening up the ICJ to international organizations reminding the listeners of the view held by Dinah Shelton that justice requires that the Court be open for information submitted by NGOs and that Christine Chinkin also has referred to the ICTY’s practice of accepting amicus curiae briefs as an argument for widening the options for NGOs at the ICJ. For the time being, however, Art. 34 (2) of the ICJ’s Statute restricts such options and, while the wording of Art. 62 of the ICJ Rules of Court (ICJ ROC) is less strict, in practice Art. 62 ICJ ROC is applied in a manner that conforms with the application of Art. 34 (2) ICJS, revealing that the Court is not yet ready, in the words of Kooijmans, to open the “floodgate” to amicus curiae briefs by NGOs. Also, the Court’s workload would be increased substantially by such a change in procedure: if one takes into account that in the Nuclear Weapons Case a total of 42 states filed briefs under Art. 60 (2) of the ICJ Statute, the number of amicus curiae briefs to be expected from NGOs would be substantial in a large number of cases. Furthermore, it is possible that an expanded influence of non-state actors at the ICJ could lead to a retreat of states from the Court. Since this would not apply to cases in which the ICJ is to give an advisory opinion, there might be one door which could be opened for non-state actors at the Court in the future. While Shelton also favors amicus curiae briefs in Human Rights related cases, Kooijmans emphasized that the pros and cons of giving a greater role to non-state actors have to be weighed against each other. While an increasing role of NGOs at the Peace Palace could strengthen the relationship between the ICJ and the world’s civil society, it has to be taken into account that the state remains the central player on the international level, albeit no longer the only one. Consequently, in Kooijmans’ opinion, international dispute settlement procedures in general should open up to non-state actors to adequately reflect the body of law in today’s globalized world.


3 Statute of the International Court of Justice, 26 June 1945, UNCIO Vol. 15, pp. 355 et seq., Art. 34 (2): “The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative.”

4 International Court of Justice, Rules of Court (1978) as amended on 5 December 2000, text available online at http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicrulesofcourt_20001205.html (last visited 21 July 2003). Art. 62: “1. The Court may at any time call upon the parties to produce such evidence or to give such explanations as the Court may consider to be necessary for the elucidation of any aspect of the matters in issue, or may itself seek other information for this purpose. 2. The Court may, if necessary, arrange for the attendance of a witness or expert to give evidence in the proceedings.”

José Alvarez, the executive director of the Center for Global Legal Problems at Columbia Law School, started the second keynote address where Kooijmans had ended, focusing on the role of international organizations in lawmaking. International Organizations like the UN create, according to Alvarez, post-positivist or post-modern law, soft law which hardens. The most prominent example hereof certainly is the Universal Declaration of Human Rights. But not only is international law increasingly made by rather than through international organizations, international organizations also allowed for a better acceptance of NGOs on the international plane. The flip-side of this development is the increasing influence international organizations have on domestic processes, especially in cases in which international organizations have court-like structures, as is the case with the Council of Europe’s European Court of Human Rights or the Special Court for Sierra Leone, a hybrid Court blurring the lines between national and international aspects of adjudication. But the lawmaking capabilities of international organizations also pose new questions such as the question for a doctrine of improper delegation of lawmaking capabilities. Other problems in this context which were mentioned by Alvarez were the fact that international organizations tend to reflect existing gender inequalities as well as western values and that some of them might even be prone to being taken over by more powerful members. Alvarez concluded that a certain price may have to be paid for effective lawmaking on an international level.

B. International Organizations – Governmental and Non-Governmental – And Good Governance

1. The role of international organizations in contemporary international law

One of the three key issues of the conference was the already mentioned role of international organizations in international law, on which further light was shed in four panel discussions on the status and role of international governmental organizations and international NGOs in international lawmaking and implementation, including the application of principles of legitimacy, openness, participation, transparency, accountability, effectiveness and democratic control. The first panel, convened by Niels Blokker of the Dutch Ministry of Foreign Affairs and Ramses Wessel (Utrecht University / University of Twente), included Judge Charles N. Brower (Iran-US Claims Tribunal), Rolf Einar Fife (Norwegian Ministry of Foreign Affairs), Pieter-Jan Kuijper (Legal Service of the European Commission) and Nigel White (University of Nottingham) and concerned itself with the role of international organizations as autonomous subjects in the international and European legal system.

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II. Lawmaking by international organizations

Nigel D. White focused on lawmaking by international intergovernmental organizations, which indicates the existence of a separate will, and thus a legal personality under international law. Some international organizations have a separate existence but lack a separate corporate will and hence they have no own lawmaking capabilities. One example of such an organization would be the G7, but the impact of such less formal conference-type organizations is not to be underestimated. While legal powers of international organizations have traditionally been transferred upon them by member states, international organizations now also develop such powers within their respective constitutional documents, as has the UN Security Council in Resolution 1373, thereby blurring the distinction between contractual and constitutional foundations of international organizations and making the UN Charter a truly “living instrument”. White concluded that the stronger a constitutional document is, the weaker the separate will of states will have to be, making the UN Charter a constitutional document not for government by or over states but rather for achieving global good governance. Another indicator for the UN Charter’s constitutional nature is Art. 108 of the Charter which allows for a change of the charter through a majority rather than an unanimous decision. Independence therefore will best be located in a constitutional framework, such as is the case with the process of European integration. The law made by international organizations, according to White, does not constitute a new source of international law but rather a legal regime of its own, concluding that the question of legal personality can only be the starting point for further research on the notion of community in international organizations.

III. The special status of the European Union

Kuijper’s presentation concerned the foreign relations of the European Union as well as the Union’s role as a subject of international law is so far as he asked whether or not the European Union was a “normal” partner in international organizations. The European Union is not a full member of international organizations and often only enjoys observer status, as has been the case recently in the negotiations over an international tobacco treaty. Only days before the conference did the EU gain full membership in the Codex Alimentarius. But is there a treaty mak-


8 Charter of the United Nations, 26 June 1945, Yearbook of the United Nations 1969, 953, Art. 108: “Amendments to the present Charter shall come into force for all members of the United Nations when they have been adopted by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations, including all the permanent members of the Security Council.”
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ing capability of the EU as such, rather than of the communities, members and pillars? Current practice seems to answer the question in the negative, since the Council concludes treaties on behalf of the EU. But according to Kuijper the question has to be asked what the value of such a practice can be in light of Art. 24 EU-Treaty\(^9\) and whether the current practice can be reconciled with Art. 24 EU-Treaty in the first place. The question remains open whether the future EU Constitution can solve this issue by avoiding external exposure of the separation between the EU’s pillars and present one international voice, making the EU one legal entity and the internal aspects of European integration a lesser concern to the EU’s partners.

IV. The increasing importance of transnational lex mercatoria rules in international arbitration disputes

Judge Charles N. Brower elaborated that the rules applied in international arbitration disputes become less and less national, not only in UNCITRAL and CISG related cases. The Iran-US Claims Tribunal also attempts to avoid the application of the national law of a party to a dispute whenever possible. Therefore, according to Brower, non-national lex mercatoria becomes more and more important. One example mentioned by Brower is the UNIDROIT principles, which he compared to the ALI Restatements. Brower emphasized that while the ALI Restatements are meant to restate the existing law and only occasionally go beyond that task, the UNIDROIT principles codify not just the existing law but the law best adopted for the special requirements of international commercial disputes. Hence the legislative element in the UNIDROIT principles is larger than the one in the ALI’s Restatements. Brower concluded that he process of developing transnational commercial law needs private measures as well, even when they find a role under the umbrella

\(^9\) Treaty establishing the European Union, consolidated version as amended by the Treaty of Nice (O.J. 2001 C 80) and published in the Official Journal (O.J.) of the EC (since the entry into force of the Treaty of Nice on 1 February 2003: “the Official Journal of the European Union”), O.J. 2002 C 325, on 24 December 2002. Art. 24: “1. When it is necessary to conclude an agreement with one or more States or international organizations in implementation of this title, the Council may authorize the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council on a recommendation from the Presidency. 2. The Council shall act unanimously when the agreement covers an issue for which unanimity is required for the adoption of internal decisions. 3. When the agreement is envisaged in order to implement a joint action or common position, the Council shall act by a qualified majority in accordance with Article 23(2). 4. The provisions of this Article shall also apply to matters falling under Title VI. When the agreement covers an issue for which a qualified majority is required for the adoption of internal decisions or measures, the Council shall act by a qualified majority in accordance with Article 34(3). 5. No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall nevertheless apply provisionally. 6. Agreements concluded under the conditions set out by this Article shall be binding on the institutions of the Union.”
of international organizations from time to time. These measures should result in more concrete, neutral, pragmatic and fair rules and must lead to flexible principles fit for the future, in turn requiring that the lawmaking process is neither a fixed nor an immutable one, since, in the words of Lord Mustill, the UNIDROIT principles “exist to serve the commercial man”.

V. The role of non-state actors in the making of the International Criminal Court’s Rome Statute

Fife concluded the presentations of the panel with a case study on the making of the Rome Statute of the International Criminal Court and the role of non-state actors in this context. According to Fife, non-state actors are not actors but the stage itself, for example the stage of international civil society. While states negotiated the Rome Treaty the input and expertise of non-state actors was crucial to the negotiation process, showing that NGOs can be responsible and efficient representatives of civil society. A problem in this context is the accountability of NGOs, which is not assured as it is with respect to national governments subject to democratic control. To some degree this scrutiny can be achieved by local NGOs and the members “back home,” but the NGOs in Rome accepted as well that some aspects of discussion were only of the concern of states, so that the credibility of the NGOs involved in the negotiations was not harmed. Fife concluded that the Westphalian system still rules international law but that “channels of learning” connect states, international organizations and NGOs.

VI. Legitimacy and accountability of international organizations

ASIL president Anne-Marie Slaughter convened the second panel on international organizations. In it Laurence Boisson de Charzournes (University of Geneva), Daniel Bradlow (American University Washington College), Alfred E. Kellermann (T.M.C. Asser Instituut, The Hague), Charlotte Ku (ASIL) and Bimal N. Patel (OPCW) addressed the question of accountability and control of international organizations leading to principles and procedures of good governance. Furthermore, Deirdre Curtin of Utrecht University was able to welcome Stephan Hobe (University of Cologne), Carole Lyons (University of Aberdeen), Math Noortmann (University of Rotterdam), Pieter J. Spiro (Hofstra University Law School) and Siegfried Wiessner (St. Thomas University) in the third panel which continued the discussion by focussing on the legitimacy, recognition, democratic control, transparency and accountability of non-governmental organizations before the fourth panel, chaired by Judge Theodor Meron (ICTY) reviewed the application of the principles of good governance by international organizations in practice. Participants in this panel discussion were John King Gamble (Penn State University), Rick Lawson (Leiden University), Philippe Lortie (Hague Conference on International Private Law),
C. Multinational Business and Corporate Governance in Public and Private International Law

I. Introduction

The role of multinational corporations and the development of principles of corporate governance and issues of transnational litigation, including international jurisdiction and treaty cooperation to improve capital flows was the focal point of the second main theme of the conference.

The first of three panels in this field, convened by René van Rooij of Shell and including Willem van Genugten (Tilburg University), Michel Nussbaumer (European Bank for Reconstruction and Development), Lucy Reed (Freshfields Bruckhaus Deringer) and Jaap Winter (De Brauw Blackstone Westbroek) discussed the role of international or external codes of conduct in corporate governance.

II. Corporate responsibility for human rights violations and environmental damage

1. National Courts as an appropriate forum - Forum non conveniens revisited

Questions of transnational litigation including international jurisdiction in cases relating to corporate responsibility for human rights violations and environmental damage were addressed by a second panel headed by Georg Berrisch (Covington & Burling), which included Mike Addo (University of Exeter), Pieter H. F. Bekker (White & Case), Andrew Clapham (Graduate Institute of International Studies, Geneva), Malgosia Fitzmaurice (Queen Mary and Westfield College, London), Harold Koh (Yale Law School) and André Nollkaemper (University of Amsterdam). The question before the first panel was whether or not national courts are an appropriate forum for addressing corporate responsibility regarding damage to the environment and human rights violations. Examples for legal grounds allowing national courts taking up such cases are the recently rediscovered Alien Tort Claims Act (ATCA)\(^\text{10}\) in the United States as well as the Belgian International Crimes Law which, ironically enough, has drawn severe criticism from the United States and was which the new Belgian government plans to change due to U.S. threats to move the NATO Headquarters away from Brussels. Fitzmaurice presented a study on the case of Wiwa v. Shell before the U.S. Court of Appeal for the

\(^{10}\) 28 U.S.C. § 1530: “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.”
2nd Circuit,\textsuperscript{11} relating to the execution of Ken Saro-Wiwa and others by the former Nigerian Government and the role Royal Dutch Shell played in supporting the military regime in Nigeria, in which she focussed on the relationship between the ATCA and the doctrine of forum non conveniens and how the Wiwa case\textsuperscript{12} could change our view of this doctrine.

The forum non conveniens doctrine was meant to protect the defendant who can challenge the forum chosen by the plaintiff if there is an other appropriate forum and certain other requirements are met. According to the plaintiffs in Wiwa v. Shell,\textsuperscript{13} the defendant had facilitated the killings of Saro-Wiwa, Kpuinen and other members of the Movement for the Survival of the Ogoni People (MOSOP) by doing business in Nigeria from which the military regime profited as well. Shell holds that the case is to be tried in either the Netherlands or the U.K. but not in the United States and that the ATCA does not apply to corporations. Furthermore, Shell relied on the act of state-doctrine and on the fact that it was the military regime which in fact killed Saro-Wiwa and others. Furthermore Shell argued that the Nigerian law on corporate responsibility should control. No plaintiff in this case was resident in the Southern District of New York where the case was filed pursuant to the ATCA and Shell complained that the District Court did not asses the question of forum non conveniens appropriately. In rare cases, according to Fitzmaurice, the decision whether or not to apply the forum non conveniens doctrine is at the discretion of the court. In such cases, two questions have to be asked: Does an adequate alternative forum exist and if yes, after balancing the private interests of the parties as well as the public interests of the state, which interests, in favor or against a certain forum, prevail. Only if the defendant’s interests are overwhelming, a forum change is permissible under this so called Gilbert-test.\textsuperscript{14} Among the factors to be taken into consideration are the access to evidence, witnesses and premises as well as all factors making the process time-consuming as well as the administrative burden of the state. In the Wiwa Case\textsuperscript{15} the fact that the plaintiffs were U.S. residents has to be taken into account as well as the U.S.’s interest in litigating international Human Rights violations under both the ATCA and the Torture Victim Protection Act (TVPA). Furthermore, Human Rights considerations must be part of the balancing, thus creating an innovative element with which to amend the traditional Gilbert-

\textsuperscript{11} Wiwa v. Royal Dutch Petroleum Co. (a.k.a. Shell or Royal Dutch Shell), 226 F.3d 88 (2d Cir. (N.Y.) 2000); Slip Copy 2002 WL 319887 (S.D.N.Y., Feb. 28, 2002).

\textsuperscript{12} ibid.

\textsuperscript{13} ibid.

\textsuperscript{14} Gulf Oil Corp. v. Gilbert, 330 US 501, 67 S Ct 839 (1947).

\textsuperscript{15} Wiwa v. Royal Dutch Petroleum Co. (a.k.a. Shell or Royal Dutch Shell), cf. fn. 11.
test. ATCA and the Torture Prevention Act, according to Fitzmaurice, diminish or even nullify the doctrine of forum non conveniens in cases in which Human Rights play a role.

2. The potential of complicity of multinational corporations relating to state caused human rights violations

Pieter Bekker, of White & Case, the law firm which is currently representing Citicorp in the Apartheid cases, spoke on the potential complicity of multinational corporations relating to state caused damages. International law de lege lata only recognizes a general rule of corporate responsibility with the exception of oil spills, etc. The problem in this context is the question if and to what extent there can be corporate responsibility for aiding, abetting or conspiring. Two pending cases referred to by Bekker are the Burma-related Unocal Case\(^\text{16}\) which is currently before the Court of Appeals for the 9th Circuit in California and the case of Certain Victims of Apartheid v. Citicorp et al.,\(^\text{17}\) a class action suit pending in New York. The plaintiffs in Citicorp employ a theory of indirect harm by claiming that the defendants’ loans to the Apartheid-government of South Africa funded and stabilized the regime and facilitated crimes against humanity. The ATCA\(^\text{18}\) requires that there is an international treaty or an other indicator of international (Human Rights) Law, according to Bekker, who was equating the term “indicator” with the sources of international law as defined in Art. 38 (1) of the ICJ Statute,\(^\text{19}\) in order to allow a


\(^{19}\) Statute of the International Court of Justice (cf. fn. 3), Art. 38. “(1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the Contesting States; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial
claim. He continued by raising the critique that U.S. courts do not discuss the sources of international law properly, placing too much emphasis on secondary sources such as UN General Assembly Resolutions and writings by teachers of international law. This is also reflected in the approach U.S. attorneys take: Ed Fagan, a well-known U.S. Class Action attorney who has already represented Holocaust victims and is now representing the plaintiffs in the case against Citicorp, demonstrated this lack of understanding by only citing a small number of UN GA Resolutions to build the - otherwise undisputed - case that Apartheid is a crime against humanity. Bekker, referring to the German Industrialist Cases decided in Nuremberg and Presbyterian Church of Sudan v. Talisman Energy Inc. as well as UN GA Res. 55/215 of 21 December 2000, concluded that international law for the time being does not accept corporate responsibility outside specific treaties, for example the rules laid down by the International Labour Organization (ILO).

Bekker's conclusion was criticized by Koh who asked how corporations could be held liable for breaches of competition law but not for involvement in genocide. Koh stated that corporations have rights and therefore also duties under international law but that yet no flood of ATCA cases need to be feared as is currently claimed by the Bush administration, which plans to cut back on the possibilities ATCA offers just as it has criticized Belgium for its International Crimes Law. In its 214 years of existence, the ATCA has lead to some twenty cases, in non of which the responding party has been found liable so far. Consequently there is no "flood" of ATCA-cases to be feared. The ATCA, according to Koh, therefore does not need reform, especially not along the lines of the Bush administration proposal, which wants to repeal Human Rights jurisdictions since Filartiga v. Peña Irala. Furthermore Koh drew attention to the fact that if international corporations cannot be held liable, Al Qaida cannot be either, which led Koh to the conclusion that domestic litigation is not necessarily a bad way to achieve higher Human Rights and environmental protection standards.

3. Values of Public International Law in the context of corporate responsibility

decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law. [...]"


Translating norms of Public International Law into rules of corporate liability was what Nollenkaemper attempted. De lege lata, he argued that such responsibility is only accepted for the worst Human Rights violations, but there yet is no general principle of corporate liability for Human Rights violations and environmental damage. But values of Public International Law can be incorporated into national laws holding corporations liable. On this point Nollenkaemper’s view reflected a widespread feeling that international law is heading towards a more value- and community-based system of international governance. Like this value-based approach, the ATCA remains an exception as Nollenkaemper reminded the audience, drawing on the fact that even the Dutch Constitution, which arguably is one of the most friendly in the world towards international law, does not allow for Public International Law to be applicable in civil cases and cannot even be used in interpreting Dutch civil law. What is therefore needed is some form of international legislation codifying norms of responsibilities for transnational corporations. Currently some 30 treaties are applicable to transnational corporations, such as the Biodiversity Convention, but a number of questions remain: Can problems be solved by a form of wholesale transfer of Public International Law to corporations? Can there be one set of rules applicable to multinational corporations large and small and are national courts the appropriate forum for what in essence are public policy choices?

4. Corporate liability under Criminal Law

Andrew Clapham addressed the criminal law aspects of corporate responsibility by asking whether or not, and if yes how, corporations can be liable under criminal law. The ICC Statute does not refer to corporations, but during the negotiation phase a draft article to this effect was on the table for some four weeks and no government held this option to be impossible in general. But which test would be appropriate for such cases? Would it be the ATCA test on aiding and abetting, the Unocal test, requiring practical assistance which has an effect on the actual crime or should some form of mens rea - test be employed which would focus on the thought that a contribution would be likely to help the abuse of human rights. Yet any such criminal law approach must have its shortcomings since the victims also want to be compensated for the damage done to them, furthermore requiring an element of tort. Yet this approach, according to Clapham, does not exactly fit with the Shell Case. Therefore Clapham suggests that the Universal Declaration of Human Rights should be a minimum standard which is also to be respected by transnational corporations and that the 2009 Convention on the reform of the ICC Statute could lead to an amendment to the statute to this effect. Mike Addo finally drew attention to the fact that Human Rights Law is sometimes not viewed as law proper but rather as non-binding rules of business ethics. Hence, according to
Addo, despite the fact that the law in general is capable of creating results, the process of lawmaking has to become more proactive instead of merely reactive.

III. The use of treaty cooperation for the improvement of capital flows

Christophe Bernasconi of the Hague Conference of Private International Law chaired a panel on using treaty cooperation to improve capital flows. The discussion included Catherina Kessedjian (University Panthéon-Assas, Paris), Diego Devois (Euroclear Banks), Sir Roy Goode (Oxford University) and Joyce Hansen (Federal Reserve Bank of New York).

D. Responding to international terrorism: Perpetual and multidimensional challenges

I. Introduction

The part of this Joint Conference which, given the transatlantic tensions in recent months, arguably would draw the most attention was the issue of responding to international terrorism. Among the issues discussed in this context was the fight against international terrorism at an international and European level and the challenge to the international security, economic and criminal system, including the role of international criminal jurisdictions.

The first panel discussion on the challenge of international terrorism to the international security system and designing responses within the UN Charter and treaty frameworks for regional security was convened by Jan Wouters (University of Leuven) and included Michael Byers (Duke University School of Law), Vera Gowlland-Debbas and Marcelo G. Kohen, both of the Graduate Institute of International Studies in Geneva, as well as Mary Ellen O’Connell (Ohio State University), John Packer of the Office of the OSCE High Commissioner on National Minorities (The Hague) and Ruth Wedgwood (John Hopkins University).

II. Accountability for military anti-terrorism measures

O’Connell’s presentation assessed the preemptive use of force by the United States in the third Gulf War as well as the targeted killing, through a CIA-operated armed Predator drone, of suspected Al Qaida terrorists in Yemen on 3 November 2001. Neither were, in her view, compatible with international law and she urged that international lawyers had the special duty to speak out against these violations of international law or risk becoming accomplices. The “Bush-Doctrine,” which
shaped the September 2002 U.S. National Security Strategy is not respectful of
either the UN Charter or customary international law, both of which only allow for
the use of force if authorized by the UN Security Council or if an attack has occurred
or is at least already underway. Consequently O’Connell sharply criticized Mi-
chael Glennon’s view that there would no longer be any legal restraint on the use of
force due to the fact that there have already been so many breaches of the ius co-
gens norm prohibiting the use of force. O’Connell referred to the ICJ’s ruling in
Nicaragua v. United States in which the Court found that a breach of international
law, without the opinio iuris that the act committed was lawful, remains a breach
and cannot serve as a starting point for a new rule of customary international law.
The targeted killing of Al Qaida members Yemen, with the prior consent of the
Yemeni Government, which was only protested by Amnesty International and
Switzerland, was illegal since there was no state of war in Yemen which would
have allowed the U.S., by which Al Qaida terrorists were regarded as combatants,
to attack perceived hostile combatants.

Gowlland-Debbas went one step further and asked how states could be held ac-
countable for acts committed in the war against terrorism at a time when we seem
to be taking a step back toward a world dominated by nation states. The United
Nations, in her words, should not give a blanket permission for all acts committed
in the war against terrorism, as seems to have been the case with UN SC Res. 1373,
which according to Art. 103 UN Charter supersedes all other treaty obligations of
UN members. In any event, UN SC Res. 1373 does not provide a sufficient justifi-
cation for the war in Iraq. Still the effects of the recent Iraq war are not normal
since, in a turn back to realpolitik, the UN has given the U.S. control over Iraq with
UN SC Res. 1483 while simply reminding the U.S. of the obvious: the obligation to
respect International Humanitarian Law. The role lawyers have to play, according
to Gowlland-Debbas, was not one of mere commentators but lawyers also have
certain responsibilities, one of them being to insist on the utopias of international
law.

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24 O’Connell, The Myth of Preemptive Self-Defense, American Society of International Law Presidential
Task Force on Terrorism, ASIL Task Force Papers, August 2002, p. 5. Available online at

25 I.C.J. Case No. 2 – Case concerning military and paramilitary activities in Nicaragua, Nicaragua v.

26 Charter of the United Nations (cf. fn. 8), Art. 103: “In the event of a conflict between the obligations of
the Members of the United Nations under the present Charter and their obligations under any other
international agreement, their obligations under the present Charter shall prevail.”
Kohen examined the role of the notion of self-defense in the war against transnational terrorism, which cannot be attributed to a state actor, and asked whether or not self-defense can be necessary or relevant in this context and whether terrorist acts are acts of war. He differentiated between internal (e.g., ETA, Shining Path, Red Brigades, RAF) style terrorism, and external terrorism, as is the case with Al Qaida. Only the latter can open the door for self-defense and consequently the U.K. added a reservation to its ratification of the First Additional Protocol to the Geneva Conventions, stating that it does not regard terrorism as a form of war to which the protocol would be applicable.27 But, while external terrorism can at times be attributed to states, Kohen suggests that this this attribution becomes difficult if a state only provides shelter for a terrorist organization.

Yet I would suggest that this is not necessarily the case since international law does offer a solution - albeit only by analogy - to cases in which states provide shelter to terrorist operations which operate internationally: In Trail Smelter28 it has been recognized that states are under an obligation not to cause transboundary environmental damage.29 This fundamental principle of international environmental law30 is also known as the “21/2 - principle”, since it has been codified in Principle 21 of the Stockholm Declaration31 and Principle 2 or the Rio Declaration.32 Yet, if

27 Reservation of 28 January 1998 on Article 1 para. 4 and Article 96 of the First Additional Protocol to the 1977 Geneva Conventions (extended to apply also with respect to Anguilla; Bermuda; the British Antarctic Territory; the British Indian Ocean Territory; the British Virgin Islands; the Cayman Islands; the Falkland Islands; Montserrat; Pitcairn; Henderson; the Ducie and Oeno Islands; St Helena and Dependencies; South Georgia and the South Sandwich Islands; the Sovereign Base Areas of Akrotiri and Dhekelia as well as the Turks and Caicos Islands on 2 July 2002): “[...J It is the understanding of the United Kingdom that the term ‘armed conflict’ of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation. The United Kingdom will not, in relation to any situation in which it is itself involved, consider itself bound in consequence of any declaration purporting to be made under paragraph 3 of Article 96 unless the United Kingdom shall have expressly recognised that it has been made by a body which is genuinely an authority representing a people engaged in an armed conflict of the type to which Article 1, paragraph 4, applies[...J” - Corrected Letter of 28 January 1998 sent to the Swiss Government by Christopher Hulse, HM Ambassador of the United Kingdom. cf. http://www.icrc.org/ihl.nsf/db8c9c8d3be94d164d15673903e6371/0a9e03f2ee757c1256e120f3f6d2?OpenDocument (last visited 21 July 2003).

28 Case of the Smelter at Trail (B.C.), United States v. Canada, 3 RIAA (1941), pp.1905 et seq.

29 ibid., at pp. 1965 et seq.


31 Stockholm Declaration on the Human Environment, Report of the UN Conference on the Human Environment, 11 ILM (1972) 1416, Principle 21: “States have, in accordance with the Charter of the United Nations and the principle of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their
states do have the responsibility to ensure that activities within their jurisdiction to
not cause damage to the environment in other states.\(^{33}\) I’d suggest that it is only
consequent to assume that they are a fortiori under an obligation to prevent that
individuals or organizations under their jurisdiction commit crimes or even terror-
nist acts abroad. While many states claim to have jurisdiction over crimes committed
by their nationals abroad,\(^{34}\) Afghanistan for example failed to fulfil this preventive
obligation and hence has become responsible for the failure to prevent terrorist
attacks by Al Qaida, which was operating from Afghanistan with the consent or at
least acquiescence of the Afghan Taliban Government.

The case for such a general obligation to fight terrorism has been strengthened by
UN Security Council Resolution 1373, leading to the codification and institutional-
ization of this obligation.

While armed countermeasures could be an alternative to self-defense in the imme-
diate aftermath of the September 11, 2001 terrorist attacks, this option has been
outlawed by the Friendly Relations Declaration\(^{35}\) and subsequent customary inter-
national law. Therefore, Kohen suggests a two-step approach which looks good in
theory but at the same time might be hard to accomplish in practice: Terrorists first
of all are to be brought before courts to prevent further terrorist attacks, self-
defense and the use of force only become an option if terrorist attacks from abroad
are ongoing.

\(^{32}\) Rio Declaration on Environment and Development, United Nations Conference on Environment and
Development, 31 ILM (1992) 876, Principle 2 is almost identical to principle 21 of the Stockholm Declara-
tion and reads as follows: “States have, in accordance with the Charter of the United Nations and the
principles of international law, the sovereign right to exploit their own resources pursuant to their own
environmental and developmental policies, and the responsibility to ensure that activities within their
jurisdiction or control do not cause damage to the environment of other States or of areas beyond the
limits of national jurisdiction. […]”

\(^{33}\) Case of the Smelter at Trail (B.C.), United States v. Canada, 3 RIAA (1941), pp.1905 et seq., at pp. 1965 et
seq.; Principle 21 Stockholm Declaration; Principle 2 Rio Declaration.

\(^{34}\) So called active personality principle, cf. e.g. § 7 (2) of the German Criminal Code (Strafgesetzbuch -
StGB) - “[...] (2) For other crimes committed outside Germany, German Criminal Law applies if the act is
punishable by Criminal Law according to the laws of the location where it has been committed or if no
Criminal Law is applicable at this location and provided that the person having committed the act in
question 1.) was a German citizen at that time or has become a German citizen afterwards or 2.) was not
a German citizen at the time in question, yet was apprehended in Germany and, despite the Law on
Extradition allowing for his or her extradition after the act committed, is not extradited because a re-
quest for extradition has not been made or has been denied or because extradition is impossible.” (unof-
ficial translation by the author).

\(^{35}\) UN GA Res. 2625 (XXV), 24 October 1970 - Declaration on principles of international law friendly
relations and cooperation among states in accordance with the Charter of the United Nations.
This criminal law approach, albeit an attractive alternative to going to war and certainly so if one takes into account Art. 33 (1) UN Charter,\textsuperscript{36} has its shortcomings in cases the leaders of terrorist organizations are provided shelter and therefore cannot be brought before the courts. Therefore peaceful dispute resolution mechanisms also have to be directed against states which shelter terrorist organisations and e.g. the United States would certainly have had a good case in this respect against Afghanistan for harboring Al Qaida. Only if this option has failed as well, non-peaceful measures can be considered. A law enforcement approach directed against the members of terrorist organizations alone therefore is insufficient and will often be ineffective, while other peaceful options exist which have to be exhausted according to Art. 33 (1) UN Charter, before military action can be taken.

III. Challenges and options in the perpetual war against terrorism

Three strong pressures were identified by Michael Byers in his presentation, which turned out to be one of the highlights of the conference. Among these pressures were the threat posed by international terrorism, weapons of mass destruction and the unilateralist aggressive tendencies of the Bush administration, which shows no allegiance to the existing international legal order. Accordingly Byers elaborated on three options for the U.S. as well as for international lawyers. The U.S. could choose to reform the existing international order which would involve a reform of the UN Charter which is highly unpractical,\textsuperscript{37} it could attempt to rule through force or it could seek informal changes to international law, for example regarding the use of force or the right of visitation on the high seas. The latter, most practical, solution has an inherent danger since a system, which is stretched too far does not offer any more constraints and would be prone to abuse. Albeit Byers was aware of existing fears that things might get worse if President Bush should be re-elected, he emphasized that international lawyers have three options at their disposal as well: they can cooperate fully with the U.S. in an attempt to buy influence, completely refuse to cooperate on anything or they can follow a more pragmatic approach, what Byers labelled “constructive opposition” and examine the merits of any legal change and support or oppose it accordingly. The highly controversial UN Security Council Resolution 1441 was cited by Byers as a good example of constructive opposition because of its unclear language: Since basically all members of the UN Security Council knew at the time of drafting what was to become Resolution 1441 that the

\textsuperscript{36} Charter of the United Nations, Art. 33 (1): “The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”

\textsuperscript{37} cf. Art. 108 UN Charter (fn. 8).
U.S. would go to war with Iraq and would also not be stopped by the UN, the unclear language was chosen to avoid creating a precedent for preemptive self-defense.

Packer reminded the audience of the fact that in the current war on terrorism, which later was characterized as “perpetual war” by Gowlland-Debbas saw a new form of terrorism different from the terrorism that merely pursued political objectives through violence. This new terrorism used violence to pursue global political agendas that contain nihilist elements and which are irreconcilable with the Westphalian paradigm, targeting civilians instead of states.

IV. Combating global terrorism in the financial and economic sphere

1. UN Anti-terrorism regimes after 11 September 2001

Concerted actions to combat terrorism in the context of the international financial and economic legal system were at the center of the second terrorism-related discussion convened by August Reinisch (University of Vienna). One core element of discussion in this session was the UN Security Council’s Resolution 1373, which has most far-reaching consequences and may become a turning point in the history of international law. Axel Marschik (Austrian Mission to the United Nations) elaborated that the UN was thought to have the capabilities to play only a supporting role in combating terrorism but became a driving force due to the UN SC Resolutions adopted in the wake of the 9/11 terrorist attacks. One reason for this surprising role was the fact that the so called P5, the five permanent members of the Security Council, have an interest in fighting terrorism and wanted to control and influence any measures taken on a global level. Due to the veto right provided by Art. 27 (3) UN Charter, the Security Council turned out to be the best forum for this purpose. Marschik presented the measures taken by the UN, addressed the question of their effectiveness and provided an outlook on future measures and necessities.

38 Charter of the United Nations (cf. fn. 8), Art. 23, sentence 2: "[...] The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council.[...]" - At the time being the People’s Republic of China holds the seat previously held by the Republic of China (Taiwan) and the Russian Federation holds the formerly Soviet seat.

39 Charter of the United Nations (cf. fn. 8), Art. 27: "1. Each member of the Security Council shall have one vote. 2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members. 3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting."
Currently there are two regimes in place aimed at combating international terrorism: UN SC Res. 1373 provides for an abstract regime with a monitoring body in the form of the Counter-Terrorism Committee (CTC) while UN Security Council Resolution 1363\textsuperscript{40} beefed up the earlier UN Security Council Resolution 1267,\textsuperscript{41} which had established the initial sanctions regime on Afghanistan back in 1999, after the terrorist attacks of September 11, 2001. Yet both regimes are subject to criticism. In its Resolution 1373 the Security Council has failed not only to provide for a definition of terrorism, thus opening up the regime to potential abuse, but also did not include an end-clause, leaving in place a temporarily unlimited anti-terrorism regime with a substantial risk of abuse. While the regime under UN Security Council Resolution 1267 only targets individuals and not entire peoples by sanctions, UN SC Res. 1267 does not foresee a right to appeal and violates, according to Marschik, the principles of due process. Only earlier this year a de-listing procedure was included in the rules of the Sanctions Committee which serves as a monitoring body for the 1267 regime. Moreover, the 1267 regime is far from being effective since it focuses too much on travel bans and arms embargoes. On the other hand, the 1373 regime provides for the largest intrusion into domestic affairs ever under Art. 41 of the UN Charter.\textsuperscript{42} The regime is, however, widely supported because of its perceived transparency and so far all 191 members of the UN have issued at least one report to the Counter-Terrorism Committee, making UN SC Res. 1373 the most successful tool in the history of international law, even overtaking the widely acclaimed Convention on the Rights of the Child (CRC). Currently the U.S. and the U.K. are pressing for on-site visits to verify the state reports which seems necessary since the enforcement against unwilling states becomes more urgent. It has been remarked as particularly positive by Marschik that the technical work at the CTC was unharmed by the crisis over Iraq in early 2003 and he suggested that both regimes could be fused to one body, similar to UNMOVIC.


\textsuperscript{42} Charter of the United Nations (cf. fn. 8), Art. 41: “The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its discussions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”
2. The free flow of capital as an obstacle to targeted sanctions?

Albert Straver (European Commission) spoke on the difficulties connected to targeted sanctions in an environment of a free flow of capital as is the case in the EU. Should the EC or the member states act and on which legal basis? The EC is facing similar due process problems as had already been mentioned by Marschick since, unlike EC regulations, Common Foreign and Security Policy (CFSP) acts cannot be reviewed by the European Court of Justice (E.C.J.). Himamuali Das (U.S. State Department) stated that the freezing of assets is only one tool while international cooperation remains the key to success in the fight against terrorism. The U.S. State Department therefore appreciates the United Nations' role after the September 11, 2001, attacks. Measures taken by the U.S. domestically include Executive Order 13224 to freeze terrorist assets\(^\text{43}\) - which in turn was based on the International Emergency Economic Powers Act (IEEPA),\(^\text{44}\) the National Emergencies Act,\(^\text{45}\) section 5 of the United Nations Participation Act of 1945, as amended (UNPA),\(^\text{46}\) and section 301 of title 3, United States Code, the USA PATRIOT Act,\(^\text{47}\) the International Emergency Economic Powers Act\(^\text{48}\) and section 219 of the Immigration and Nationality Act,\(^\text{49}\) which is aimed at identifying foreign terrorist organizations.


\(^{44}\) 50 U.S.C. 1701 et seq.

\(^{45}\) 50 U.S.C. 1601 et seq.

\(^{46}\) 22 U.S.C. 287c.


\(^{48}\) 50 U.S.C. 1701 et seq.

\(^{49}\) 8 U.S.C., sec. 219 - Designation of Foreign Terrorist Organizations: " (a) Designation - (1) in general - The Secretary is authorized to designate an organization as a foreign terrorist organization in accordance with this subsection if the Secretary finds that -- (A) the organization is a foreign organization; (B) the organization engages in terrorist activity (as defined in section 212(a)(3)(B)); and (C) the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States. (2) Procedure [...] (C) Freezing of Assets - Upon notification under paragraph (2), the Secretary of the Treasury may require United States financial institutions possessing or controlling any assets of any foreign organization included in the notification to block all financial transactions involving those assets until further directive from either the Secretary of the Treasury, Act of Congress, or order of court."
(FTOs) and at freezing their accounts. Executive Order 13224\textsuperscript{50} blocks the assets of individuals on the list based on UN SC Res. 1267 and allows both the State Department and the Treasury Department to block assets. These measures, although they have consequences similar to those of legislation in the field of criminal law, are considered to be only administrative measures, making them easier to apply. Yet they can be challenged in court and there is no automatic transfer from the UN 1267-list to the U.S. 13224-list. Any such transfer can only be on a case-by-case basis and must comply with the Administrative Procedure Act (APA).

3. Challenges to international police cooperation

Europol’s Deputy Director Willy Bruggeman explained the work of Europol in this context. Europol issues regular threat assessments, together with Interpol, the FBI and the police services of the U.K. One of the problems Europol faces in the context of stopping the financial flows towards terrorist organizations is the fact that not all funding is illegal, thus leading to a collision between human rights and anti-terrorism measures. Furthermore, there is still no universal definition of terrorism, albeit one on an EU level. Other problems in this context relate to the following of cash flows and different data protection systems, e.g. in the EU and the U.S. Finally, the fact that the U.S. still uses capital punishment leads to legal problems relating to extraditions.

4. Trends and challenges regarding the UN anti-terrorism regimes

Marcel Brus (Leiden University) finally asked the question how this reflects a trend towards international governance and a more community oriented form of international law. In the following discussion, Byers addressed the democratic deficit in the lawmaking by the UN in UN SC Res. 1373 while Bekker asked how to reconcile the immunity of heads of states with the freezing of their assets. One solution offered on this problem was Art. 103 of the UN Charter,\textsuperscript{51} allowing the UN SC to overrule the customary law immunity of heads of state.

V. International Terrorism and International and European Criminal Law

1. Defining terrorism

The final discussion panel, convened by Harry Post (University of Exeter) was concerned with International Terrorism and International and European criminal law.

\textsuperscript{50} cf. fn. 43.

\textsuperscript{51} cf. fn. 26.
Andrea Gioia (University of Modena) elaborated on the problem of finding a common definition for terrorism, since so far there are only topical treaties on this subject, for example relating to civil aviation, hostages or explosives. So far definitions only exist on a regional level, apart from the indirect definition offered in the 1999 UN Convention on the Financing of Terrorism, which defines terrorism as acts “intended to cause death or injury to civilians no taking part in hostilities with the purpose to intimidate or to force a state to act or abstain from action.” This definition is widely accepted but, according to Gioia, needs to be broadened to include not only civilians but all victims as well as damage to property and the environment. The only two generally accepted exceptions are wars of national liberation and state terrorism. A Comprehensive UN Convention on Terrorism suggested by Gioia should not include acts of war, labeling terrorist acts in times of war as what they are, i.e. violations of international humanitarian law, neither should acts committed by armed forces in times of peace be treated as terrorism, which he regards as state terrorism and possibly crimes against humanity.

2. International Criminal Law as an alternative to military action after 11 September 2001: A law enforcement approach to the challenges posed by international terrorism

Leila Sadat (U.S. Commission in International Religious Freedom) emphasized that international criminal law has evolved so much that it could have been used by the United States after the September 11, 2001, attacks to pursue the perpetrators. Instead, the U.S. left the path of multilateralism. The main question in this context is whether or not terrorism is a crime which can be tried on the basis of universal jurisdiction, since the ICC currently does not have jurisdiction over terrorist acts, unless they constitute a crime against humanity. This could be changed in the 2009 Review Conference for the ICC. The fact that UN SC Res. 1373 assumed that there was universal jurisdiction over terrorist acts opened the door for an international tribunal, widening the ICTY/ICTR precedent, making aut dedere aut judicare seem to have become a rule of customary international law.

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52 International Convention for the Suppression of the Financing of Terrorism, 9 December 1999, available online at http://untreaty.un.org/English/Terrorism/Conv12.pdf (last visited 21 July 2003), Art. 2 (1), albeit only indirectly, provides the closest thing to a universally accepted definition of terrorism: “1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.”
The question who can try terrorists in which forum was addressed from a prosecu-
tor’s point of view by William Fenrick (ICTY), while Jordan Paust (University of
Houston) asked whether or not international humanitarian law could apply to a
non-state actor such as Al Qaida. States, in his words, cannot be at war with Al
Qaida as such and Al Qaida cannot be bound by the laws of war outside a concrete
armed conflict, as for example in Afghanistan. Yet, for Paust that doesn’t mean that
the U.S. improperly invoked Art. 51 UN Charter as a justification for going to war
in Afghanistan. Christopher C. Joyner (Georgetown University) preferred a law
enforcement approach to counter terrorism, as opposed to the military approach
chosen by the Bush administration. Since 1960 twelve major instruments have been
created to deal with terrorism and the challenge for a proposed future Comprehen-
sive Convention on Terrorism is not so much a lack of law but making the law
work. Monica den Boer (EULEC) asked whether the September 11, 2001, attacks
offered a window of opportunity for the EU to act against terrorism and even a
paradigmatic shift. While she admits that there was a window of opportunity, she
denies that there was a paradigmatic shift in the EU’s way of dealing with terror-
ism, since Europe could build on the experience of twenty years of cooperation in
anti-terrorism measures. Especially the cooperation in the field of Justice and Home
Affairs took a giant step forward and the introduction of the European Arrest Warr
rant in 2004 would not have been possible without the attacks speeding things up
substantially. Moreover, the EU has adopted a framework decision on terrorism as
well as on the freezing of terrorist assets. The competencies of Europol’s Anti-
Terrorism Department were strengthened and Eurojust now plays an important
role in the European Anti-Terrorism Context. Finally Tony Bunyan (Statewatch)
criticized that the war on terrorism had replaced the ideology of the Cold War and
had led to large restrictions on civil rights, especially for foreigners and minorities.
His most astonishing claim was that the EU had formed a secret anti-terrorism
force which allegedly was not bound by legal restraints and which he compared to
Operation Gladio.

E. Concluding Discussion

In a concluding debate entitled “The structure of the international and European
Legal System and its values” convened by Dorinda Dallmeyer of the University of
Georgia and Ige F. Dekker of Utrecht University, ASIL-president Anne-Marie
Slaughter (Princeton), NVIR’s acting president Nico J. Schrijver (Free University of
Amsterdam), Theo Raaijmakers (University of Tilburg) and Sean Murphy (George
Washington University) addressed the question whether the transition for the
Westphalian-style state government to international governance will change the
fundamental structure of the international legal system, not only in the sense of the
kind of participating actors, including now non-state actors, but also in the sense of
its fundamental values and principles. Slaughter recalled that we are moving from
national government "to international something" and that we are on the verge of a change of the underlying fundaments of international law. This change could lead to a world of networks including states as well as non-state actors such as international organizations.

F. Speech by the President of the International Court of Justice, Shi Jiuyong

The Conference ended with a speech by the President of the International Court of Justice, Shi Jiuyong. His remarks on the role of non-state actors in international law can at best be called conservative since he strongly reminded the attendants that all non-state actors, international organizations, NGOs and transnational corporations, are dependent on states, which according to him remain the center of international law. In this respect Judge Shi rejected the view that the rise of non-state actors could have an impact on the role of states in international law. To the contrary, the ICJ’s president not only emphasized that the state remains, in his view, the only true subject of international law, but also insisted that the sovereignty of states prohibits that foreign “values” can be imposed upon states and that doing so would amount to imperialism.

Shi’s very conservative view contradicts the findings of the conference regarding the increasing importance of non-state actors, and his criticism of the idea of a value-based system of international law appears to be unnecessary, since international law, as a system of law based on the consent of the governed is designed to reflect the core values on which the overwhelming majority of subjects of international law agree on, such as the need to preserve international peace and security and to protect human rights. Creating universal standards for human rights, the protection of the environment or other aspects of a more and more fragmented system of international law and holding states accountable according to these very standards cannot be considered a new form of imperialism, since all actors of international law have the possibility to participate in the creation and shaping of such universal rules. As long as a consent-based legal system, like the international legal system today, is working without interference regarding the decision-making process of its actors, Shi’s claim would go too far. The limit for this interference is pro-

53 As has been the case e.g. with regard to Yemen: After Yemen had announced it would not support a U.S. bid for a UN Security Council threatening the use of force against Iraq in the context of its occupation of Kuwait in 1990, some US$ 70 million in U.S. foreign aid which were supposed to go to Yemen were withheld, making it, in the words of one official in the administration of Pres. Bush sr., “the most expensive ‘no’ in history”.
vided by Art. 2 (7) UN Charter. In general, Western efforts in favor of stricter human rights standards certainly do no reach this limit.

Given the fact that the Kosovo Cases are still pending before the ICJ Shi’s remarks, with which he attempted to strengthen the veil of sovereignty under which human rights violations and undemocratic governance are hidden, could lead to suspicion that the Court will give Human Rights considerations a less important role in the future and place a greater emphasis on state sovereignty, a concept which is now more limited than since the beginning of the Westphalian period in international law. While the idea that we are witnessing a fundamental change in international law away from an all-dominant role of states towards a more community- or value-oriented legal system had certainly prevailed among the participants during the three-day long conference, Shi, appeared wary of any such ideas and certainly preferred strong state government over the value-based international governance favored by many of the conference’s participants.

The proceedings of the conference will be published in spring 2004 by T.M.C. Asser Press, The Hague.

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54 Charter of the United Nations, cf. fn. 8, Art. 2 (7): "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."
Legal Culture


By Annika Weidemann


Since September 11, terrorism and the question of how to deal with it have become the central focus of public attention, at least in the developed world. Plenty of articles and books have been written about this topic recently.¹ This slim new book, “Terrorism – Legal Questions Concerning External and Internal Security,” edited by Hans-Joachim Koch, offers a collection of six essays by prominent German legal scholars. It is the product of a symposium held at the Europa-Kolleg in Hamburg on 31 May 2002 in honor of professors Hans Peter Bull and Helmut Rittstieg, who retired from Hamburg University in 2002. Questions of internal and external security have played a central role in the life and work of both professors.

Helmut Rittstieg, who died shortly before the symposium could be held, primarily taught administrative, European and international law. In his work he focused on legal instruments for securing international peace. Rittstieg was a critical scholar of international law, who always kept a sharp eye on political developments, especially in the field of international relations. In the last months of his teaching, Rittstieg focused on the war against terror and its implications.

Hans Peter Bull, who was the first German Federal Data Protection Commissioner and who also served for a long time as Minister of the Interior in one of Germany’s states, Schleswig-Holstein, is a professor of public and administrative law. That the symposium honoring these men’s work should be held in Hamburg was also fitting for the sad prominence the city gained in the wake of September 11 as the residence of 3 of the 19 terrorists involved in the attacks on New York and Washington D.C.

This collection of essays spans topics from “What is Terrorism” (Dieter S. Lutz) through “Terrorism – a Crime under International Law” (Stefan Oeter) to “The New International Terrorism: Does International Law Change?” (Thomas Bruha). Other essays deal with “Freedom through Security?” (Erhard Denninger), “Secret Service Reconnaissance and Internal Security” (Christoph Gusy), and “The Contribution of the European Police Office (Europol) to the Fight against Terror” (Manfred Baldus). While the first three articles in the book cover mainly external security aspects of the fight against terror, the last three essays deal with internal (German/European) security. The book concludes with a summary of the plenary discussion of the symposium and a short article on Helmut Rittstieg by the editor.

The volume opens with an essay by the late Dieter S. Lutz, the former director of the Institute for Peace Research and Security Policy at the University of Hamburg and a central figure in peace research, on “What is Terrorism? Definitions, Change, Perspectives.” Lutz tries to answer three questions: what is terrorism? What is new about today’s terrorism? What does the future hold?

With regard to the first question, Lutz examines existing efforts to define terrorism, but he also rightly points out that there is no universally accepted definition. Lutz develops four definition criteria and then comes to his own definition according to which a “terrorist is an illegal combatant, who uses illegal means.” However, he points out that his definition should only be used to show what does not constitute terrorism. In answering his second question, Lutz correctly shows that the events of September 11 were not as unexpected as politicians now like to portray them. However, he also clearly demonstrates that these attacks opened a new chapter in the history of terrorism and broke with old taboos.

Lutz concludes with a rather pessimistic look to the future. Hinting at Francis Fukuyama’s “The End of History,” which infamously claimed that the end of the

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2 See Lutz, 9-10, 16.
3 Lutz, 17.
4 Lutz, 10.
Cold War marked the triumph of liberalism and thus the end of the struggle of the big ideas, Lutz suggests that the West missed a big opportunity in the aftermath of the Cold War to remake the world both better and more just – an opportunity missed through arrogance and the concentration on the pursuit of national interests rather than any attempt to balance interests. He predicts a dire future in which we might face not only a “clash of civilizations,” but also a war of religions, of poor against rich, of the race against race, and the breakdown of civilization as we know it. In order to avoid this development, Lutz pleads for a “just peace,” which must be reached through dialogue and cooperation. At the beginning of this process stands – according to Lutz – the acceptance of one’s own vulnerability. In May 2002 – when the piece was written – Lutz still saw a chance for reaching such a “just peace.” However, his contribution suggests that it is unlikely that, following the war in Iraq, he would be as optimistic now as he was more than a year ago.

Stefan Oeter, Director at the Institute for International Affairs at Hamburg University, begins his essay on “Terrorism – a Crime under International Law?” by describing the widespread insecurity when it comes to dealing with terrorism. “One person’s terrorist, is the other person’s freedom fighter” was the gist of the debate for a long time. Today, he argues, the open question of the debate is not whether acts of terrorism are damnable crimes (they are), but how exactly these crimes sit within the rubric of international law. Oeter rightly points out that acts of terrorism are first and foremost crimes under domestic criminal law. Generally, international law does not say how these crimes should be prosecuted. However, in the last decades, international law has come a long way towards outlawing all forms of terrorism – even if terrorism as such does not constitute a criminal act under international law (as opposed to genocide or crimes against humanity). Oeter reminds the reader that the 1998 draft of the Statute of the International Criminal Court foresaw a definition of terrorism and a criminal offence called terrorism. However, states were not ready to include this in the final version of the Statute. Oeter sees good reasons for this decision. According to him, there already exists a worldwide obligation for the criminal prosecution of terrorist acts according to the principle of universality. Additionally, some forms of terrorism fall under specific anti-terrorism treaties, such as the International Convention for the Suppression of

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7 Lutz, 23, 25.

8 With the use of the words “Just Peace”, Lutz hints at the concept of “Just War.” See for this play on words also the book by Simon Chesterman, Just War or Just Peace: Humanitarian Intervention and International Law (Oxford: Oxford Monographs in International Law, 2001).

9 Oeter, 31.
Terrorist Bombings or the Convention on the Physical Protection of Nuclear Material.\textsuperscript{10} An “International Convention for the Suppression of the Financing of Terrorism” has not been ratified by many states yet, but has – in most of its parts – been put into force by the Security Council in its Resolution 1373 following the events of September 11. Oeter points out that the new, noteworthy component of this Convention is that States for the first time ever agreed on an abstract definition of terrorist offences (“…any other act intended to cause death or serious bodily injury to a civilian, or any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act.”).\textsuperscript{11} Oeter continues with some thoughts on “state terrorism” and “national fights for liberation.”\textsuperscript{12} He points out that there is no justification in international law for terrorist acts like the suicide bombings by Hamas against civilians in the Palestinian-Israeli conflict, which are committed within the framework of a national liberation struggle. However, he sees room for the justification of acts committed against military targets of an illegal occupying power. Such liberation struggles, however, are nevertheless bound by international humanitarian law.\textsuperscript{13} With regard to state terrorism, he demonstrates that certain acts committed by state organs can consequently be defined as terrorism if they are meant to intimidate a (civilian) population as such. He calls this the “dark sides” of modern statehood.\textsuperscript{14} According to Oeter, there cannot be any useful distinction between private or state actors: Rather, what is important are the modalities and objectives of such acts. Of course, one should point out that this aspect is the continuing subject of fierce debate and thus the answer might be more unclear than Oeter is suggesting.

Oeter concludes his essay with a look at the political debate on whether it is useful to include terrorism in the jurisdiction of the International Criminal Court (against which the current U.S. Government is vigorously fighting with all diplomatic means). He thinks that the disadvantages of such an inclusion would outweigh the obvious advantages.\textsuperscript{15} However, his arguments for this (for example that the Court might be overloaded with work if it really wants to prosecute all terrorist acts – and states will never be willing to give it the necessary financial and personnel means to deal with these cases) are generally not particularly convincing.

\textsuperscript{10} See for the complete list Oeter, 35 et seq.
\textsuperscript{11} Article 2 para. 1 b) of the International Convention for the Suppression of the Financing of Terrorism.
\textsuperscript{12} Oeter, 40 et seq.
\textsuperscript{13} Oeter, 45 et seq.
\textsuperscript{14} Oeter, 50.
\textsuperscript{15} Oeter, 49.
Thomas Bruha’s essay on “New International Terrorism: Does International Law Change?” is a remarkable tour de force. It spans topics from “what is new international terrorism” (which he abbreviates “NIT” – a rather odd and pretty useless new acronym) through “was the U.S. response to the September 11 attacks legal under international law” to “how can and must international law change in order to adapt to the new circumstances and to NIT.”

In the first part of his essay, Bruha, who is a professor of international law at Hamburg University, describes what is new about this new form of international terrorism – the arguments he uses here are well known and can for the most part be found in Lutz’s contribution. Bruha then repeats his justification of the U.S. attacks on Afghanistan under international law, which he has already made elsewhere. What is most interesting about his essay is the last part in which he describes the need for international law to adapt in order to deal with the new forms of terrorism that are being developed. However, his suggestions are very limited. Bruha is strongest, where he argues for the need to adhere to humanitarian law – even if terrorists do not follow the rules – and the need to defend human rights – even the rights of accused terrorists (i.e. those being held in Guantanamo Bay). He rightly points out that human rights can be limited under certain circumstances, but that there are some rights (for example the prohibition of torture and “nulla poena sine lege”) that are fundamental and cannot be limited under any circumstances. He sees these “basic standards of civilization” threatened by the war against terror – and the year that passed since the symposium was held proves him right.

All around the world, human rights are under attack these days by state institutions that justify their attacks with the war against terror. However, it is absolutely necessary to be aware of the fact that the very rights that western states such as the U.S. want to “defend” are being severely and dangerously limited by them – at home and abroad – in the process.

Last but not least, Bruha asks whether there is a renaissance of the “just war” doctrine, as both – “victim states” of terror and terrorists themselves – are making use of this concept to defend their actions.

Bruha sees this seeming revival as a misapprehension or a conscious disregard of international law and the UN system. He points out that a “just war” concept is incompatible with the basic

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17 Bruha, 79.

18 Bruha, 80.

19 Bruha, 81.
philosophy of the UN Charter. Finally, he warns that a thorough analysis of international law and the competencies of the Security Council is almost completely missing in the current (pre-war-in-Iraq!) debate. As we see today, Bruha was right about this a year ago and we are now – at least since the start of the war in Iraq – further down the slippery slope of undermining international law.

With his article on “Freedom through Security?”, Erhard Denninger, a professor of public law at Frankfurt University, begins the part of the book that deals with domestic (mostly German) security aspects of the fight against terror. He sheds light on the new German “Law on Fighting International Terrorism” of 9 January 2002. Denninger’s central concern is to defend freedom against security. He is right in pointing out that there cannot be complete security on earth and that anyone who promises such complete security is simply not being serious. His central thesis is that the logic of the functioning of the liberal state based on the rule of law (Rechtsstaat), which is based on freedom and autonomy of the individual, and the logic of the security- or prevention-state are mutually exclusive. Nevertheless, he argues that a coherent security policy that does justice to both logics needs to be developed. The contrast between security and freedom runs throughout Denninger’s essay. As an example, he mentions that in the draft of the German “Law on Fighting International Terrorism” the word “security” appears 37 times while the word “freedom” is not used at all. The pursuit of the unreachable ideal “security” is part of the logic of the prevention-state. Any state that promises full “security” gives a promise that it can never fulfill, but that forces it to be constantly active. Denninger warns that the securitization of all policy endangers the achievements of a state based on the rule of law. In the extreme case, he warns, the new German law (and parts of other new laws passed after September 11) might even be unconstitutional and might run contrary to the declared political intention of better integrating resident foreigners in Germany.

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20 Bruha, 81.

21 Denninger, 84.

22 See Denninger, 84.

23 Denninger, 86 et seq.

24 Denninger, 87.

25 See Denninger, 89 et seq.

26 Denninger, 92.
Denninger’s warnings should be taken seriously. However, one misses in his article an answer to the question he himself raised: how can a coherent security policy that reconciles freedom and security be developed or where does the compromise lie?

In his contribution on “Secret Service Reconnaissance and Internal Security,” Christoph Gusy, a professor of public law at Bielefeld University, outlines a particular method of looking for sleeper cells (Schläfer) – collecting and electronically screening data of potential suspects (Rasterfahndung). He asks whether the architecture of the German security authorities is ready for the search for members of sleeper cells (Schläfer is a term that originated in the world of the intelligence services and that describes a “potential suspect”, i.e. a person who so far acted legally, acts legally and will most likely act legally in the near future, but who, under the cover of legality, is building his/her capacity to act\textsuperscript{27}) and whether the “Rasterfahndung” is at all suitable for detecting members of such sleeper cells. “Rasterfahndung” was invented in the 1970ies when Germany was shattered by terrorist acts, mainly of the RAF-group.\textsuperscript{28} Briefly, “Rasterfahndung” is a method whereby data of a group of people, which is characterized in a general way, is screened by computers looking for special features or profiles that generally characterize a group of (potential) criminals. The high risk that innocent people are also screened, their data saved, and their human rights (right to privacy, right to their home) violated, “Rasterfahndung” is allowed only under very strict preconditions. In fact, most data collected belong to absolutely innocent people.\textsuperscript{29} Gusy spends most of his essay describing the various legal preconditions of conducting a “Rasterfahndung” under different German state and federal laws, their history, and how such a search is conducted. He points out that the successes of this method are so far very limited and that any such success usually involved solving a crime that had already been committed – not prevented one. Gusy thus unsurprisingly comes to the conclusion that the “Rasterfahndung” method is unsuitable for detecting sleeper cells.\textsuperscript{30} He sees his essay as a contribution to the discussion on finding better and more suitable methods for identifying sleeper cells, but unfortunately does not suggest any concrete or viable solutions to this end.

\textsuperscript{27} See Gusy, 96.

\textsuperscript{28} The RAF (Red Army Faction) was a terrorist group with Marxist views that committed brutal attacks, including murder and hostage-taking, on high-ranking figures of German political and economic life.

\textsuperscript{29} Gusy, 108.

\textsuperscript{30} Gusy, 119.
The last essay in this book was contributed by Manfred Baldus of the University of the Armed Forces in Hamburg and deals with “The Contribution of the European Police Office (Europol) to the Fight against Terror.” His essay is mainly a description of the history, mission and tasks of Europol. The establishment of Europol was agreed in the Maastricht Treaty on the European Union in 1992. It is based in The Hague, The Netherlands and started limited operations in 1994. After the Europol Convention was ratified by all EU member states and came into force in 1998, Europol commenced its full activities on 1 July 1999. Its mandate is to support the law enforcement activities of the member states in combating and preventing serious international crimes, such as terrorism. It has no executive powers. Baldus spends some time explaining how the fight against terrorism became part of Europol’s mandate against initial opposition by some member states, notably Great Britain. He then focuses on Europol’s contribution to the fight against terrorism, which he concludes has so far been limited. However, it is notable that among the new developments since publication of the volume is the signing of a full co-operation agreement between Europol and the U.S. Law Enforcement Authorities in December 2002 – an agreement which includes the exchange of personal data and is seen as a first step in joint European and U.S. efforts in fighting terrorism supplementing the bilateral cooperation that already exists between the U.S. and individual EU member states. But Baldus’ warning – that one should not overestimate Europol’s capabilities in the fight against terrorism and that most of its benefit is so far “symbolic” – should still be taken seriously.

In conclusion, most of the essays in this book offer important background information on terrorism and the various legal instruments used to fight it, which can be very useful in the current debate – especially for non-German readers who want to understand the current thinking at German universities and the latest legislative developments in Germany in the fight against terrorism.

31 Baldus, 121 et seq.

32 However, one needs to take into account that Baldus finished his research for the essay on 31 May 2002. For more current information see, for example, Europol’s website at www.europol.eu.int.


34 Baldus, 136 et seq.
Constitutional Law as a Work of Art - Experts’ Eyes: Judges of the World examine the Constitution of Europe

By Alexandra Kemmerer

“To be honest,” remarked Lord Scott with dry humor when we left Villa La Pietra, “to be honest, I passed no single room where I would simply feel comfortable after a long day’s labors.” However, the British Lord of Appeal in Ordinary thinks highly of the arts, certainly no less than his colleagues from Washington, Paris, Rome, Karlsruhe and Luxemburg with whom he explored the collections at La Pietra on this midsummer afternoon. But the wealth and variety of the artworks assembled during the course of the last century by English eccentrics and their assemblage according to fairly personal esthetic criteria relieve the visitor barely for a moment of concentrated observation, requiring permanent attention – and considerate behavior in the midst of irreplaceable treasures.

The Actons’ Florentine Villa, inherited in 1994 by New York University, is an art work sui generis. And so was the subject matter of the Transatlantic Dialogue on the Constitutional Future of Europe convened here by NYU’s Global Law School: the Draft European Constitution recently released by the Convention on the Future of Europe. While in Brussels some Convention members still stood in line to sign the document, its structure and content was already subject to judicial and scholarly scrutiny in Florence. Members of the US Supreme Court and Judges of European Member State Constitutional Courts as well as scholars in the fields of European and American Constitutional Law discussed the Draft Constitution.

Beginning with the introductory question concerning the “nature of the beast”, i.e. the legal nature of the “Treaty establishing a Constitution for Europe”, the participants responded with as much diversity as logically possible. What to the eyes of one lawyer appears to be a constitution, is for his or her neighbor simply a treaty – and for yet another a “constitutional treaty”. A constitutional treaty laying down only existing constitutional structures, one may precisely say. But who knows – the Convention’s final document might as well mirror a profound change of the EU’s constitutional foundations, or even of the entire European constitutional

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sphere, requiring, *strictu sensu*, an amendment to several Member States’ Constitutions.

Koen Lenaerts, having been for nine years Judge at the Luxemburg Court of First Instance and just nominated as new member of the ECJ by the Belgian Government, sketched the steps of the Conventional process and introduced the structure and basic content of the Draft Constitution – a draft which still has to gain legitimacy by the consent of the citizens of Europe. Around the table, five US Supreme Court Justices listened attentively – a majority of the Court, as should be noted.

Right after the conclusion of the Supreme Court’s 2002 Term at the end of June, Ruth Bader Ginsburg, Stephen Breyer, Sandra Day O’Connor, Anthony Kennedy and Clarence Thomas set out on a journey to “old Europe.” Before travelling to Florence, the Supremes met with Judges and Advocate Generals of the European Court of Justice in Luxemburg and exchanged views with high-level representatives of the French judiciary in Paris. While scholars still discuss global judicial networks in subjunctive wording, such networks have already become an informal reality among constitutional judges. Numerous American and European constitutional judges know each other, meet now and again, are familiar with the institutional structure of other constitutional courts – and sometimes even with their respective decisions and patterns of argumentation.

However, a link as immediate as the explicit reference to decisions of the European Court of Human Rights in the Justice Anthony Kennedy’s majority opinion in the U.S. Supreme Court’s recent decision in *Lawrence v. Texas*, in which it struck down a Texas sodomy law, will remain an exception. More interaction would be hindered by too dissimilar constitutional forms and legal systems, one or another judge pointed out while strolling after lunch in the splendid Renaissance gardens of La Pietra. In a similar way, the EU’s complex structure must not be superficially compared to classical federal systems, as tempting as parallels may be. After all, a foreign minister makes no state. And even if one admits that every thing in the universe is *sui generis* – as a US Supreme Court Justice bluntly emphasized, in response to the widespread talk of the Unions’ *sui generis*-character - the EU does not simply fit into constitutional law’s traditional categories.

But the Union is to be measured by them. As an American, familiar with a Constitution of sixteen pages, Justice Sandra Day O’Connor admitted that she had been astonished by the length of the Draft European Constitution, with its more than 300 articles. Judicial restraint kept the guests from Washington from further comments on the extent of the document. But, facing the complexity of their constitutional future, the Europeans should keep in mind a key question formulated by Justice Stephen Breyer which he characterized as a permanent
The challenge for European as well as American Constitutional Courts: How should a constitution be written and interpreted to be understood by citizens, to be accessible for everyone and to enhance political participation? After all, the Brussels Convention set out on its historic journey sixteen months ago with the mandate to bring the Union closer to its citizens by simplifying its legal foundations.

According to former Karlsruhe Constitutional Court Judge Dieter Grimm, the “democracy problem” of the Union is not an institutional, but a socio-cultural problem, due to the lack of intermediary structures, of a common European public sphere. But is not the string of causality between public sphere and political structures a classical hen-and-egg-constellation? Or does a public sphere develop, as Judge Gertrude Lübke-Wolff of the German Federal Constitutional Court dared to assume, just inevitably along the lines of power? Does it follow any shift in decision-making, to the institution or structure where crucial decisions are made? The conference’s host, Joseph Weiler, University Professor and European Union Jean Monnet Chair at NYU’s Law School, could not agree. He used to assume that the European Parliaments lack of power was the reason for its lacking legitimacy, Weiler confessed. But now, observing that citizens’ participation in European parliamentary elections is on a steady decline despite a remarkable increase of power and competences for the European Parliament in recent years, he could no longer stick to the hypothesis of a nexus between power and public attention.

Will, as the Portuguese scholar and designated Advocate General at the ECJ Miguel Poiares Maduro stressed, an enhanced transparency of European governance and a strengthened participation of national parliaments in European decision-making change this “legitimacy deficit” caused by the EU’s merely virtual public sphere? Lord Scott of Foscote, British Lord of Appeal in Ordinary, expressed his doubts, despite all his praise for the Convention’s achievements. Still, the institutions of the European Union would be lacking accountability for their actions.

A topic discussed in extenso during the meeting was the protection of fundamental rights in the Union. Francis Jacobs, Advocate General at the ECJ, introduced the Charter of Fundamental Rights, solemnly proclaimed in 2001 at the Laeken IGC. As Part II of the European Constitution, the Charter shall be a legally binding core element of Union’s legal order. The Charter does not create new rights, but crystallizes existing guarantees, Jacobs explained. However, the details of the Charter’s future relation to Member States’ Constitutions and, even more delicate, to the European Convention on Human Rights, will be one of the most interesting questions in the ongoing European constitutional discourse. A discourse which will from now on be mainly in the hands of judges.
The upcoming Intergovernmental Conference, discussing the Draft Constitution elaborated by the Convention, will barely change the European House’s furnishings profoundly. But who would dare to predict whether the Europeans will feel comfortable in their new constitutional home? As so numerous experts participated in the Convention’s work, its tiny rooms and great halls are furnished with diverse fittings of various constitutional provenances.