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Environment and Human Rights – Cooperative Means of Regime Implementation

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Editorial Note:

Dirk Hanschel has studied law in Marburg, London, Heidelberg and Adelaide. He is currently finishing a doctoral dissertation on negotiation solutions in international environmental law; at the same time he is working as a senior research assistant in the project "Institutionalization of International Negotiation Systems (IINS)" at Professor Dr. Eibe Riedel´s Chair of German and Foreign Public Law, International Law and European Law. The present paper is published as part of this research project.

Abstract

This paper carries out a comparative analysis of cooperative, negotiation-oriented means of treaty implementation in the fields of human rights and environmental protection. The effectiveness of the relevant institutions and procedures is examined on the basis of the examples of the International Covenant on Civil and Political Rights including its two Protocols, the International Covenant on Economic, Social and Cultural Rights, the ozone treaties and the climate change treaties.

In the course of analysis, these treaties are classified as international regimes which set in motion a dynamic process of negotiation-oriented implementation through international monitoring bodies. The comparison shows that while both fields of international law have a lot in common (such as the rather modest level of compliance and the lack of confrontational enforcement mechanisms), there are also important institutional and procedural differences. While some elements of institutional design are due to the peculiarities of the respective issue-area (such as the procedure of joint implementation under the environmental treaties), there are others (such as the existence of an integrated political treaty body or the use of the framework-protocol approach) which might serve as a model for both fields.

In his conclusions the author states that the regime concept is able to handle problems of implementation if it is applied more persistently in both fields of international law. Questions of effective implementation should be integrated into the *whole* process of negotiation and treaty-drafting. Otherwise, instruments are designed which may be ratified by a large number of states, but become "sleeping treaties", because they are not properly implemented. While most of the existing cooperative, negotiation-type procedures contribute considerably to effective implementation, they need to be backed up by a greater power of the relevant institutions, including the option to switch from cooperation to confrontation.

Contents

A. Introduction

I. Subject outline

The protection of human rights and the environment represent two areas of international law where extensive use has been made of techniques or mechanisms of implementation which do not rely on sanctions or other confrontational means, but rather on cooperative, negotiation-oriented institutions and procedures. The aim of this study is to provide a close analysis of these techniques of implementation by examining the cases of the International Covenant on Civil and Political Rights (ICCPR) including its two Protocols, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the ozone treaties[1] and the climate change treaties[2]. Through a comparison of these four examples of international environmental and human rights protection, conclusions shall be drawn regarding the effectiveness of the relevant techniques in the respective context. Furthermore, suggestions shall be made on how to improve the implementation systems by comparing the solutions in the two regulatory fields.

Examining the effectiveness of certain factors remains a very difficult task.[3] External factors like the particular bargaining-situation or the nature of the issue-area play an important role which can only be dealt with cursorily in this study. Therefore, some skepticism regarding the results is certainly justified. However, this does not render such an analysis useless. Much will depend on similar studies on different examples which all taken together might produce a more comprehensive picture.

There is a strong impression that traditional international law is "too cumbersome and archaic to cope with the pressing needs of mankind".[4] The chosen cases of environmental and human rights protection constitute typical examples of modern international instruments that are based on a but limited consensus concerning both their conclusion and their implementation. Thus, these instruments have developed characteristic cooperative techniques of implementation in order to tackle this problem and to achieve a reasonable level of compliance. In the case of the human rights Covenants committees were set up, the task of which is to monitor implementation of the respective treaty obligations. In doing so, they have created procedures designed to support their work and to make it more effective. In turn, the ozone and climate change regimes both provide for conferences of the parties which are forums for re-negotiation of the obligations and which supervise their implementation. A comparison of these institutions and procedures will be the main focus of analysis

[1] The Vienna Convention on the Protection of the Ozone Layer and the Montreal Protocol on Substances that Deplete the Ozone Layer including its amendments.
[2] The UN Framework Convention on Climate Change and the Kyoto Protocol to the UN Framework Convention on Climate Change.
[3] Bernauer, Thomas, "The Effect of International Environmental Institutions: How We Might Learn More" (1995) 49 *International Organization* 351.
[4] Oeter, Stefan, "Inspection in International Law - Monitoring Compliance and the Problem of Implementation in International Law" (1997) 28 *Netherlands Yearbook of International Law* 101 (102).

in this paper. Since the institutional design varies to some extent, it is clear that the chosen examples cannot cover the whole field of human rights and environmental regimes. However, the cases offer quite a representative and current sample since they reflect the most recent institutional and procedural innovations.

II. Regime analysis

1. Regime definition

The classical regime definition has been given by *Krasner* who has described them as "implicit or explicit principles, norms, rules, and decision-making procedures around which actors´ expectations converge in a given area of international relations" (so-called ´consensus definition´).[5] *Young* criticized *Krasner´*s definition as being "really only a list of elements that are hard to differentiate conceptually and that often overlap in real-world situations".[6] This criticism led *Keohane* to formulate a more clear-cut definition of regimes as "institutions with explicit rules, agreed upon by governments, that pertain to particular sets of issues in international relations".[7]

While this definition has the charm of avoiding the problematic distinction of regulatory elements undertaken by *Krasner*, a fresh discussion about these elements might contribute towards a better understanding of regimes. Since it is in fact very difficult to make out a difference between principles, rules, norms and decision-making-procedures, a new definition shall be suggested: International regimes are treaty-centered regulatory systems for the solution of international problems that provide for an integrated implementation and re-development structure.[8] These regulatory systems typically consist of primary and secondary elements: The primary elements are those rules of a regime which directly pursue its regulatory aim, i.e. the solution of the respective problem. These are the substantial obligations like specified emission reduction targets or the protection of particular human rights. By contrast, the secondary elements of regime-design contribute only indirectly to the achievement of the regulatory aim. They consist of procedures and institutions which typically serve the functions of implementation and re-development of the primary norms.

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[5] Krasner, Stephen D., "Structural Causes and Regime Consequences: Regimes as Intervening Variables", in Krasner (ed), *International Regimes* (1983, Ithaca, Cornell University Press) p2.

[6] Young, Oran R., "International Regimes: Towards a New Theory of Institutions" 39 *World Politics* 104 ff (106).

[7] Keohane, Robert O., "Neoliberal Institutionalism: A Perspective on World Politics", in Keohane (ed), *International Institutions and State Power: Essays in International Relations Theory* (1989, Boulder, Colorado, Westview Press) p4.

[8] see Klein, Eckart, *Statusverträge im Völkerrecht: Rechtsfragen territorialer Sonderregime* (1980, Berlin, Springer); Ott, Hermann, *Umweltregime im Völkerrecht – Eine Untersuchung zu neueren Formen internationaler institutionalisierter Kooperation am Beispiel der Verträge zum Schutz der Ozonschicht und der Kontrolle grenzüberschreitender Abfallverbringungen* (1998, Baden-Baden, Nomos) p43.

2. International regimes in the fields of the environment and human rights

It has become relatively common to speak of international environmental regimes:[9] In the fields of ozone and climate protection, as in many other cases, multilateral treaties have been created which serve as the main instruments to solve the respective international environmental problems. Apart from the substantial legal obligations, these treaties provide for various cooperative implementation procedures, such as monitoring, joint implementation and compliance assistance, as well as re-development mechanisms such as obligations for re-negotiation, facilitated amendment procedures etc.[10] Therefore, these regulatory instruments are rightly classified as international regimes.

By contrast, it is a lot more unusual to subsume human rights treaties under the regime definition. However, it does not really appear forced to do so: In order to deal with the international problem of human rights violations all over the world, the states have cooperated and agreed upon treaties such as the two UN-Covenants. Apart from the actual human rights obligations these treaties contain implementation procedures, in particular various monitoring mechanisms.[11] As far as the re-development of the existing obligations is concerned, human rights treaties are somewhat weaker than their environmental counterparts. However, there is a slightly facilitated amendment procedure in Art. 51 ICCPR, respectively Art. 29 ICESCR. An indirect element of re-development has been activated by the Committees, which, through the issuing of General Comments, Concluding Observations etc., have brought about important refinements of existing treaty provisions. It follows from this that the human rights treaties, too, may be categorized as international regimes.

3. Regime analysis and implementation

Implementation of regimes is managed through secondary elements only (i.e. institutions and procedures) because it is mainly the primary elements (i.e. the substantial commitments) which are to be implemented. Procedures pertain to decision-making and voting, to various duties of cooperation, especially reporting duties, and to other cooperative means of implementation. Institutions are organizational entities which take over monitoring, re-negotiation and administrative functions. They may either be created specifically for one regime, or they may be "borrowed" from already existing instruments.

The implementation dimension of the institutions and procedures in the four regimes to be examined presents the main focus of this study. It is suggested that these institutions and procedures reflect the

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[9] Gehring, Thomas/Oberthür, Sebastian, *Internationale Umweltregime - Umweltschutz durch Verhandlungen und Verträge* (1997, Opladen, Leske + Budrich); Müller, Harald, *Die Chance der Kooperation - Regime in den internationalen Beziehungen* (1993, Darmstadt, Wissenschaftliche Buchgesellschaft) p90 ff.

[10] Ott, Hermann, "Das internationale Regime zum Schutz des globalen Klimas", in Gehring/Oberthür (eds), *Internationale Umweltregime - Umweltschutz durch Verhandlungen und Verträge* (1997, Opladen, Leske + Budrich) p201 ff; Breitmeier, Helmut, "Entstehung und Wandel des globalen Regimes zum Schutz der Ozonschicht", in Gehring/Oberthür (eds), *Internationale Umweltregime - Umweltschutz durch Verhandlungen und Verträge* (1997, Opladen, Leske + Budrich) p27 ff.

[11] see generally Dimitrijevic, Vojin, "The Monitoring of Human Rights and the Prevention of Human Rights Violations Through Reporting Procedures", in Bloed/Leicht/Nowak/Rosas, *Monitoring Human Rights in Europe* (1993, Dordrecht/Boston/London, Nijhoff) p1.

dynamic and cooperative structure of the regimes they have been created for, and that a regime-type approach to implementation is needed in both fields of international law.

III. Comparability of the two issue-areas

The underlying question when comparing regulatory solutions to environmental and to human rights problems is, of course, whether such a comparison is at all feasible and possible. There are different opinions on the exact conditions under which comparison becomes fruitful, which usually run under the heading of "evaluation".[12] The central thread seems to be that the problems which the law is trying to solve in the cases to be compared have to be the same or at least similar.[13] The solutions may then be compared as to their effectiveness, efficiency and legal style.

At first glance, the bargaining situations, in particular the problem structures, in the two fields of comparison seem to be rather different: First of all, human rights and environmental protection are two entirely different fields of international law. While the cause of human rights is essentially a normative one, in the case of environmental protection factual considerations such as scientific evidence, new technology etc. play a crucial role. Moreover, it might be claimed that human rights regimes are not as dynamic as international environmental regimes, where a constant process of norm-setting and re-negotiation takes place, organized through institutional arrangements.

While this may be partly true, it does not render the comparison impossible: Both cases are characterized by low-consensus bargaining situations, in particular a conflict between different factions, such as the North against the South, which at first allowed for modest regulatory instruments only. In both cases the answer to compliance problems has been to rely on cooperation instead of confrontation and to establish institutions and procedures that help to constantly improve and re-develop the existing rules and their implementation. These techniques show a remarkable affinity rendering them an interesting subject of comparative analysis.

[12] Zweigert, Konrad/Puttfarken, Hans-Jürgen, "Critical Evaluation in Comparative Law" (1976) 5 *Adelaide Law Review* 343; Van Hoecke, Mark/Warrington, Ronnie, "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law " (1998) 47 *International and Comparative Law Quarterly* 495.

[13] Zweigert, Konrad/Puttfarken, Hans-Jürgen, "Critical Evaluation in Comparative Law" (1976) 5 *Adelaide Law Review* 343 at 355.

B. Cooperative implementation techniques under the ozone and the climate change regimes

I. The ozone regime

1. Substantial legal obligations

a) The Vienna Convention on the Protection of the Ozone Layer

The Vienna Convention was concluded in March 1985 and entered into force in September 1988. Until now 176 countries have ratified it.[14] The Convention merely imposes the general obligation on the parties to "take appropriate measures...to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer" (Art. 2 I). This general norm is specified by several duties of cooperation, e.g. the exchange of relevant data or the cooperation "with competent international bodies to implement effectively this Convention and Protocols to which they are party" (Art. 2 II (d)).

b) The Montreal Protocol on Substances that Deplete the Ozone Layer including its amendments

Since the Vienna Convention was unable to solve the problem of ozone depletion in a satisfactory way, very soon a protocol was created with more and stronger obligations, in particular concrete reduction targets. The Montreal Protocol on Substances that Deplete the Ozone Layer was concluded in September 1987 and entered into force in January 1989. It has been ratified by 175 countries.[15] The Protocol has been revised many times by the Meetings of the Parties (MOPs). Through the 1990, 1992, 1995 and 1997 amendments in London, Copenhagen, Vienna and Montreal, the phasing-out periods were shortened drastically and new substances were added.[16] The London Amendments have been ratified by 141 parties, the Copenhagen Amendments by 109 parties and the Montreal Amendments by 40 parties.[17]

2. Cooperative implementation techniques

a) Institutions

The Vienna Convention creates a so-called Conference of the Parties (Art. 6) and a Secretariat (Art. 7) which also operates under the Montreal Protocol. Both institutions were modeled according to other environmental treaties, such as the regime on Long-Range Transboundary Air Pollution (LRTAP).[18]

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[14] The Ozone Secretariat, in *http://www.unep.org.*
[15] As above.
[16] Further amendments were made by the Eleventh Meeting of the Parties and the Fifth Conference of the Parties on 27th November – 3rd December 1999 in Beijing, China, in http://www.unep.org.
[17] The Ozone Secretariat, in *http://www.unep.org.*
[18] Gehring, Thomas, "Das internationale Regime über weiträumige grenzüberschreitende Luftverschmutzung", in Gehring/Oberthür, *Internationale Umweltregime* (1997, Opladen, Leske + Budrich) p45.

According to Art. 6 IV, the Conference of the Parties is the main institution for the implementation and re-development of the regime. In contrast to LRTAP, the Secretariat under the ozone regime is an independent treaty body. This has the advantage that it can fully concentrate its work on the one regime it was created for. The disadvantage is that it cannot rely on already gained experience under different regimes, but it had to start its work from scratch.

Under the Montreal Protocol a Meeting of the Parties was established (Art. 11) with similar functions as the Conference under the Convention. It helped the successful implementation of the obligations laid down in the Protocol.[19]

b) Monitoring

Under the Vienna Convention the question of implementation is addressed in Art. 5, whereby the Parties are to present some information "on the measures adopted by them in implementation of this Convention and of protocols to which they are party in such form and at such intervals as the meetings of the parties to the relevant instruments may determine". The task of the Conference of the Parties is to "consider such information as well as reports submitted by any subsidiary body" (Art. 6 IV (a)). The Conference of the Parties to the Vienna Convention has taken place every two or three years.[20]

Art. 8 of the Montreal Protocol concerns the non-implementation by the State parties. According to this norm, the Meeting of the Parties is called upon to develop "procedures and institutional mechanisms" for the establishment of non-compliance and the treatment of the respective State parties. These procedural rules were agreed upon in London on an interim-basis. In Copenhagen they were consolidated and extended. According to these rules, an implementation committee was set up which is composed of ten State parties, representing different parts of the world.[21] Its task is to deal with submissions, information and observations concerning possible non-implementation by trying to reach an amicable solution and by making non-binding recommendations to the Meeting of the Parties. While the Implementation Committee has examined the state reports quite thoroughly, the decision on responses to non-compliance is taken by the Meeting of the Parties.[22] According to Art. 11 IV (j) it may "consider and undertake any...action that may be required for the achievement of the purposes of this Protocol". The monitoring is further sustained through Art. 7 of the Protocol which provides for the necessary reporting of data.

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[19] Oberthür, Sebastian, "Montreal Protocol: 10 Years After" (1997) 27/6 *Environmental Policy and Law* 432.

[20] Breitmeier, Helmut, *Wie entstehen globale Umweltregime? Der Konfliktaustrag zum Schutz der Ozonschicht und des globalen Klimas* (1996, Opladen, Leske + Budrich) p73 (106, 158).

[21] Wolfrum, Rüdiger, *Means of Ensuring Compliance with and Enforcement of International Environmental Law* (1999, The Hague, Nijhoff) p40; Annex VII to the Report of the Ninth Meeting of the Parties, *UNEP/OzL. Pro.9/12, 25 September 1997.*

[22] Lang, Winfried, "Compliance Control in Respect of the Montreal Protocol" (1995) *The American Society of International Law - Proceedings of the 89 th Annual Meeting (April 5-8, 1995, New York, Johnson)* 70 at 206.

c) Joint implementation

Pursuant to Art. 2 VIII of the Protocol, State parties which are members of a regional economic organization may fulfill their obligations jointly. This provision was specifically created for the European Community which redistributed the commitments internally after agreeing on an overall reduction target (so-called ´bubble´).[23] Furthermore, Art. 2 V of the Protocol authorizes State parties within certain limits to "transfer to another Party any portion of its calculated level of production".

d) Compliance assistance

In order to provide some compliance assistance to the developing countries, the Montreal Protocol established a financial mechanism. Pursuant to Art. 10, a multilateral fund was set up which is sponsored by the industrialized countries. Its task is to cover most of the costs the developing countries have to bear in order to fully implement the obligations laid down in the Protocol. This financial mechanism was agreed upon on a provisional basis at the Second Meeting of the Parties in London. It was formally accepted at the Fourth Meeting of the Parties in Copenhagen. For the administration of the Fund an Executive Committee was created which is assisted by the World Bank, the United Nations Development Programme (UNDP) and the United Nations Environmental Programme (UNEP). While the Fund mainly operates as a supporting instrument, the suspension of financial benefits has sometimes been used as a sanction in reaction to non-compliance.[24]

The Implementation Committee has composed an "Indicative List of Measures that might be taken by the Meeting of the Parties in respect of non-compliance with the Protocol", containing a catalogue of support measures and sanctions.[25] These include financial and technical assistance.[26]

e) Evaluation

Compliance with the reduction targets has been quite satisfactory. The implementation committee has even noted that "many parties, which accounted for a major portion of the production and consumption of controlled substances in the world, have reduced their consumption much beyond the extent called for by the Protocol".[27] The regime has lead to a drastic reduction of ozone-depleting substances: According to recent scientific evidence, the rate of ozone depleting substances entering the

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[23] Lawrence, Peter, "International Legal Regulation for the Protection of the Ozone Layer: Some Problems of Implementation" (1989) 1 *Journal of Environmental Law* 17 at 44.

[24] Wolfrum, Rüdiger, *Means of Ensuring Compliance with and Enforcement of International Environmental Law* (1998, The Hague, Nijhoff) p127; Greene, Owen, "The Montreal Protocol: Implementation and Development in 1995" (1997) *Verification* 407 at 413.

[25] *UNEP/OzL. Pro.4/15*: Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, Copenhagen, 23-25 November 1992, Annex V, 48.

[26] Wolfrum, Rüdiger, *Means of Ensuring Compliance with and Enforcement of International Environmental Law* (1999, The Hague, Nijhoff) p119.

[27] *UNEP/OzL.Pro.4/15*: Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, Copenhagen, 23-25 November 1992, p8.

atmosphere has already been diminished and, if all states keep on coming up to their obligations, the situation is likely to recover by about 2040.[28]

However, the impartiality and objectivity of the implementation mechanism is questionable, since the institution consists of government representatives only. At the same time its effectiveness is enhanced through its small size.[29] In his thorough analysis *Lang* concludes: "Taken together the implementation committee and the conference of the parties have rather wide competences. The control activities can be triggered by a wide spectrum of actors, albeit not by individual actors". However, he complains that "even the reporting duties are not kept universally" and that "the non-compliant states - in particular the developing countries - often apologize by claiming inadequate financial and technological aid by the multilateral fund and the respective implementation bodies".[30] Further weaknesses of the system remain the payment behavior concerning the Multilateral Fund and the long transitional periods for the developing countries.[31] These countries, as well as some Eastern European states, do not show such an excellent record of implementation.

Nevertheless, the ozone regime has aptly been described as "a major success story".[32] While it is true that the reporting system has not worked perfectly,[33] the Implementation Committee has improved the situation a lot:[34] Through its pragmatic and cooperative approach it made the system more coherent and effective. Furthermore, the Conferences and Meetings of the Parties have played an important role: After the conclusion of the Convention they functioned as the crucial institutions for the further negotiations and made the implementation process more transparent and more effective.

[28] Environment Australia, *http://www.environment.gov.au/epg/pubs/fs_montreal.html.*
[29] Lang, Winfried, "Compliance Control in Respect of the Montreal Protocol", in *The American Society of International Law - Proceedings of the 89 th Annual Meeting (April 5-8, 1995, New York, Johnson)* p 206 (209).
[30] As above.
[31] Breitmeier, Helmut, *Wie entstehen globale Umweltregime? Der Konfliktaustrag zum Schutz der Ozonschicht und des globalen Klimas* (1996, Opladen, Leske + Budrich) p106.
[32] Greene, Owen, "The Montreal Protocol: Implementation and Development in 1995" (1997) *Verification* 407 at 424.
[33] At 411.
[34] Victor, David G./Raustiala, Kal/Skolnikoff, Eugene B. (eds), *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (1998, Massachusetts and London, England, The MIT Press) p167.

II. The climate change regime

1. Substantial legal obligations

a) Obligations under the UN Framework Convention on Climate Change

The Climate Change Convention is, similar to the Vienna Convention, only a framework convention with very little substantial obligations.[35] It was concluded in 1992, and it has been ratified by 184 states, which is the bulk of the international community.[36] Art. 2 lays down the aim to stabilize "greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system". Art. 4 requires states to develop national and regional programs on emission control measures, to develop, apply and distribute technologies and other means to fight anthropogenic emissions etc. According to Art. 4 states shall also promote the exchange of information. Art. 4 II a contains an obligation for the OECD and East European states mentioned in Annex I of the Convention to take policies and measures aimed at returning their greenhouse gas emissions to 1990 levels by the year 2000.[37]

b) Obligations under the Kyoto Protocol

The Kyoto Protocol was adopted by consensus at the third session of the Conference of the Parties (COP-3) in December 1997. Until now 84 parties have signed and 23 have ratified the treaty. The Protocol will enter into force after being ratified by at least 55 Parties to the Convention, including developed countries which have to represent at least 55 % of the total 1990 carbon dioxide emissions of this group.[38] According to Art. 3 I of the Kyoto Protocol, the industrialized and Eastern European states included in Annex I have to keep their emissions within their "assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B...with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012."

2. Cooperative implementation techniques

a) Institutions

As under the ozone regime, a Conference of the Parties was established (Art. 7 of the Climate Change Convention). It represents the highest regime body with a number of legislative and executive functions. It verifies the effectiveness of the regime, controls its implementation and re-develops its normative content by adopting decisions, protocols and changes to the Convention. The Secretariat of the International Negotiating Committee for a Framework Convention on Climate Change (INC) was

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[35] French, Duncan, "1997 Kyoto Protocol to the 1992 UN Framework Convention on Climate Change" (1998) 10 *Journal of Environmental Law* 227 at 228 f.
[36] *http://www.unep.org.*
[37] Breitmeier, Helmut, *Wie entstehen globale Umweltregime? Der Konfliktaustrag zum Schutz der Ozonschicht und des globalen Klimas* (1996, Opladen, Leske + Budrich) p159 (174).
[38] UNEP, in: *http://www.unep.org.*

integrated into the regime. Its tasks are to prepare and support the sessions of the other institutions, to provide data and to serve as an interface between the State parties and the other regime bodies.[39]

There are two further institutions, i.e. the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation (Art. 9 and 10). The Global Environmental Facility (GEF) obtained the provisional task to administer the financial mechanism envisaged in Art. 11 of the Convention.[40]

The Conference of the Parties (COP) of the Convention also serves as the Meeting of the Parties (MOP) under the Kyoto Protocol (Art. 13 I of the Kyoto Protocol). The Secretariat and the two subsidiary bodies also operate under the Protocol (Art. 14 and 15 of the Kyoto Protocol).

b) Monitoring

According to Art. 12 of the Convention, the states have to provide national inventories and to report on their greenhouse gas emissions and their counter-measures. Pursuant to Art. 4 II (b) the states are to submit national communications on a regular basis, which reveal information on the parties´ implementation of the Convention.[41]

Apart from providing general data on the distribution of greenhouse gases, the developed states mentioned in Annex I of the Convention have to report on their policies and measures taken for the implementation of the Convention and of the Protocol and to estimate their effects on the emissions. According to Art. 5 and 7 of the Kyoto Protocol they have to establish national systems for the estimation of emissions caused by them, including the "necessary supplementary information for the purposes of ensuring compliance with Article 3..." (Art. 7 I of the Protocol). Art. 4 I (a) of the Convention obliges the Parties to use "comparable methodologies" in their reports to the Conference of the Parties. The Protocol further elaborates this requirement: Art. 5 II states that "methodologies for estimating anthropogenic emissions...shall be those accepted by the Intergovernmental Panel on Climate Change and agreed upon by the Conference of the Parties at its third session". It further states that "where such methodologies are not used, appropriate adjustments shall be applied..." and that these methodologies and adjustments shall regularly be reviewed and revised. In addition to this, the Conference of the Parties, acting as the Meeting of the Parties, is to adopt and to review periodically "guidelines for the preparation of the information required" (Art. 7 IV of the Protocol).

Under the Convention the information is collected annually, but it is published and reviewed only in connection with the periodic national communications, whereas the Kyoto Protocol now provides for an independent annual review (Art. 8 I of the Protocol).[42] According to Art. 8 IV of the Protocol, the

[39] Breitmeier, Helmut, *Wie entstehen globale Umweltregime? Der Konfliktaustrag zum Schutz der Ozonschicht und des globalen Klimas* (1996, Opladen, Leske + Budrich) p159 (180 f).
[40] As above.
[41] UNEP, *http://www.unep.org*.
[42] Wolfrum, Rüdiger, *Means of Ensuring Compliance with and Enforcement of International Environmental Law* (1999, The Hague, Nijhoff) p42.

Meeting of the Parties has to "adopt guidelines for the review of implementation of this Protocol" at its first session. Pursuant to Art. 13 IV, it shall regularly "review the implementation of this Protocol and shall make, within its mandate, the decisions necessary to promote its effective implementation".

Art. 13 of the Convention deals with the "resolution of questions regarding implementation". It states that "the establishment of a multilateral consultative process...for the resolution of questions regarding the implementation of the Convention" shall be considered by the Conference of the Parties. This formulation is weaker than the one in the Montreal Protocol.[43]

c) Joint implementation

Pursuant to Art. 4 II (a) of the Convention, the Annex I countries may implement policies and measures on the mitigation of climate change jointly with other Parties "and may assist other Parties in contributing to the achievement of the objective of the Convention...". As the developing countries were opposed to this idea, Art. 4 II (a) is formulated rather vague and subject to the qualification in Art. 4 II (d) that "the Conference of the Parties...shall...take decisions regarding criteria for joint implementation".[44] The idea behind this concept is an economic one: The measures to be taken imply different sacrifices or costs for the industrialized and the developing countries. This is why the former shall be enabled to carry out some of these measures in the latter countries thereby receiving credits concerning their own obligations.[45] Thus, the total costs of meeting the reduction targets shall be reduced.[46]

There has been some debate on whether joint implementation is only possible among developed countries or whether developing countries could be included. The wording suggests the former alternative,[47] the rationale being to prevent the developed countries from completely shaking off their obligations through payments.[48] However, the provision is, among other things, guided by the principle of common, but differentiated responsibilities and envisages comprehensive strategies including *all* State parties, so that "a more flexible approach concerning joint implementation" appears to be justified.[49]

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[43] At 121.

[44] Yamin, Farhana, "The Use of Joint Implementation to Increase Compliance with the Climate Change Convention" (1993) 2/4 *RECIEL* 348; Brown, Chester, "Facilitating Joint Implementation Under the Framework Convention on Climate Change: Towards a Greenhouse Gas Emission Reduction Protocol (1997) 14:1 *Environmental and Planning Law Journal* 356 (358).

[45] Wolfrum, Rüdiger, *Means of Ensuring Compliance with and Enforcement of International Environmental Law* (1999, The Hague, Nijhoff) p139 f.

[46] Yamin, Farhana, "The Use of Joint Implementation to Increase Compliance with the Climate Change Convention" in Cameron/Werksman/Roderick, *Improving Compliance with International Environmental Law* (1996, London, Earthscan) p228 at 230.

[47] At 239.

[48] Loske, Reinhard/Oberthür, Sebastian, "Joint Implementation under the Climate Change Convention" (1994) 6 *International Environmental Affairs* 45.

[49] Wolfrum, Rüdiger, *Means of Ensuring Compliance with and Enforcement of International Environmental Law* (1999, The Hague, Nijhoff) p141.

The Intergovernmental Negotiating Committee and the Conference of the Parties agreed on a pilot phase of "Activities Implemented Jointly", including the developing countries, but without granting the developed countries credits for their joint projects with them.[50] By the end of the year 2000, a decision shall be taken whether the developed countries may finally receive credits for such projects.[51] A review also took place at the Fourth Conference of the Parties in Buenos Aires in 1998.

Art. 4 I of the Kyoto Protocol further codifies the concept of joint implementation. Art. 6 in combination with Art. 3 grants the possibility of trading so-called "emission reduction units".[52] Such units are acquired by investments in projects aimed at reducing greenhouse gas emissions, including investments by developed countries in projects taking place in developing countries (Art. 12 III (b)). This particular situation is called the Clean Development Mechanism which "combines financial assistance with the obligation to reduce greenhouse gas emissions in a way that they mutually enforce each other".[53] However, credits may not be received if a state is not in compliance with its measuring and reporting obligations (Art. 6 I (c)). According to Art. 6 II, the Conference of the Parties shall "further elaborate guidelines for the implementation of this Article, including for verification and reporting". Into the bargain, Art. 17 gives a mandate to the Conference of the Parties to establish a system of emission trading. On the Conference in Buenos Aires no consensus was reached on this point.[54]

The concept has been described as rather ineffective in practice.[55] In fact, it may easily enlarge the gap between developed and developing countries resulting from a sale-out of certificates in favor of the financially superior Western industries. Still, the concept should not be underestimated. It may contribute to greater cost efficiency of reduction measures and thus to a better level of implementation.

d) Compliance assistance

According to Art. 4 III of the Convention, Annex II countries are to meet the "agreed full costs" of developing countries arising from the reporting obligations under Art. 12 I. The same applies to the incremental costs of all other implementation measures mentioned under Art. 4 I of the Convention, as long as they have been approved by the Fund.[56] The reimbursement of costs requires a detailed

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[50] Framework Convention on Climate Change, Conference of the Parties, First Session, *UN Doc. FCCC/CP/1995/7Add. 1, Decision 5/CP. 1*, at 19 (6 June 1995).

[51] Wolfrum, Rüdiger, *Means of Ensuring Compliance with and Enforcement of International Environmental Law* (1999, The Hague, Nijhoff) p141.

[52] French, Duncan, "1997 Kyoto Protocol to the 1992 UN Framework Convention on Climate Change" (1998) 10 *Journal of Environmental Law* 227 at 235 f.

[53] Wolfrum, Rüdiger, *Means of Ensuring Compliance with and Enforcement of International Environmental Law* (1999, The Hague, Nijhoff) p143; Warbrick, Colin/McGoldrick, Dominic, "Global Warming and the Kyoto Protocol" (1998) 47 *International and Comparative Law Quarterly* 446 (457).

[54] As above.

[55] Loske, Reinhard/Oberthür, Sebastian, "Joint Implementation under the Climate Change Convention" (1994) 6 *International Environmental Affairs* 45; Bodansky, Daniel M., "The United Nations Framework Convention on Climate Change: A Commentary" (1993) 18:2 *The Yale Journal of International Law* 453 at 520 f.

[56] Bodansky, Daniel M., "The United Nations Framework Convention on Climate Change: A Commentary" (1993) 18:2 *Yale Journal of International Law* 492 ff.

assessment procedure which relies, among other things, on the criterion of ´environmental reasonableness´.[57] Moreover, the principle of common, but differentiated responsibilities is stressed.[58]

For the reimbursement of these costs a financial mechanism under the provisional guidance of the Global Environmental Facility (GEF) was established (Art. 11). This financial mechanism "shall have an equitable and balanced representation of all Parties within a transparent system of governance" (Art. 11 II), while the further modalities have to be established by the Conferences of the Parties (Art. 11 III).

e) Evaluation

The implementation system may be described as quite advanced. Compared to the Montreal Protocol, the reporting system under the Kyoto Protocol has become more sophisticated.[59] The Protocol further elaborates and improves the existing implementation techniques under the Climate Change Convention by "(1) strengthening the nature of the commitments to be legally binding, (2) requiring more rigorous reporting, (3) establishing a more critical and comprehensive review process, and (4) mandating the development of procedures and mechanisms to address cases of non-compliance".[60]

It is unfortunate that there is no compliance procedure which identifies specific consequences of non-compliance, as it is envisaged by Art. 18 of the Kyoto Protocol.[61] Since the Protocol has not yet entered into force, its true effectiveness remains to be seen in the future. But the parallels to the ozone-regime, both concerning the bargaining-situation and the regulatory framework, are striking. Therefore, chances are quite good that the climate change regime will develop in a similarly effective way. However, these parallels seem to include problems with the reporting mechanism: At its tenth session the Subsidiary Body For Implementation (SBI) noted that "only 25 Annex I Parties had submitted emissions inventory data for 1990 to 1996 to the Secretariat, which were due on 15 April 1998, and as of 1 June 1999, only 16 Annex I Parties had submitted their national greenhouse gas inventories, which were due on 15 April 1999".[62] As under the ozone regime, these problems might be solved through an active role of the Conferences and Meetings of the Parties and through a better tuning of the implementation procedures by the SBI. Furthermore, the developing countries need to be better integrated into the process. The "provisions on measurement, reporting and review in the Protocol" provide a good-starting point for further elaboration in order to arrive at a regime which addresses the problem of climate change in a more effective and adequate way.[63]

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[57] As above.
[58] Wolfrum, Rüdiger, *Means of Ensuring Compliance with and the Enforcement of International Environmental Law* (1999, The Hague, Nijhoff) p128.
[59] At 42.
[60] Breidenich, Clare et al., "The Kyoto Protocol and the United Nations Framework Convention on Climate Change" (1998) 92 *The American Journal of International Law* 315 at 327.
[61] At 331.
[62] Report of the Subsidiary Body for Implementation on its Tenth Session, Bonn 31 May - 11 June 1999, in *http://www.unep.org.*
[63] Breidenich, Clare et al., "The Kyoto Protocol and the United Nations Framework Convention on Climate Change" (1998) 92 *The American Journal of International Law* 315 (331).

C. Cooperative implementation techniques under the international human rights regimes

I. The International Covenant on Civil and Political Rights (ICCPR) and its protocols

1. Substantial rights and obligations

The Covenant was concluded in 1966 and entered into force in 1976. So far, 143 states have ratified this treaty, 94 the First Optional Protocol and 42 the Second Optional Protocol.[64] The Covenant falls into a Preamble and six parts.[65] It contains so-called ´first generation´ rights like the right to life, the prohibition of torture and slavery, the freedom of opinion and religion, the right to liberty and security of person, the right to form coalitions, the right to a family life etc. Art. 2 I obliges all State parties to undertake "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant", without discrimination of any kind. While the First Optional Protocol establishes an individual complaint procedure, the Second Optional Protocol contains a prohibition of death penalty.

2. Cooperative implementation techniques

a) Institutions

According to Art. 28 ICCPR, a Human Rights Committee was established, consisting of eighteen members which are nationals of the State parties. These members have to "be persons of high moral character and recognized competence in the field of human rights..." (Art. 28 II). In their election "consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of principal legal systems" (Art. 31 II). They are elected for a term of four years, but may be re-elected (Art. 32 I). The Committee constitutes the main body of implementation control (Art. 40 ff.).

The Committee is funded by the General Assembly and the Secretary-General who has to provide "the necessary staff and facilities for the effective performance of the functions of the Committee" (Art. 36). The Secretary-General is the first one to receive the reports (Art. 40 II). He may transmit relevant information to the specialized UN agencies (Art. 40 III). The General Assembly of the United Nations is integrated into the regime only to the extent that it receives annual reports of the Committee´s activities through the Economic and Social Council (ECOSOC) and can decide to make it an issue of political discussion within the UN bodies (Art. 45). In turn, ECOSOC may receive pieces of information from the Committee (Art. 40 IV). Concerning possible amendments of the Covenant, the Secretary-General may, upon request, convene a conference of State parties (Art. 51 I). Such amendments shall

[64] *http://www.unhchr.ch.*
[65] Nowak, Manfred, "The International Covenant on Civil and Political Rights", in Hanski (ed), *An Introduction to the International Protection of Human Rights* (1997, Turku, Abo Akademi) p79 (83).

come into force after their approval by the General Assembly and their acceptance by a two-third majority of the State Parties (Art. 51 II).

b) Monitoring through complaint procedures

State-complaints are provided for on an optional basis under Art. 41, 42 ICCPR. While this was originally planned to become the main way of implementation, this procedure has never been used so far.[66] A state complaining about another today might be put in the pillory itself tomorrow, "opening a Pandora´s box of counter-allegations"[67]. Therefore, there is a certain solidarity about not using this procedure.

The second option is the individual complaints procedure which is based on Art. 2 of the First Optional Protocol. It states that "individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration". Admissibility of a communication requires that it is compatible with the Covenant, that it is not anonymous and that it does not constitute an abuse. Only the victim or a representative are possible claimants. Further requirements are the exhaustion of all domestic remedies, and the case must not be pending at another international body.[68]

The preparation of cases is carried out by a Working Group, respectively a Special Rapporteur who is assisted by the Secretariat. This is the first level on which a communication is dealt with. The Committee requires the claimant to "submit sufficient evidence in substantiation of his allegations as will constitute a prima facie case".[69] According to Art. 4 I of the Protocol, the case must be brought to the attention of the party concerned. The delivered communication is disclosed to the respective state and considered by the Committee in a closed meeting. Art. 4 II then grants the party six months of time to react on the allegations by submitting "written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State". The Committee "shall consider the communication "in the light of all written information made available to it" (Art. 5 I of the Protocol). If the state is not willing to cooperate, i.e. to respond to the accusation, the Committee simply takes the presented facts of the case for granted. This way many states feel a certain pressure to change their mind and eventually do comment on the accusation. While the files and other documents on the Committee´s considerations remain secret, the final decision, called view (Art. 5 IV of the Protocol), is

[66] Opsahl, Torkel, "The Human Rights Committee", in Alston (ed), *The United Nations and Human Rights - A Critical Appraisal* (1992, Oxford, Clarendon Press) p419.

[67] Dinstein, Yoram, "Implementation of Human Rights", in Beyerlin/Bothe/Hofman/Petersmann (eds), *Recht zwischen Umbruch und Bewahrung - Festschrift für Rudolf Bernhardt* (1995, Berlin, Springer) p331 (340 f); Bilder, Richard B., "Rethinking International Human Rights: Some Basic Questions" (1969) *Wisconsin Law Review* 171, 183.

[68] Müllerson, Rein, "The Efficiency of the Individual Complaint Procedures: The Experience of CCPR, CERD, CAT and ECHR", in Bloed/Leicht/Nowak/Rosas, *Monitoring Human Rights in Europe* (1993, Dordrecht/Boston/London, Nijhoff) p25 (30 f).

[69] Report of the Human Rights Committee, *UN Doc. A/39/40 (1984), para. 588, and A/40/40 (1985), para. 696.*

delivered to the claimant and usually made public.[70] The Committee summarizes its activities in annual reports, describing the procedure and practice in abstract terms.[71]

c) Monitoring through reporting procedures

The examination of state reports according to Art. 40 ICCPR represents the most important means of implementation. Five stages can be distinguished: "(1) The preparation of the report, (2) the preparation of the dialogue, (3) the conduct of the dialogue, (4) the Concluding Observations of the Human Rights Committee, (5) the follow-up."[72]

The State parties are responsible for the preparation of the reports, be they initial, periodic or special ones.[73] In a Decision of Periodicity the Committee interpreted Art. 40 I (b), according to which States have to submit their reports "whenever the Committee so requests", as a duty to report periodically every five years.[74] Unfortunately, most states do not fulfill this duty right on time.[75] Therefore, the Secretariat sends out reminders to the States a year ahead of the actual date on which the periodic reports have to be handed in.[76] Another aspect is that the quality of the reports varies a lot. As *Klein* has stated, "in many cases the information contained in the reports tends to zero, in particular as far as information on the implementation of the rights at the administrative and judicial level is concerned".[77] One easy way to determine a violation of the reporting duty is "when the report is obviously incomplete and superficial".[78] The report has to be structured Article by Article, because the Committee believes that this way it becomes more difficult for a State to escape its problems.[79] The preparation of the dialogue between the State party and the Committee starts with a list of issues which is drawn up by the Secretariat on the basis of all available material and then delivered to the State party.[80]

The dialogue itself is divided up into two parts, the first one dealing with questions concerning the main problems, the second one with other issues of concern. Additional questions not covered in the

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[70] Opsahl, Torkel, "The Human Rights Committee", in Alston (ed), *The United Nations and Human Rights - A Critical Appraisal* (1992, Oxford, Clarendon Press) p421.
[71] At 422.
[72] Klein, Eckart, "The Reporting System under the International Covenant on Civil and Political Rights", in Klein, *The Monitoring System of Human Rights Treaty Obligations* (1996, Berlin, Berlin Verlag A. Spitz) p17 (18).
[73] As above.
[74] Dimitrijevic, Vojin, "The Monitoring of Human Rights and the Prevention of Human Rights Violations Through Reporting Procedures", in Bloed/Leicht/Nowak/Rosas, *Monitoring Human Rights in Europe* (1993, Dordrecht/Boston/London, Nijhoff) p1 (14); Decision of the Human Rights Committee of 22 July 1981, *UN Doc. CCPR/C/19.*
[75] Report of the Human Rights Committee, *GAOR, 47th Sess., Suppl. No. 40 (1992), Annex IV*.; Report of the Human Rights Committee, *UN Doc. A/46/40 (3 October 1995), Annex III, based on Rule 69 of the Rules of Procedure.*
[76] Klein, Eckart, "The Reporting System under the International Covenant on Civil and Political Rights", in Klein, *The Monitoring System of Human Rights Treaty Obligations* (1996, Berlin, Berlin Verlag A. Spitz) p17 (19).
[77] As above.
[78] Dimitrijevic, Vojin, "The Monitoring of Human Rights and the Prevention of Human Rights Violations Through Reporting Procedures", in Bloed/Leicht/Nowak/Rosas, *Monitoring Human Rights in Europe* (1993, Dordrecht/Boston/London, Nijhoff) p1 (17).
[79] Klein, Eckart, "The Reporting System under the International Covenant on Civil and Political Rights", in Klein, *The Monitoring System of Human Rights Treaty Obligations* (1996, Berlin, Berlin Verlag A. Spitz) p17 (20).
[80] Decision of the Human Rights Committee of 19 August 1981, *UN Doc. CCPR/C/18*.

list of issues may be asked ad hoc by the Committee.[81] In the Concluding Observations the Committee as a whole expresses its opinion to the State party concerned.[82] Since Art. 40 IV merely states that the Committee shall "transmit its reports, and such general comments as it may consider appropriate, to the State parties", there has been some debate on the question whether the Committee is allowed to do so. In practice, however, the Committee has acted like this since 1992.[83]

In a number of cases special or urgent reports were requested from certain countries. The Committee amended its rules of procedures accordingly and decided that this procedure would only be used if a delayed submission coincided with an emergency situation.[84]

There is no formal follow-up procedure. The Committee may only include cases of non-compliance in the annual report which is then published. The fear of publicity sometimes helps to make the states come up to their obligations. The only other option is to reschedule the issue and deal with it in the next dialogue again.[85]

d) Evaluation

All in all, the monitoring system has developed into a kind of quasi-judicial procedure with the Committee providing reporting guidelines for the states in order to make the system more coherent and systematic. The states are heard by the Committee and given the opportunity to start a constructive dialogue.

Whereas so far the instrument of interstate-complaints has not worked very effectively, the individual complaint-procedure has turned out to be quite an accomplishment: In quite a few cases it helped to remedy human rights violations which could not be asserted on the national level. The mechanism of individual complaints also serves as a monitoring instrument by using the individual as ´guardians of the treaty´. Through this procedure, the Committee has the chance to consider details of a country´s particular human rights situation, which might not be addressed by the somewhat broader reporting system.

The ´mobilization of shame´ which results from the publishing of views under the reporting system helps to remind the states of their commitments. Still, there are many cases where this measure does not alter a state´s behavior at all. It is unrealistic to hope that the Committee could deal with all the

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[81] Boerefijn, Ineke, "Towards a Strong System of Supervision: The Human Rights Committee´s Role in Reforming the Reporting Procedure under Article 40 of the Covenant on Civil and Political Rights" (1995) 17 *Human Rights Quarterly* 76 at 775.

[82] Report of the Human Rights Committee, *UN Doc. A/46/40 (10 October 1991), para. 45; UN Doc. CCPR/C/79 (2 September 1992).*

[83] Report of the Human Rights Committee, *GAOR, 47th Sess., Suppl. No. 40 (1992), paras. 292-299.*

[84] Boerefijn, Ineke, "Towards a Strong System of Supervision: The Human Rights Committee´s Role in Reforming the Reporting Procedure under Article 40 of the Covenant on Civil and Political Rights" (1995) 17 *Human Rights Quarterly* 76 at 775.

[85] Klein, Eckart, "The Reporting System under the International Covenant on Civil and Political Rights", in Klein, *The Monitoring System of Human Rights Treaty Obligations* (1996, Berlin, Berlin Verlag A. Spitz) p17 (21).

violations of civil and political rights occurring in the State parties.[86] Furthermore, the remedy is very incomplete if one considers the lack of real enforcement. The respective state will only alter its law or its practice if there is at least a minimum degree of democracy and a positive attitude towards human rights.[87] Those states that are only paying lip service to their obligations will often not react at all. Unfortunately, compliance with the reporting obligations as such is not very high, either. In 1996, 115 reports were overdue.[88] Thus, positive statements on the constructive dialogue have been called "a very euphemistic assessment".[89] However, the same author does not consider the whole process to be useless, but believes "that reporting on human rights gives an excellent opportunity for States to check themselves, and for the international community to perform a valuable monitoring task".[90] He only suggests some procedural improvements.[91]

While the role of non-governmental organizations (NGOs) is only an informal one, they provided, in many cases, crucial and independent pieces of information.[92] They have contributed greatly to the monitoring of compliance by the Committee and have an important impact on the media. Thus, they helped to put recalcitrant states in the pillory.[93]

Camp Keith has carried out an interesting study on the effectiveness of the ICCPR by comparing the human rights record of Member States before and after ratification of the treaty, as well as the behavior of parties and non-parties. The result is rather frustrating: There was a complete failure to "discern any observable impact of the Covenant".[94] However, she suggests that the "treaty´s impact may be more of an indirect than direct process" for example by first changing domestic law before changing human rights behavior. Another explanation could be that ratification of the Covenant may be "the final step in a long socialization process within the international community that influences a state´s willingness to protect human rights".[95] Still she concluded that "overall human rights protection among the treaty´s parties is no better than that in non-party states, all things being equal".[96]

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[86] Müllerson, Rein, "The Efficiency of the Individual Complaint Procedures: The Experience of CCPR, CERD, CAT and ECHR", in Bloed/Leicht/Novak/Rosas, *Monitoring Human Rights in Europe* (1993, Dordrecht/Boston/London, Nijhoff) p25 (31).

[87] Bayefski, Anne, "The U.N. Human Rights Treaties: Facing the Implementation Crisis" (1996) 15 *Windsor Yearbook of Access to Justice* 189 at 200 ff.

[88] Riedel, Eibe, "Universeller Menschenrechtsschutz - Vom Anspruch zur Durchsetzung", in Baum/Riedel/Schaefer (eds), *Menschenrechtsschutz in der Praxis der Vereinten Nationen* (1998, Baden-Baden, Nomos Verl.-Ges.) p25 (48).

[89] Klein, Eckart, "The Reporting System under the International Covenant on Civil and Political Rights", in Klein, *The Monitoring System of Human Rights Treaty Obligations* (1996, Berlin, Berlin Verlag A. Spitz) p17 (26).

[90] At 27.

[91] As above.

[92] Dimitrijevic, Vojin, "The Monitoring of Human Rights and the Prevention of Human Rights Violations Through Reporting Procedures", in Bloed/Leicht/Nowak/Rosas, *Monitoring Human Rights in Europe* (1993, Dordrecht/Boston/London, Nijhoff) p1 (18).

[93] Alston, Philip, "Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments", *UN Doc. E/CN.4/1997/74 (27 March 1997).*

[94] Camp Keith, Linda, "The United Nations International Covenant on Civil and Political Rights: Does it Make A Difference in Human Rights Behavior?" 36:1 *Journal of Peace Research* 95 (112).

[95] At 113.

[96] As above.

She finds this to be "consistent with the assertions that the treaty´s implementation mechanisms are too weak and rely too much on the goodwill of the state party to effect observable change in actual human rights behavior".[97] This study is still relatively isolated and deserves a critical assessment. Further evidence needs to be found in order to support or to defeat its conclusions.

II. The International Covenant on Economic, Social and Cultural Rights (ICESCR)

1. Substantial rights and obligations

The ICESCR, too, was concluded in 1966 and entered into force in 1976. By now, it has been ratified by 141 states.[98] The catalogue of rights includes, inter alia, the right to work, the protection of the family, the right to an adequate standard of living, the protection of physical and mental health, a right to education and the right to take part in cultural life.[99] According to Art. 2 I "each party to the Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant...". This principle of progressive realization stands in a clear contrast to the nature of obligations under the ICCPR and has been the subject of a vast amount of literature.[100]

2. Cooperative implementation techniques

a) Institutions

As under the ICCPR, a Committee was created which constitutes the main implementation body. First there was only a working party of government representatives which did not prove to be very effective because they lacked the necessary expertise and dealt with the reports in a politicized way.[101] ECOSOC Resolution 1985/17 then established the Human Rights Committee which consists of 18 experts with recognized competence in the field.[102] In contrast to the Committee under the ICCPR, the legal basis for this body is not to be found in the Covenant, but in the UN-Charter. Apart from that, the Committee has a similar structure as its twin under the ICCPR.

Since the Committee was established by ECOSOC, this institution has a great relevance for the regime. It receives the Committee´s reports through the Secretary-General (Art. 16 II (a)) and may

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[97] As above.
[98] *http://www.unhchr.ch*
[99] Riedel, Eibe, "The Examination of State Reports", in Klein (ed), *The Monitoring System of Human Rights Treaty Obligations* (1998, Berlin, Berlin-Verl. Spitz) p97 ff.
[100] see only Riedel, Eibe, "The Examination of State Reports", in Klein (ed), *The Monitoring System of Human Rights Treaty Obligations* (1998, Berlin, Berlin-Verl. Spitz); Dankwa/Flinterman/Leckie, "Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights" (1998) 20 *Human Rights Quarterly* 705 at 713.
[101] Coomans, Alphonsus P.M., "Economic, Social and Cultural Rights", in *Netherlands Institute for Human Rights, SIM Special No. 16*, Utrecht (1995) p3 (6).
[102] As above.

transmit them to the Commission on Human Rights (Art. 19) "for study and general recommendation or, as appropriate, for information...". Thus, a link to the UN human rights system was established. Furthermore, the specialized agencies of the UN receive copies of the reports "in so far as these reports, or parts therefrom, relate to any matters which fall within the responsibilities of the said agencies in accordance with their constitutional instruments" (Art. 16 II (b)). Finally, the General Assembly may receive some "recommendations of a general nature and a summary of the information received from the State Parties..." (Art. 21). Amendments to the Covenant follow the same procedure as under the Covenant on Civil and Political Rights (Art. 29).

b) Monitoring through reporting procedures

While there is an examination of state reports, no complaint procedure exists. Pursuant to Art. 16 and 17 ICESCR, states have to report on their level of compliance to the Secretary-General and to ECOSOC. Similar to the ICCPR, the monitoring function is carried out through a "constructive dialogue", i.e. a cooperative, negotiation-based discourse between the Committee and the states which are granted some assistance and guidance in preparing their reports. Each State party has to hand in an initial report, followed by regular ones at the interval of five years. The Committee may also ask for special reports on an ´ad hoc´-basis if there are new and threatening developments in a country. The Committee may send a reminder to the recalcitrant states and eventually mention them to ECOSOC. Moreover, it may set up schedules and decide to consider a case on the basis of NGO and media information only or empower a special rapporteur. The Committee may issue recommendations and conclusions. A kind of ´case law´ has developed which constitutes the basis for abstract interpretations of provisions.[103] Thus, as under the ICCPR, a court-like atmosphere has been created (´quasi-judicial function´).[104]

By developing reporting guidelines and issuing general comments on the provisions of the Covenant, the Committee succeeded in gradually restricting the huge margin left open by the principle of progressive realization (Art. 2 I). These measures are largely based on the so-called Limburg Principles and on the Maastricht Guidelines.[105] Thus, the Committee decided in its General Comments that the ´steps´ which Art. 2 I requires the states to undertake must occur within a reasonable, short time and should be "deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant".[106] The "maximum of available resources" must be

[103] Craven, Matthew C. R., "*The International Covenant on Economic, Social and Cultural Rights - A Perspective on its Development* (1995, Oxford, Clarendon Press) p57 ff.

[104] Craven, Matthew C. R., "Towards an Unofficial Petition Procedure: A Review of the Role of the UN Committee on Economic, Social and Cultural Rights", in Drzewicki/Krause/Rosas (eds), *Social Rights as Human Rights: A European Challenge* (1994, Abo, Abo Akademi) p91 (97 ff).

[105] The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights of 6 June 1986, *UN Doc. E/CN.4 (1987/17), Annex*. Reproduced in (1987) 9 *Human Rights Quarterly* 122; The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1998) 20 *Human Rights Quarterly* 691.

[106] Simma, Bruno, "The Implementation of the International Covenant on Economic, Social and Cultural Rights", in Matscher (ed), *Die Durchsetzung wirtschaftlicher und sozialer Grundrechte* (1992, Kehl am Rhein/Straßburg/Arlington, Engel) pp90/92.

mobilized.[107] Retrogressive measures can only be justified under special circumstances and should have a legal basis in the Covenant itself.[108] The Committee has initiated a benchmarking procedure, which enables it to take into account the particular economic, political and legal situation within a state and consider the steps a state has taken from its individual starting position.[109] However, lack of economic resources or other domestic problems are not always a good excuse, since all rights have a "resource-free dimension".[110]

There is a very controversial debate about whether to concentrate on so-called core rights or on the core content of every right.[111] In General Comment No. 3 the Committee stressed that the rights in the Covenant are to be "considered justiciable more frequently than it appears at first glance".[112] Provisions such as the non-discrimination clauses in Art. 2 II and 3 may well be directly applicable by the national courts.

In contrast to the ICCPR, NGOs have a formal role to play in the reporting procedure.[113] Again, they represent a major source of independent fact-finding. They prepare their own reports and publish them. During one day of the proceedings they may speak in front of the Committee.

c) Compliance assistance

According to Art. 22 of the ICESCR, ECOSOC may inform UN bodies concerned with technical assistance about matters arising from the reports so that they may provide adequate support measures. This provision is rather vague and has not initiated a true financial mechanism.

d) Evaluation

As under the ICESCR, compliance with the reporting procedure itself is far from perfect[114], but often "brief, generalized, incomplete, or out of date"[115]. By 1994, 14 states had not delivered any report in

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[107] General Comment No. 3, para. 2. Committee on Economic, Social and Cultural Rights, Report on the Fifth Session. Economic and Social Council, *Official Records, 1991, Supplement No. 3 (UN Doc. E/1991/23)*, pp83/87.

[108] Simma, Bruno, "The Implementation of the International Covenant on Economic, Social and Cultural Rights", in Matscher (ed), *Die Durchsetzung wirtschaftlicher und sozialer Grundrechte* (1992, Kehl am Rhein/Straßburg/Arlington, Engel) p92.

[109] General Comment No. 1 (1989), in Craven, *The International Covenant on Economic, Social and Cultural Rights - A Perspective on its Development* (1995, Oxford, Clarendon Press) p368 ff.

[110] Craven, Matthew C. R., "The International Covenant on Economic, Social and Cultural Rights", in Hanski (ed), *An Introduction to the International Protection of Human Rights* (1997, Turku, Abo Akademi) p99 (106).

[111] Riedel, Eibe, "The Examination of State Reports", in Klein (ed), *The Monitoring System of Human Rights Treaty Obligations* (1998, Berlin, Berlin Verl. A. Spitz) p95 (103).

[112] Simma, Bruno, "The Implementation of the International Covenant on Economic, Social and Cultural Rights", in Matscher (ed), *Die Durchsetzung wirtschaftlicher und sozialer Grundrechte* (1992, Kehl am Rhein/Straßburg/Arlington, Engel) p91.

[113] Craven, Matthew C. R., *The International Covenant on Economic, Social and Cultural Rights - A Perspective on its Development* (1995, Oxford, Clarendon Press) p80 ff.

[114] At 57 ff.

[115] At 64.

ten years and 62 states had delayed as many as 72 reports.[116] In 1996, 115 reports were overdue.[117] While some states still seem to believe that social rights are less important than civil rights, others are simply incapable to live up to their obligations, including their reporting duties. Thus, while still being relatively effective, the so-called ´constructive dialogue´ has worked only partially.[118] It is difficult to estimate to what extent the State parties complied with the substantial obligations. Such a statement presupposes a clear picture of what a violation is, which is distorted by the different types of obligations (respect, protect and fulfill) and the principle of progressive realization. Instead of putting states in the pillory, the Committee is far more concerned with gradually improving compliance starting from the benchmarked status quo. This relativist approach allows the Committee to avoid clear statements on violations or breaches of the treaty.

A greater transparency remains desirable. One way to achieve this has been outlined by *Chapman* who proposes to concentrate more strongly on violations. The result might be "a fuller catalogue of types of violations of each of the constituent rights of the Covenant" in order to facilitate implementation.[119] The Committee itself has taken this direction to some extent by starting to identify some specific violations of the Covenant. However, it must not be overlooked that this approach is limited by the principle of progressive realization which does not allow easy specifications. In this respect, the difference towards the ICCPR remains important. The main deficit of the Covenant remains the absence of a complaint procedure.[120] Because of the mentioned difficulties to determine what a violation is, the drafters of the Convention considered it impossible to establish such a mechanism. Thus, individual and collective complaints may only be submitted indirectly through NGOs.[121] The extensive interpretation of rights by the Committee and the tendencies towards a violation approach render these initial concerns less relevant now. A complaint procedure has already been outlined in a Draft Optional Protocol which is currently pending before the UN Commission on Human Rights.[122] It is to be hoped that this procedure will work both as a remedy for individual and collective human rights violations and as a specific monitoring element using the claimants as guardians of the treaty. As under the ICCPR, publishing the views on individual cases could lead to a ´mobilization of shame´, pressurizing the states into compliance.

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[116] Riedel, Eibe, "The Examination of State Reports", in Klein (ed), *The Monitoring System of Human Rights Treaty Obligations* (1998, Berlin, Berlin Verl. A. Spitz) p95 (100); Shue, Henry, *Basic Rights: Subsistence, Affluence & U.S. Foreign Policy* (1980, Princeton, N.J., Princeton University Press) p23 ff.

[117] Riedel, Eibe, "Universeller Menschenrechtsschutz - Vom Anspruch zur Durchsetzung", in Baum/Riedel/Schaefer (eds), *Menschenrechtsschutz in der Praxis der Vereinten Nationen* (1998, Baden-Baden, Nomos Verl.-Ges.) p25 (48).

[118] Craven, Matthew C. R., *The International Covenant on Economic, Social and Cultural Rights - A Perspective on its Development* (1995, Oxford, Clarendon Press) p57 (68 ff).

[119] Chapman, Audrey R., "A Violations Approach" (1996) 18 *Human Rights Quarterly* 23.

[120] Craven, Matthew C. R., *The International Covenant on Economic, Social and Cultural Rights - A Perspective on its Development* (1995, Oxford, Clarendon Press) p105; Müllerson, Rein, "The Efficiency of the Individual Complaint Procedures: The Experience of CCPR, CERD, CAT and ECHR", in Bloed/Leicht/Novak/Rosas (eds), *Monitoring Human Rights in Europe* (1993, Dordrecht/Boston/London, Nijhoff) p25.

[121] Craven, Matthew C. R., "The International Covenant on Economic, Social and Cultural Rights", in Hanski (ed), *An Introduction to the International Protection of Human Rights* (1997, Turku, Abo Akademi) p99 (109/115).

[122] see Status of the International Covenants on Human Rights, Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *U.N. ESCOR, Commission on Human Rights, 53d Sess., Agenda Item 14, U.N. Doc. E/CN.4/1997/105 (1997).*

D. Comparative Evaluation

I. Design and effectiveness of the cooperative implementation techniques

1. Institutions

Institutions are an important factor to ensure implementation of international obligations, when they are really capable to take the necessary measures, even against the will of individual states.[123] However, the most striking features of institutions in the fields of the environment and human rights are their *cooperative* working style and the constant revision process within a regime which enables them to ´learn´.[124] *Raustiala/Victor* evaluate the importance of institutions on the basis of a number of case studies from the field of international environmental law. They conclude:

> In virtually all of our studies, the most important turning points and fundamental pressures that have caused regulatory action have not been institutions...But in these cases, institutions have helped policy advocates to take advantage of opportunities...Institutions have also set standards for data reporting, helped to target financial resources, and made possible international reviews of national performance. Such institutions have made international cooperation more effective, but they were not the critical element.[125]

These indirect effects of institutional guidance within regimes are exactly what can be witnessed in the chosen four examples: Here institutions function as a reliable framework for the re-development and implementation of substantial commitments.[126] Institutionalization constitutes an important element of organization and guidance helping to produce more effective results. The peculiarities and common features of the techniques found under the four regimes shall now be examined in some detail.

a) Conferences of the parties versus human rights committees

The most striking common feature of the environmental and human rights bodies examined in this study is that apart from carrying out their monitoring tasks, they are enabled to constantly refine and improve the supervision process, thus exercising the functions of review, correction and creativity.[127] While the conferences of the parties are composed of government representatives, the committees are expert bodies and thus much more effective in working out the details of monitoring procedures etc. However, much depends on the exact function they are carrying out. For monitoring purposes

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[123] Boyle, Alan E. "Saving the World? Implementation and Enforcement of International Environmental Law through International Institutions" (1991) 3 *Journal of Environmental Law* 229 ff.

[124] Sand, Peter, *Lessons Learned in Global Environmental Governance* (1990, Washington D.C., World Resources Institute) p36.

[125] Raustiala, Kal/Victor, David G., "Conclusions", in Victor/Raustiala/Skolnikoff, *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (1998, Massachusetts and London, England, The MIT Press) p659 ff (698).

[126] Haas, Peter M. et al., *Institutions for the Earth. Sources of Effective International Environmental Protection* (1993, MIT Press, Mass.).

[127] Van Hoof, G. J. H./De Vey Mestdagh K., "Mechanisms of International Supervision", in Van Dijk (ed), *Supervisory Mechanisms in International Economic Organisations* (1984, Deventer, Kluwer) p3 (11 ff).

these quasi-judicial bodies appear to be appropriate, but when it comes to the consequences of non-compliance and to regime innovation a more political body seems better equipped to do the job, since such an institution is able to create new commitments and better implementation mechanisms without being limited by narrowly defined competences. The conferences of the parties have rightly been described as the pivotal dynamic element in environmental regimes, since they drive on the negotiation and rule-making process, balancing sovereign and global interests and implementing the principle of common, but differentiated responsibilities.[128] Their role is much more encompassing than simply the monitoring of implementation.

The Committee under the ICESCR first consisted of government representatives only and was therefore not very effective for monitoring purposes. However, it might have served as a body of political guidance like the conferences of the parties. Now both committees are relatively independent: They set up their own rules of procedure exploiting their limited competences to the maximum, but there is no institution which can decide about the further development of the regimes. In fact, the Covenants do create some links to UN bodies such as ECOSOC or the Human Rights Commission. But these links are rather weak and do not provide for an institution with the same powers as the conferences or meetings of the parties. A re-development of the regimes can only take place through a new round of negotiations including all signatories to the first instrument. Exactly this happened in the case of the protocols to the ICCPR. It is true that the amendment procedures only require a two-third majority, and that the Secretary-General may convene conferences of the parties. But these conferences are only ad hoc intergovernmental conferences with special voting procedures. Thus, the human rights regimes stop short of establishing a permanent, internal political regime body which is able to institutionalize and guide their constant reshaping and further development.

b) Secretariats and subsidiary bodies

The main institutions are usually overloaded with work and at the same time heavily underfunded. They need some organizational and administrative assistance. Secretariats have in all four cases proven to be of great value in carrying out this task. However, without adequate funding they cannot live up to their full capacity, either.

In addition to the secretariats, there are sometimes auxiliary bodies with specific functions which are tied to one of the main institutions. Two examples are the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation under the climate change regime. By fulfilling their special tasks these bodies often integrate the expertise of so-called ´epistemic communities´ into the regime. Such epistemic communities represent a network of experts with acknowledged competence in a specified issue-area.[129]

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[128] Werksman, Jacob, “The Conference of Parties to Environmental Treaties“, in Werksman (ed), *Greening International Institutions* (1996, London, Earthscan) p55.

[129] Breitmeier, Helmut, *Wie entstehen globale Umweltregime? - Der Konfliktaustrag zum Schutz der Ozonschicht und des globalen Klimas* (1996, Opladen, Leske+Budrich) p57.

According to *Haas*, such a community typically acts on the basis of common principles and criteria, it further has a common opinion on the causes of a problem, and finally it identifies with a common political project.[130] Epistemic communities act in particular through these specialized regime bodies, because here their expertise is needed and accepted most. Due to their seemingly subordinate importance they are often relatively free from external political pressures. This situation allows them to operate in a quite objective and effective manner. However, such bodies should be used with due care, because they tend to lead their own life and to drift away from the political process taking place ´above their heads´. Therefore, they need to be integrated well into the overall institutional structure.

c) Non-governmental organizations (NGOs)

NGOs play an important role in all four regimes. Sometimes with formal, sometimes with informal status, their function is to collect and distribute information, relatively independent from political pressures, guided by their legitimate aim which is reflected in the particular regime they are working for. Their main strength lies in their ability to build up pressure by using the public opinion. Under the ICESCR they have even obtained the formal right to speak in front of the Committee during one day of the proceedings. Albeit without a comparable formal status, NGOs are equally important under the ICCPR since they are a valuable source of information for the Committee.

Similarly, under the environmental regimes their main function is to inform the public and to exert pressure on governments.[131] Occasionally, they are also used for the collection of detailed information on implementation,[132] one example being the World Conservation Monitoring Unit under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973).[133] At the big environmental conferences like the Earth Summit in Rio de Janeiro, NGOs were invited to take part in the negotiations, sometimes even as members of national delegations.[134] Especially the ozone and the climate change regimes show that NGOs are increasingly playing an active part in the implementation of commitments. Wherever possible, they should be formally integrated into the regime structure and be equipped with the necessary procedural rights. However, this requires a critical assessment of each individual NGO which is allowed to participate, since there is, in fact, a great divergence as to their character and quality.

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[130] Haas, Peter M., "Introduction: Epistemic Communities and International Policy Coordination" (1992) 46:1 *International Organization* 1 at 3.

[131] Bothe, Michael, "Compliance Control beyond Diplomacy - the Role of Non-Governmental Actors" (1997) 27/4 *Environmental Policy and Law* 293 ff.

[132] Wolfrum, Rüdiger, *Means of Ensuring Compliance with and Enforcement of International Environmental Law* (1999, The Hague, Nijhoff) p52.

[133] Brown Weiss, Edith, "Strengthening National Compliance with International Environmental Agreements" (1997) 27/4 *Environmental Policy and Law* 297 at 30.

[134] Wolfrum, Rüdiger, *Means of Ensuring Compliance with and Enforcement of International Environmental Law* (1999, The Hague, Nijhoff) p53.

d) Global institutions

Environmental lawyers have discussed the question if one central institution should be set up which could then coordinate and manage all the different environmental regimes.[135] The Declaration of the Hague signed in March 1989 calls for a ´new institutional authority´.[136] But the trend is quite a different one, both in the fields of the environment and human rights: Although some overarching institutions like UNEP, the Commission on Sustainable Development, the Human Rights Commission etc. were established and to some extent integrated into the machinery of individual regimes,[137] most institutions were created specifically within particular regimes. It has rightly been said that "the obvious disadvantage of relying on the existing structure is its sheer complexity".[138] Conversely, the advantage of the present functional structure is "its openness and adaptiveness to change" which "must include the option of consequential institutional change".[139] Furthermore, a functional approach is able to respect the fact that the nature of problems varies greatly. Having said this, it certainly remains helpful to provide some overall guidance by more general institutions like UNEP, without formally and fully integrating them into the regimes. This way, they can serve as an important link between the different regulatory systems thus creating an overarching structure and helping to exploit possible synergy effects. The vision would be a network of satellite-like regimes rotating around some fixed central institutions that fulfill the functions of stabilization, coordination and guidance.

2. Procedures

Institutions cannot function without some basic idea of their powers and working procedures. Many international institutions spend some time passively ´floating around´, until they are suddenly ´discovered´ and filled with new life. Usually, these powers and procedures stem from treaty provisions which are then, within a particular regime, interpreted and further elaborated by the institution itself. Procedures may describe both the external and the internal structure, i.e. the functions and the functioning of an institution. This diversity makes the procedural side very interesting and earns it a close analysis.

a) Monitoring

Monitoring is at the very heart of all cooperative implementation mechanisms, be it in the field of the environment or in the field of human rights. *Raustiala* and *Victor* state that "SIRs (systems of implementation review) are becoming more common and elaborate" and that they "have steadily

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[135] Wolfrum, Rüdiger, *Means of Ensuring Compliance with and Enforcement of International Environmental Law* (1999, The Hague, Nijhoff) p48 with further references; Oeter, Stefan, "Inspection in International Law - Monitoring Compliance and the Problem of Implementation in International Law" (1997) 28 *Netherlands Yearbook of International Law* 101 (102).

[136] Sand, Peter H., *Lessons Learned in Global Environmental Governance* (1990, Washington, D.C., World Resources Institute) p21.

[137] Wolfrum, Rüdiger, *Means of Ensuring Compliance with and Enforcement of International Environmental Law* (1999, The Hague, Nijhoff) p48.

[138] Sand, Peter H., *Lessons Learned in Global Environmental Governance* (1990, Washington, D.C., World Resources Institute) p35.

[139] At 35 f.

become more complex and appear to be making an increasing contribution to the effectiveness of agreements".[140]

The main instrument of monitoring are reporting procedures. The General Assembly, in its Resolution 43/115, stressed the importance of reporting duties in the case of human rights as follows:

> The effective implementation of instruments of human rights, involving periodic reporting by State parties to the relevant treaty bodies...not only enhances international accountability in relation to the protection and promotion of human rights, but also provides State parties with a valuable opportunity to review policies and programs affecting the protection and promotion of human rights and make any appropriate adjustments.[141]

This statement holds true for the field of environmental protection, as well.[142] While the exact design of the reporting procedures varies to some extent, they have all appeared to be quite effective in receiving and assessing reliable data on state compliance. However, the study of *Camp Keith* referred to above shows that the effectiveness of the reporting mechanisms has partly become a question of belief, not of scientific evidence. Thus, the real effects of monitoring are difficult to estimate.

The human rights institutions have used their powers to the maximum to achieve the greatest effectiveness which is possible under the given circumstances. They strongly rely on additional information provided by NGOs and the media since this constitutes a very reliable means of verification of state reports. Under the environmental regimes, very accurate measuring techniques have been created and applied reflecting the technical and scientific progress. Thus, in both cases the monitoring procedures have been finely tuned and elaborated towards a transparent and efficient system of compliance control.

Individual complaint mechanisms are to be found under the ICCPR and under the Draft Optional Protocol to the ICESCR. Interstate complaints are possible under the ICCPR and under the two environmental regimes. The problem with interstate complaints is that they have hardly been used, because states are afraid to annoy other parties today which they might have to cooperate with tomorrow. By contrast, individual complaints have proven to be quite effective as an extra instrument of human rights monitoring which is more precise and specific than the reporting mechanisms and, at the same time, provides a certain remedy function. However, under the environmental regimes such a technique seems rather difficult to establish: While human rights law more and more focuses on the

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[140] Raustiala, Kal/Victor, David G., "Conclusions", in Victor/Raustiala/Skolnikoff, *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (1998, Massachusetts and London, England, The MIT Press) p659 (679).

[141] General Assembly, Resolution 43/115 on Reporting on the Implementation of Human Rights Obligations, *UN Doc. A/Res/43/115.*

[142] Wolfrum, Rüdiger, *Means of Ensuring Compliance with and Enforcement of International Environmental Law* (1999, The Hague, Nijhoff) p36.

individual and not only on states,[143] environmental problems can be seen not only from an anthropocentric, but also from an ecocentric perspective.[144] While under the former view individuals might be able to complain on their own behalf, the latter view rather puts them in the position of trustees. Under both views the question arises who should be allowed to complain about what. Due to the many facets of environmental protection and the global nature of the problems, there will have to be some restrictions. While it appears obvious that an individual should be entitled to claim damages caused by hazardous substances emitted from the neighbor´s property, it is much harder to conceive how and against whom one should proceed in the case of ozone depletion or climate change. Individuals should be able to claim the non-implementation of environmental commitments by their own states in front of a regime body. This would either mean that the conferences of the parties would have to develop a quasi-judicial procedure which could be modeled along the one under the human rights regimes. The better alternative would be to create an additional institution composed of independent experts which is more suitable to deal with such cases. Where non-implementation committees exist, they could be used for such purposes.

In order to evaluate the monitoring results, the responsible bodies should have some idea of how to establish non-compliance. This is a very tricky issue, because under the negotiation-oriented model compliance is often more a question of degree than of ´yes´ or ´no´ and the states shall not be put in the pillory. However, the example of the ICESCR shows that such a qualification is in fact essential for the effective carrying out of the monitoring tasks. The problem is only that the more vague the obligations are, the more difficult it gets to arrive at a viable definition. Under the ICCPR, this task is much easier to fulfill than under the ICESCR with its concept of progressive realization. In the environmental field similar problems exist: Here non-compliance is dealt with by the conferences or meetings of the parties, which, due to their political character, have a better chance to deal with recalcitrant states. However, emission reduction targets are defined in concrete numbers and can be measured easily. Non-compliance can thus be expressed in percentages, which would be a rather presumptuous exercise in the field of human rights protection.

b) Joint implementation

The concept of joint implementation remains idiosyncratic to the field of environmental protection, since human rights first and foremost have to be protected by individual states within their own domain. Unlike environmental reduction units and emission certificates, human rights are not tradable: It is unthinkable that a state should be able to get rid of its domestic human rights obligations by implementing them in other countries. The idea that human rights should be implemented where it is economically most reasonable is immoral, because human rights have to be respected everywhere.

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[143] Riedel, Eibe, "Universeller Menschenrechtsschutz - Vom Anspruch zur Durchsetzung", in Baum/Riedel/Schäfer (eds), *Menschenrechtsschutz in der Praxis der Vereinten Nationen* (1998, Baden-Baden, Nomos-Verl.-Ges.) p25 (25).

[144] Riedel, Eibe, "Paradigmenwechsel im internationalen Umweltrecht", in Stober (ed), *Recht und Recht - Festschrift für Gerd Roellecke zum 70. Geburtstag* (1997, Stuttgart, Kohlhammer) p245 (247).

By contrast, for the protection of the environment the concept is an excellent one. Here economic considerations are paramount since they are the main obstacle for implementation. Joint implementation may enhance cooperation between developed and developing countries and create new strategies to tackle the global problems. But it has to be construed in such a way that it does not once again put the poorer countries at a disadvantage and lead to a complete sale-out of obligations in favor of the developed states.

c) Compliance assistance

Concerning technical and financial compliance assistance, the situation is quite different. Especially economic, social and cultural rights, but also civil and political rights, do have a clear economic dimension. Thus, the bold question shall be asked: Why should it not be possible to oblige the developed states to support the developing states in their efforts to protect human rights without freeing the developed countries from their own obligations? This is exactly what the developing countries are aiming at anyway when claiming so-called third dimension or third generation rights like the right to development.[145] Such claims are very difficult to defeat considering the fact that especially economic rights are a luxury for states which still have to solve elementary problems like starvation and high percentages of illiteracy. Thus, an analogy may be drawn to the field of environmental protection where financial assistance is a core obligation of the developed states.

The analogy works for technical aid, too: The protection of human rights depends on well-structured, independent and efficient courts and on an administration respecting individual rights. Technical aid could be translated into some kind of legal aid and advice provided by countries with the necessary expertise. Both phenomena are actually occurring to some extent already, but only in a very limited way: Under the ICESCR, UN bodies may provide compliance assistance to make states comply with the obligations arising from the Covenant. But in doing so, they have a lot of discretion and act according to their own rules and tasks which are not part of the regime itself. These and other means of compliance assistance should have a legal basis in the treaties.

3. Conclusions

The most striking difference between the two issue-areas is that the human rights regimes, unlike the environmental regimes, do not provide for compliance assistance, joint implementation and for a political institution like the conference of the parties which is part of the regime itself. While the technique of joint implementation is unique to the field of environmental protection and cannot be transferred without discrediting the whole idea of human rights protection, compliance assistance should in fact be put on a more solid basis and could help to make the developing countries fulfill their obligations, especially in the case of the ICESCR. Institutionally, the absence of a political body integrated into the regime which constantly re-negotiates the treaties including their implementation is

[145] Riedel, Eibe, “Die Menschenrechte der dritten Generation als Strategie zur Verwirklichung der politischen und sozialen Menschenrechte“, in Perez Esquivel (ed)*, Das Recht auf Entwicklung als Menschenrecht* (1990, München/Zürich, Schnell u. Steiner) p49 ff.

suggested to have a clear negative effect. One possible solution to this problem would be the integration of the Human Rights Commission or of ECOSOC into the regimes.[146] However, the development in the field of the environment has shown that a more functional regime-specific approach is needed rather than the creation of a ´super-institution´. It seems more appropriate to amend the treaties by establishing in both regimes conferences of the parties, modeled after the environmental regimes, thus providing the necessary dynamics to re-develop and to strengthen the implementation mechanisms. Of course, such changes will be quite difficult to achieve, but small steps would already point at the right direction.

II. Cooperation versus Confrontation

The analysis on the basis of the four regimes in the fields of human rights and the environment has concentrated on the cooperative techniques only. Although this focus remains essential, this does not imply that such techniques are generally better suited to solve the implementation problems than confrontational enforcement techniques. Therefore, some comments appear appropriate in order to place the issue into a wider context. The pivotal questions to be asked are how best to react to non-compliance and how to prevent non-compliance at all. The answer to these questions depends on the particular view (or: school of thought) on how the international system works or should work: rather in a cooperative manner, based on negotiation and reciprocity or in a confrontational way, using sanctions and other enforcement mechanisms.[147] While the ´managerial approach´ suggests that states are generally willing to comply, the enforcement school, which is founded on realist theory, claims that states merely search and exploit their own advantage.[148]

Looking at the reality of environmental agreements, the antagonism between the ´carrots´ and the ´sticks´ approach is in fact less clear than it appears to be: Cooperation can turn into a sanction simply by withdrawing it in one case while granting it in another.[149] Conversely, sanctions against one state may promote cooperation by others, because they may eliminate ´free rider´ problems. Apart from that, support for both theses can be found: While it is true that most cases of non-compliance do not seem to be willful violations[150], there are also cases hinting in the opposite direction, such as the persistent non-compliance of Russia with the Montreal Protocol[151].

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[146] Riedel, Eibe, "The Examination of State Reports", in Klein (ed), *The Monitoring System of Human Rights Treaty Obligations* (1996, Berlin Verlag Spitz, Berlin) p95 (99).

[147] Victor, David G./Raustiala, Kal/Skolnikoff, Eugene B., *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (1998, Massachussetts and London, England, The MIT Press) p681.

[148] As above.

[149] At 683.

[150] Beyerlin, Ulrich/Marauhn, Thilo, *Rechtsetzung und Rechtsdurchsetzung im Umweltvölkerrecht nach der Rio-Konferenz 1992: Forschungsbericht 10106072* (1997, Berlin, Erich Schmidt) p158.

[151] Victor, David G./Raustiala, Kal/Skolnikoff, Eugene B., *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (1998, Massachusetts and London, England, The MIT Press) p683.

However, this discussion appears to be slightly besides the point. In practical terms, the real question is not which method of implementation is more effective, but rather which of the particular techniques permitted by the bargaining-situation are more effective. Only where the bargaining-situation was very cooperative, the consensus was strong enough to make provision for sanctions and other means of law enforcement. In that case, they were usually quite effective. However, the typical situation both in international environmental law and in human rights law is that such a consensus simply does not exist. Then, the managerial model is the only one available. It follows from this that the discussion should focus rather on the question which of the techniques allowed by the bargaining situation are the most effective ones. By contrast, *Beyerlin* and *Marauhn* arrive at the conclusion that cooperative means of implementation should *generally* be preferred to authoritative ones.[152] They note that the traditional means and methods of environmental law enforcement do not work adequately and conclude that the effectiveness of international agreements could best be enhanced by an active treaty management which combines the elements of a supervision or control mechanism with that of compliance assistance.[153] Since the authors base these conclusions on a thorough examination of both cooperative and confrontational means of implementation, their validity shall not be questioned. But these results should be viewed more strongly against the background of the particular bargaining situations, since many of the confrontational enforcement techniques could never have been established anyway.

III. Conclusions

In all four cases cooperative techniques have worked quite effectively to achieve a reasonable degree of implementation in bargaining situations which are characterized by a very limited degree of consensus. Under the environmental regimes, a clear ´framework-protocol-approach´ was chosen, which implies that the real substantial obligations only came much later.[154] This made implementation slightly easier than in the human rights regimes, especially in the case of the ICCPR which already contains a fully-fledged catalogue of human rights and only shifts some parts of the implementation system and the prohibition of death penalty to the protocols. In the case of environmental protection, implementation grew alongside with stronger obligations in a very harmonious way. Furthermore, the regime-type approach coincided with the creation of institutions which were formally responsible for the continuous amendment and improvement not only of the obligations, but also of the implementation procedures. This might teach a lesson to the more stagnant human rights treaties, where only committees have been set up which already have come very close towards overstepping their competences. There may be a great deal of reluctance to construe human rights treaties as openly as environmental regimes, since human rights are, especially in the eyes of many Western

[152] Beyerlin, Ulrich/Marauhn, Thilo, *Rechtsetzung und Rechtsdurchsetzung im Umweltvölkerrecht nach der Rio-Konferenz 1992: Forschungsbericht 10106072* (1997, Berlin, Erich Schmidt) p161.
[153] At 158.
[154] Beyerlin, Ulrich/Marauhn, Thilo, *Rechtsetzung und Rechtsdurchsetzung im Umweltvölkerrecht nach der Rio-Konferenz 1992: Forschungsbericht 10106072* (1997, Berlin, Erich Schmidt) p30 ff.

scholars, too sacrosanct to be touched or even to be bargained about. But these criticisms overlook that the Committees, within the framework of their limited powers, have already started exactly this process through their constructive dialogue and through techniques like benchmarking, which have been described as a breakthrough.[155]

The dynamic regime approach has the advantage that issues on which consensus cannot be reached at a given time, may be shifted to a later stage of the negotiations thus allowing for an initial ´framework´ agreement.[156] This way, the negotiation process is kept alive and changes of the bargaining situation, such as new scientific evidence or a shift of public opinion, can still be taken into account. A permanent forum of negotiation and codification is created which is marked by the elements of review, correction and creativity.[157] The review process provides the factual basis for implementation. The correction function aims at eliminating or preventing non-compliance by way of negotiation, incentives like technical or financial aid, mobilization of the public opinion and, only as a last resort, the use of sanctions. The creative function is the permanent improvement and adaptation of the regime to changing circumstances and towards a more effective regime-design.[158] This very dynamic process prevents the initial instrument from becoming a ´sleeping treaty´ and makes it harder for State parties to escape their responsibility.

The traditional enforcement model coincided with a very clear-cut notion of compliance. In the regime-model, however, there is usually no clear ´yes´ or ´no´ anymore, but different levels of compliance.[159] While it remains important to identify these levels including the status of non-compliance, and also to consider enforcement techniques, the cooperative problem-solving-approach has the advantage that it avoids putting states in the pillory and that it even works under a very limited consensus.[160] One of the main objectives of this ´managerial model´[161] is to achieve transparency, since states are often eager to disguise their real behavior and merely pay lip-service. Transparency ensures responsibility for non-compliance.[162] The four examined regimes achieved this by establishing various monitoring and other implementation techniques and by setting up institutions which are capable to carry out these tasks in an effective manner.

However, some criticism must be made: The strategy of the regime model often is to get as many states on board as possible by lowering the threshold for participation. The price for this approach are

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[155] Müller, Harald, *Die Chance der Kooperation - Regime in den internationalen Beziehungen* (1993, Darmstadt, Wissenschaftliche Buchgesellschaft) p169.

[156] Riedel, Eibe, "Change of Paradigm in International Environmental Law" (1998) 57 *Law and State* 22 at 32.

[157] Van Hoof, G. J. H./De Vey Mestdagh K., "Mechanisms of International Supervision", in Van Dijk (ed), *Supervisory Mechanisms in International Economic Organisations* (1984, Deventer, Kluwer) p3 (11 ff).

[158] Ott, Hermann, "Elements of a Supervisory Procedure for the Climate Regime" (1996) 56 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 732 at 747.

[159] Chayes, Abram/Handler Chayes, Antonia, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995, Cambridge, Mass., Harvard University Press) p4 ff.

[160] Oeter, Stefan, "Inspection in International Law - Monitoring Compliance and the Problem of Implementation in International Law" (1997) 28 *Netherlands Yearbook of International Law* 101 (105).

[161] Chayes, Abram/Handler Chayes, Antonia, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995, Cambridge, Mass., Harvard University Press) p3, 22-28.

weak implementation procedures, little substantial obligations and broad exception clauses. The idea behind this is that once a state is on board, further commitments and implementation procedures with real teeth will follow along the way. To put it in a nutshell: Ratification has priority over implementation.[163] While in fact this strategy has worked quite well in many cases, there is also quite a number of states which simply try to gain some prestige without really intending to fulfill their obligations.[164] In some regimes this has led to the grotesque situation of globally accepted instruments which have not been duly implemented at all. However, as far as the four regimes examined in this study are concerned, this observation does not really hold true. Although there have been some major problems in the early phase, the ozone regime has become one of the most effective instruments for the protection of the environment. Concerning the climate change regime, it is still too early to arrive at a judgment, but already now the parallels are striking.

By contrast, the human rights regimes do have some major problems in this respect. Here, the level of implementation is more heterogeneous: While many states have a quite good record of human rights protection, others do not at all live up to the expectations. There are some doubts about the long-term effects of the constructive dialogue.[165] Indirect effects of this procedure are, for example, to keep human rights on the agenda and to raise public awareness by making violations public. In individual cases the Committee has in fact been successful in getting states to change their behavior.[166] Many authors claim that this strategy is seriously flawed: The dialogue is said to frequently lead to "a series of unclear, incomplete, misleading, or dishonest representations on the one hand, and a series of polite, but skeptical responses, on the other hand."[167] It is further pointed out that the committees lack adequate financial support and that NGOs do not participate actively enough in the process.

The strategy outlined above indeed needs to be reconsidered. It is not always desirable to have a maximum number of ratifications when implementation of the substantial commitments is lagging behind. This would mean to rely on quantity only, instead of quality. However, this does not mean that the regime-type approach should be abandoned as such. On the contrary: A more flexible and dynamic approach would probably help to further develop the human rights instruments and to improve implementation, as it is happening under the environmental regimes. The real problem with the human rights regimes is that they partly rely on the regime concept without applying it through to the very end: conventions and protocols have been created, but no institution has been established which guarantees the dynamic re-development and improvement of the obligations through further

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[162] Keohane, Robert O., "The Demand for International Regimes", in Krasner (ed), *International Regimes* (1983, Ithaca, Cornell Univ. Press) p161-167.

[163] Bayefsky, Anne F., "The U.N. Human Rights Treaties: Facing the Implementation Crisis" (1996) 15 *Windsor Yearbook of Access to Justice* 189 at 199.

[164] At 200.

[165] Camp Keith, Linda, "The United Nations International Covenant on Civil and Political Rights: Does it Make A Difference in Human Rights Behavior?" 36:1 *Journal of Peace Research* 95 (113).

[166] Higgins, Roslayn, "Opinion: Ten Years on the UN Human Rights Committee: Some Thoughts upon Parting" (1996) 1 *European Human Rights Law Review* 570.

[167] Bayefsky, Anne F., "The U.N. Human Rights Treaties: Facing the Implementation Crisis" (1996) 15 *Windsor Yearbook of Access to Justice* 189 at 193; Klein, Eckart, "The Reporting System under The International

negotiations. The only thing the committees can do is to work on the existing implementation provisions and elaborate them by stretching them as far as possible. The alternative is to reassemble all State parties in a new negotiation round, without any institutional framework and the risk of a complete failure. What the committees need is more power to effectively fulfill their tasks. Furthermore, they need to be part of a more dynamic rulemaking and negotiation process, guided by a second, political institution like the conferences of the parties under the environmental regimes. Such a political body should be given the ability to re-develop, adapt and tighten the implementation mechanisms. Therefore, while it is true that in some cases a smaller number of states would buy stronger implementation procedures, the regime concept is able to handle global participation - but only, when it is applied from the start to the end.

Having said this, it remains true that implementation should be emphasized more strongly starting from the very beginning of negotiations.[168] Otherwise cheap gains of participation may easily result in long-term losses regarding the solution of the given problem. The right balance needs to be struck between participation, substantial obligations and implementation. Consensus should be considered as a resource which needs to be exploited in the most efficient way. The most efficient regulatory techniques (including the techniques for implementation) are those which need the lowest consensus to achieve the greatest contribution towards the attainment of the regulatory aim, respectively the solution of the problem in the relevant issue-area.

Obviously, such changes are not very realistic to occur in the next few years. But as the debate on human rights continues, it seems appropriate to take a comparative stance and maybe experience some guidance by looking at the field of international environmental law. Conversely, the reporting procedures under the human rights regimes are a very good example of how to make the most out of a limited mandate for implementation review. In this respect, the environmental systems of implementation review could well learn some valuable lessons, too, although a lot has been achieved already through revisions undertaken by the respective treaty bodies.[169] Under their respective bargaining situations both fields of international law have their own strengths and weaknesses, and it seems that they can learn a lot from each other. In order to fully use the potential the comparative perspective implies, further interdisciplinary studies on an empirical basis will have to be carried out.[170] This will help to learn more about the effectiveness of implementation.

Covenant on Civil and Political Rights“, in Klein (ed), *The Monitoring System of Human Rights Treaty Obligations* (1996, Berlin, Berlin Verl. Spitz) p17 (26).

[168] Riedel, Eibe, “Universeller Menschenrechtsschutz - Vom Anspruch zur Durchsetzung“, in Baum/Riedel/Schaefer (eds), *Menschenrechtsschutz in der Praxis der Vereinten Nationen* (1998, Baden-Baden, Nomos Verl.-Ges.) p25 (54 f).

[169] Wolfrum, Rüdiger, *Means of Ensuring Compliance with and Enforcement of International Environmental Law* (1999, The Hague, Nijhoff) p55.

[170] Bernauer, Thomas, “The Effect of International Environmental Institutions: How We Might Learn More“ (1995) 49 *International Organization* 351.