ABSTRACTS

International Jurisdiction – yesterday and today

From the Adjudication on Inter-State Conflicts to the Conviction of Individuals – Foundations, Peculiarities and Limits of International Adjudication

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International jurisdiction was originally conceived as one of several alternative means for the settlement of international disputes by force. Since, however, international law is governed by the principle of co-ordination, which means that the subjects of international law, originally only States, are equally sovereign and not subject to any superior power, the creation of courts and tribunals as well as their competencies and the implementation of their decisions depend on the will of the States. The creation of international judicial bodies requires the transfer of a part of State sovereignty upon a third organ, the tribunal, and therefore obligatory jurisdiction as in national law is non-existent in international law. International jurisdiction is thus based on a voluntary act of the States concerned: all international courts and tribunals are instituted by a treaty that is binding only upon the parties to that treaty and the hope that all States would submit to international jurisdiction by accepting the jurisdiction of the International Court of Justice has failed.

Nevertheless, international jurisdiction has developed in an impressive manner in the second part of the 20th century although not primarily as a means of peaceful as opposed to forcible settlement of disputes, but as a means to implement fundamental principles of international law. The increasing internationalisation of numerous subject-matters such as human rights, environment, economics etc. and the acceptance of new actors in international law, such as international organisations and individuals as holders of own international rights and obligations, has led to a significant development of international judicial bodies not only with a view to their quantity but also to their quality. International courts and tribunals are called upon to assure the common aims and values laid down in the treaty in the framework of which they have been created and not only or mainly disputes between States concerning their proper, egoistic, interests.

However, all courts and tribunals – with only one exception, namely the International Court of Justice – are part of a specific treaty system which as a rule does not bind the whole state community and therefore is generally not the only one created in a specific field of state activities. This fact may lead to conflicts of jurisdiction and jurisprudence and thereby endanger the unity of international law which may only be countered by the creation of some hierarchical structures in international law and jurisdiction.

International jurisdiction is a mirror of international law and the more international law will develop in the direction of "constitutionalisation", the more international jurisdiction will become the natural means not only of dispute settlement but also of guaranteeing and implementing the international rule of law.

The Protection of Human Rights in Africa – New Developments and Perspectives

The African Court of Human and Peoples' Rights and the Mauritius Declaration of the Organization of African Unity (OAU)

By *Michaela Wittinger*, Saarbrücken

The actual situation of the African human rights system is marked by two decisive developments: the establishment of the African Court on Human and Peoples' Rights by the Protocol to the African Charter on Human and Peoples' Rights from 9 June 1998, not yet in force, and the Grand Bay (Mauritius) Declaration and the Plan of action, adopted on 16 April 1999 at the OAU's First Ministerial Conference on Human and Peoples' Rights.
The Protocol to the African Charter on Human and Peoples' Rights on the establishment of the African Court on Human and Peoples' Rights, with its jurisdiction over contentious cases, grants the right for individuals and Non Governmental Organizations to bring complaints directly before it – although this right is not an automatic one: the possibility for an individual to lodge a complaint directly before the Court depends on the special declaration of the state to accept the Court's jurisdiction in such a case. Thus, a state could sign and ratify the Protocol without granting an independent and direct right of complaint for the individual before the Court – a situation comparable on the original version of the European Convention on Human Rights, not corresponding on the present system after the Protocol n° 11 to the European Convention on Human Rights came into force. Nevertheless, the new African Court as an independent, juridical organ represents an important enforcement for the protection of human rights in Africa. But besides the Court, the African Commission on Human and Peoples' Rights doesn't become superfluous due of its mandate to investigate on general human rights violations and situations as such in the African states, independently of an individual case. But the future of the new African Court on Human and Peoples' Rights is faced with financial problems influencing the work of the existing African Commission on Human and Peoples' Rights which is also financed by the OAU: it is to be feared that financial deficits will mark the practical work of the Court with the same negative consequences for an insufficient technical and personal situation.
The Mauritius Declaration and the Plan of action is on a political point of view a clear confession regarding the priority given to the human rights problem within the OAU;

furthermore, it clearly points out the existing human rights violations in the African states. Legally spoken, the Mauritius Declaration is not a binding instrument, but a simple declaration of an OAU organ which is not empowered to impose obligations on the OAU members. Nevertheless, the Mauritius Declaration can reach certain legal impacts. Firstly, in being transformed by the members states into national plans of actions like it is proposed in the Declaration (in its point 28). Secondly, the Mauritius Declaration can serve as an document of interpretation for the African Court on Human and Peoples' Rights and for the African Commission on Human and Peoples' Rights regarding the unclear formulations of the African Charter of Human and Peoples' Rights. Especially the references in the African Charter on the "African traditions" which have to be saved for example by the family (art. 18 section 2 African Charter) become much more clear with the support of the Mauritius Declaration because the Declaration points out that only positive African traditions which conform with universal values, like human dignity and tolerance (point 5 of the Declaration), are integrated in the Human Rights system. In this meaning, negative traditions, in the context of marriage or such as the genital mutilation, which are a danger for women and children can not to be protected by African Human Rights documents, including the African Charter of Human and Peoples' Rights. In this view, the Mauritius Declaration could fulfill the important task to clarify the decisive African human rights document, the African Charter of Human and Peoples' Rights.
In summary, both, the African Court on Human and Peoples' Rights and the Mauritius Declaration, have to assume their special function in the African Human rights system in complementing each other: the Court grants a more effective protection for the individual; the Mauritius Declaration will promote the human rights situation in general and will tackle the human rights problem on its roots.

The Right to Life and Physical Well Being, the Protection of Patent Rights and the Case of the High Court of South Africa on the Constitutionality of the South African Medicines and Related Substances Control Amendment Act

By *Jörg Fedtke*, Hamburg

In a lawsuit which caught worldwide attention in March and April 2001, the Pharmaceutical Manufacturers Association of South Africa (PMA) and 39 pharmaceutical companies claimed that the South African Medicines and Related Substances Control Amendment Act was unconstitutional due to an infringement of, *inter alia*, the right to property and the freedom of occupation.
Though not confined to this issue, the Act – passed by both Houses of Parliament and signed by President Nelson Mandela in 1997 – is to a large extent part of an initiative of the

South African government to combat Aids (*acquired immune deficiency syndrome*). The epidemic has become a serious threat to Southern Africa, endangering the social and economical basis of many developing societies. Most patients cannot afford the expensive drug-cocktails necessary to prolong their lives, and though experts estimate that 71 per cent of all persons infected worldwide live south of the Sahara, pharmaceutical companies sell less than 1 per cent of their Aids-related medicines on these markets. In essence, the Act tries to address this situation by allowing compulsory licensing and parallel importation of on-patent drugs. It also aims at a reduction of treatment costs by encouraging the substitution of branded medicines by generic products and the introduction of a pricing system as well as prescribed dispensing fees. This article seeks to shed some light on the ensuing conflict between the holders of patent rights and the interest of societies in private research and development funded by sales profits on the one hand and the duty of states to protect the life, physical well-being and human dignity of their citizens on the other.
This is done by outlining the legal interests involved in the conflict (II.), depicting the history of Case No. 4183/98 – High Court of South Africa, Transvaal Provincial Division – (III.), analyzing the constitutionality of the Amendment Act (IV.) and comparing its provisions with the relevant principles established by the Agreement on Trade-Related Aspects of Intellectual Property Rights – TRIPS – (V.). The author concludes that the Amendment Act is basically constitutional and stresses the need to address the different technical, economical and social preconditions of countries member to the World Trade Organization (WTO) when developing new legal instruments of global application.

The Formation of a Constitutional Court in Bolivia: Law No. 1836 of April 1998 (II.)

By *Francisco Fernández Segado*, Madrid

Bolivia is one of the States in Latin America which decided to divert from the US-American system of constitutional review to the European tradition of separate constitutional courts.
The 1967 Bolivian Constitution states in its articles 228 and 229 that constitutional control lies in the hands of the ordinary Courts, judges and the administrative organs. This system proved to be ineffective because of the lack of personnel that is specialized in constitutional matters. In order to overcome this unsatisfactory situation, the Bolivian Parliament decided, in 1994, to change the Constitution. By Law No. 1836 of 1998 the formation of a Constitutional Court was implemented.
Law No. 1836 is subdivided into four parts and contains 119 articles. It covers mainly the composition of the Court and the different types of procedures. The new "Tribunal Constitucional" consists of five judges who are elected by a 2/3 majority of the National

Congress. The main competences of the Court include decisions on disputes between State Organs and on complaints of unconstitutionality.
The article completes the first part which has been published in the previous issue of this Journal.