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LAW 2010/20

DEPARTMENT OF LAW

A CONSTITUTIONAL TRIBUTE TO GLOBAL GOVERNANCE:
OVERCOMING THE CHIMERA OF THE
DEVELOPING-DEVELOPED COUNTRY DICHOTOMY

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*A Constitutional Tribute to Global Governance:
Overcoming the Chimera of the Developing-Developed Country Dichotomy*

ROSTAM JOSEF NEUWIRTH

EUI Working Paper **LAW** 2010/20

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ISSN 1725-6739

© 2010 Rostam J. Neuwirth
Printed in Italy
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu
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This paper is based on a draft which was presented at the international conference “Exclusions from Constitutional Law”, held at the School of Law of the University of Hong Kong, October 28-29, 2009. The paper gathers the results from numerous experiences and conversations with people related to the topics touched upon in this paper. Too numerous to mention all of them, I wish to thank in particular H. Patrick Glenn, Francis Snyder, M.P. Singh, Surya Deva, Sindhu Vasantha Nagaraja, Arno Kreilhuber, Holger Neuwirth, Iris Neuwirth, Abderrahmane Ould Isselmou, Miguel Ângelo Loureiro de Lemos, Iris Eisenberger, and Chen Zhi Jie for the many interesting conversations and their useful comments. I would especially like to thank Francesco Francioni and Alison Tuck for their kind support in the organization of my stay as a Visiting Fellow at the European University Institute (EUI) in summer 2010.

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Abstract

The past century has seen drastic changes and the pace with which they occur appears yet to be accelerating. It is not only we as individuals who have difficulties following these processes, but also the international legal and institutional framework put in place by previous generations no longer provides efficient responses to the imminent global challenges. It appears that the perennial struggle between continuity and change has reached a new level. This new level is summarized in the global governance debate which is aimed at deepening our understanding of the processes on which our paths depend and, at the same time, at formulating new ideas about new ways we might proceed. However, a global platform on which this debate can unfold is generally absent. International organizations continue their autistic practice and international law fragments further. The question then is how we can create a common platform without a common place to converse. The answer offered in this paper is by starting to create a common vocabulary, as thoughts and words precede and determine our actions. In this global vocabulary, the “developing/developed” dichotomy is one conceptual distinction that, it is argued here, is largely outdated and even malicious in its effects. A survey of its use across various legal contexts not only uncovers institutional fragmentation but also largely contradicts the dynamism inherent in nature. In sum it annihilates the basis for a broader solidarity needed for a more synthetic approach to the solution of many urgent global problems. This conceptual distinction divides the world into so-called “developing countries”, on the one hand, and “developed countries”, on the other. With a view to contributing to the global governance debate, this “constitutional” reading and comprehensive overview of numerous international and national legal instruments marks an attempt to demonstrate the need for more dynamic processes of governance because, ultimately, we all want to live in “developing countries”.

Keywords

Global Governance, Change, Development, International Law, United Nations, Institutional Reform, Comparative Constitutional Law

I. Introduction

To anticipate the prospects for global governance in the decades ahead is to discern powerful tensions, profound contradictions, and perplexing paradoxes.

James N. Rosenau¹

Global governance is becoming a commonly used term, yet its precise meaning and exact scope remains elusive.² Carrying contradictions and paradoxes, the term global governance also poses serious challenges to our established modes of thinking,³ and thus it has been aptly described as a “mystery”.⁴ In greatly simplified terms, it can be understood as trying to find answers to the questions of “how we are governed” and of “how we want to be governed”. This largely corresponds to the distinction in legal discourse between the law as it is (*de lege lata*) and the law as it should be (*de lege ferenda*). In other words it focuses at the same time on a twofold set of issues: first, it aims to understand the present legal and institutional framework and the identification of urgent problems of a global character and, second, it marks an attempt to gather enough critical ideas for the development and reform of the present legal framework with a view to establishing a new global legal order. Both sets of questions, however, are inextricably linked.

Apart from the traditional issues of international peace and security,⁵ global governance is used in a wide array of areas, from health and food security via culture to environmental protection, as well as from international trade and global competition law via human rights to sustainable development.⁶ This enumeration is far from complete. The term also responds to the challenges imposed by new technological advances.⁷ Following challenges from a changing political environment, it bridges the gaps between previously well established distinctions, such as those of public and private, municipal and international law, or politics and economics.⁸ It interconnects various themes and transcends

¹ James N. Rosenau, ‘Governance in the 21st Century’ (1995) 1 *Global Governance* 13, 13.

² See e.g. Lawrence S. Finkelstein, ‘What is Global Governance?’ (1995) 1 *Global Governance* 367, writing that “The term governance has been applied to international matters in a variety of ways that have been at best disorderly and perhaps confusing”.

³ See e.g. Rosenau, *supra* note 1.

⁴ See David Kennedy, ‘The Mystery of Global Governance’ (2008) 34 *Ohio N.U.L. Rev.* 827.

⁵ See e.g. Brian Orend, ‘Terminating Wars and Global Governance’ (1999) 12 *Can. J. L. & Jurisprudence* 253.

⁶ See e.g. Obijiofor Aginam, ‘Globalization of Infectious Diseases, International Law and the World Health Organization: Opportunities for Synergy in Global Governance of Epidemics’ (2004) 11 *New Eng. J. Int’l & Comp. L.* 59; Michael A. Livermore, ‘Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius’ (2006) 81 *N.Y.U.L. Rev.* 766; Joel R. Paul, ‘Cultural Resistance to Global Governance’ (2000) 22 *Mich. J. Int’l L.* 1; Brooke Ackerly & Michael P. Vandenbergh, ‘Climate Change Justice: The Challenge for Global Governance’ (2008) 20 *Geo. Int’l Envtl. L. Rev.* 553; Paul L. Joffe, ‘Current Issues in Public Policy: The Dwindling Margin for Error: The Realist Perspective on Global Governance and Global Warming’ (2007) 5 *Rutgers J.L. & Pub. Pol’y* 89; Andrew T. Guzman, ‘Global Governance and the WTO’ (2008) 45 *Harv. Int’l L.J.* 303; Anu Piilola, ‘Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation’ (2003) 39 *Stan. J. Int’l L.* 207; William H. Meyer & Boyka Stefanova, ‘Human Rights, the UN Global Compact, and Global Governance’ (2001) 34 *Cornell Int’l L.J.* 501; James C. Kraska, ‘Global and Going Nowhere: Sustainable Development, Global Governance & Liberal Democracy’ (2006) 34 *Denv. J. Int’l L. & Pol’y* 247.

⁷ See e.g. Milton Mueller, John Mathiason & Hans Klein, ‘The Internet and Global Governance: Principles and Norms for a New Regime’ (2007) 13 *Global Governance* 237; Stephen J. Kobrin, ‘Territoriality and the Governance of Cyberspace’ (2001) 32 *Journal of International Business Studies* 687.

⁸ See e.g. Annelise Riles, ‘Relations: The Anti-Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State’ (2008) 56 *Am. J. Comp. L.* 605; Douglas A. Kysar, ‘The Role of Private Global Governance:

national, regional and international boundaries to attain a global dimension.⁹ Here in particular the role of private individuals under international law gains special significance.¹⁰ Similarly, the emerging role of global civil society is being taken into account.¹¹ This gradual change in perspective is also responsible for the use of the adjective “global” instead of “international” in connection with “governance”, especially in a legal context.¹² Global governance also brings different scientific branches and disciplines together by slowly corresponding to new developments which cut diagonally through previously well-established disciplinary boundaries.¹³ In the legal realm, it meets with the concepts of constitutionalization or constitutionalism and relies on comparative law.¹⁴ Equally, being a child of globalization¹⁵ and trying to cope with challenges to legitimacy and democratic principles of global rule, global governance experiments with well-established concepts, such as the nation state and sovereignty, and proposes new forms of government in an era of globalization.¹⁶ New forms of government also mean acknowledgement of changing conditions in the political and economic arena which pose new global challenges.¹⁷ New global challenges require not only new forms of government

(Contd.)

Sustainable Development and Private Global Governance’ (2005) 83 Tex. L. Rev. 2109; Benedict Kingsbury et al., ‘Global Governance as Administration – National and Transnational Approaches to Global Administrative Law’ (2005) 68 Law & Contemp. Prob. 1; Manuel Castells, ‘Governance and Global Politics’ (2005) 38 Political Science and Politics 9; Miles Kahler & David A. Lake, ‘Governance in a Global Economy: Political Authority in Transition’ (2004) 37 Political Science and Politics 409.

⁹ See e.g. Ernst-Ulrich Petersmann, ‘Multilevel Judicial Governance as Guardian of the Constitutional Unity of International Economic Law’ (2008) 30 Loy. L.A. Int’l & Comp. L. Rev. 367; David M. Driesen, ‘Linkage and Multilevel Governance’ (2008-2009) 19 Duke J. Comp. & Int’l L. 389; Elke Krahnemann, ‘National, Regional and Global Governance’ (2003) 9 Global Governance 323.

¹⁰ See e.g. Saskia Sassen, ‘The Participation of States and Citizens in Global Governance’ (2003) 10 Ind. J. Global Legal Stud. 5; Rolf Schwartmann, *Private im Wirtschaftsvölkerrecht* (Mohr Siebeck, Tübingen 2005).

¹¹ See e.g. B.K. Woodward, ‘Global Civil Society and International Law in Global Governance: Some Contemporary Issues’ (2006) 8 Int’l Comm. L. Rev. 247; Steve Charnovitz, ‘The Emergence of Democratic Participation in Global Governance (Paris, 1919)’ (2003) 10 Ind. J. Global Leg. Stud. 45.

¹² On the problem with the concept “international law”, see Stéphane Beaulac, ‘The Westphalian Model in Defining International Law: Challenging the Myth’ (2004) 9 Australian Journal of History of Law 181; see also Yasuaki Onuma, ‘When was the Law of International Society Born? – An Inquiry of the History of International Law from an Intercivilizational Perspective’ (2000) 2 Journal of History of International Law 1.

¹³ See e.g. Gregory Mandel, ‘Nanotechnology Governance’ (2007-2008) 59 Ala. L. Rev. 1324; Mark Mansourn et al., ‘Regulating Biotechnology: Science, Ethics, Law and Governance Meet Head On in the Age of Informed Ignorance’ (2003) 21 Temp. Envtl. L. & Tech. J. 93; and Kim Richard Nossal, ‘Global Governance and National Interests: Regulating Transnational Security Corporations in 21st Century’ (2001) 2 Melb. J. Int’l L. 459.

¹⁴ See e.g. Theodor Schilling, *On the Constitutionalization of General International Law*, Jean Monnet Working Paper 06/2005; Peter L. Lindseth, ‘The Contradictions of Supranationalism: Administrative Governance and Constitutionalization in European Integration since the 1950s’ (2003) 37 Loy. L.A. L. Rev. 363; Ernst-Ulrich Petersmann, ‘Constitutionalism and International Organizations’ (1996-1997) 17 NW. J. Int’l L. & Bus. 398; Ernest A. Young, ‘The Trouble with Global Constitutionalism’ (2003) 38 Tex. Int’l L.J. 527 (2003); Martha C. Nussbaum, ‘Comparative Constitutionalism: Introduction to Comparative Constitutionalism’ (2002) 3 Chi. J. Int’l L. 429; David Kennedy, ‘New Approaches to Comparative Law: Comparativism and International Governance’ (1997) 1997 Utah L. Rev. 545.

¹⁵ See e.g. Aseem Prakash & Jeffrey A. Hart, eds., *Globalization and Governance* (Routledge, New York 1999).

¹⁶ See e.g. Lee-Anne Broadhead, ‘Commissioning Consent: Globalization and Global Governance’ (1995-1996) 51 Int’l J. 651; Obiora Chinedu Okafor, ‘The Global Process of Legitimation and the Legitimacy of Global Governance’ (1997) 14 Ariz. J. Int’l & Comp. Law 117; Faina Milman-Sivan, ‘The Virtuous Cycle: A New Paradigm for Democratizing Global Governance through Deliberation’ (2009) 30 Comp. Lab. L. & Pol’y J. 801; Herbert V. Morais, ‘Globalization and Sovereignty: The Quest for International Standards: Global Governance vs Sovereignty’ (2002) 50 Kan. L. Rev. 779; Kanishka Jayasuriya, ‘The Rule of Law in the Era of Globalization: Globalization, Law and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance’ (1999) 6 Ind. J. Global Leg. Stud. 425.

¹⁷ See e.g. Jing Gu, John Humphrey & Dirk Messner, ‘Global Governance and Developing Countries: The Implications of the Rise of China’ (2008) 36 World Development 274.

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but also a new institutional architecture which is being discussed under the aegis of governance.¹⁸ It even proposes to proceed without the concepts of “state” or “government”.¹⁹ These two words relate well to the underlying problem in our perception which has resulted in the emergence of the concept of governance. This is found in the etymological meaning of “governance”, which derives from the ancient Greek verb κυβερνάω (*kubernao*) “to steer”. It could be said that governance is the adaptation of states and their governments to a more dynamic and long-term vision. In this respect it connects with the concept of sustainable development and reflects the ongoing trend of human perception to move from a merely static to a more dynamic world view.

This shift is crucial. It started to become visible notably with the invention of the cinematograph at the beginning of the twentieth century and has since then become known as the communication revolution.²⁰ This is where the present paper comes in, as it asks about ways to improve the governance of global affairs and its corresponding institutional architecture. Proposals for improvement, however, require a global platform on which a global governance debate and an exchange of ideas can successfully take place. It is precisely this institutional platform which is missing, as the different actors in the global arena do not sufficiently converse and cooperate. Discussions on global issues all take place in different fora, such as the United Nations (UN), the World Trade Organization (WTO), the International Monetary Fund (IMF), the World Bank or the Group of Twenty (G-20), without due consideration for each other and their substantive links. A first step for improvement would be to achieve greater coherence in the debate, which requires the establishment of a global institutional framework in which such deliberations can take place. Paradoxically, such a framework can only emerge from a shared global understanding of global problems. It thus also involves a cognitive aspect. For that reason, we need to agree first on a common vocabulary while we must at the same time rethink the precise meaning of concepts and their respective implications for the context in which they are used. One such concept which requires our attention in paving the way for a global governance debate is the concept of “developing countries” as opposed to their apparently “developed” counterparts.

With a view to contributing to the global governance debate, this paper contests the adequacy and practicality of the developing/developed country dichotomy. Through a “constitutional” reading and a comprehensive overview of numerous international and national legal instruments, it displays the lack of coherence in the present international legal architecture and stresses the need for more dynamic processes of governance. On that account, Part II yields some preliminary thoughts on the developed/developing country distinction and its related deficiencies before briefly looking at the impossibility, at present, of finding a reliable legal definition of what constitutes a “developing country” in Part III. The following Part IV discusses some of the undesirable side-effects of the use of the distinction in debates. Part V offers a brief meta-juridical critique of the distinction based on its neglect of nature’s underlying dynamism. It serves to introduce the legal analysis of the use of the developed/developing country terminology in selected international policy fields and their respective governing international bodies and international instruments. Before concluding, Part VI takes a brief look at four (supra-)national constitutional systems and tries to trace elements for change and development in their spirit.

¹⁸ See e.g. Sanjeev Khagram, ‘Possible Architectures of Global Governance: A Transnational Perspective/Prospective’ (2006) 12 *Global Governance* 97.

¹⁹ See e.g. Gunther Teubner, ed., *Global Law without a State* (Dartmouth, Aldershot 1997); Kalypso Nicolaidis & Gregory Shaffer, ‘Transnational Mutual Recognition Regimes: Governance without Global Government’ (2005) 68 *Law & Contemp. Prob.* 263.

²⁰ See e.g. Harmon B. Stephens, ‘The Relation of the Motion Picture to Changing Moral Standards’ (1926) 128 *Annals Am. Acad. Pol. & Soc. Sci.* 151.

II. ...We all Live in “*Developing Countries*”

The deepest yearning of human beings seems to be a constellation in which the two poles (motherliness and fatherliness, female and male, mercy and justice, feeling and thought, nature and intellect) are united in a synthesis, in which both sides of the polarity lose their antagonism and, instead, color each other.

Erich Fromm²¹

Today almost every discourse involving two or more countries, especially when they are on different continents or have different political, social, economic or cultural backgrounds, is likely to include the use of the developed/developing country dichotomy. This holds true for news reports, policy debates or mere chitchat. Such discourse is often marked by numerous stereotypes and implies a simplification of the underlying reality. The world is more complex than that, however. For instance, how do we measure the wealth of a country? Is it by the wealth of the richest men or women it hosts, the number of millionaires it counts, or the gross domestic product (GDP)? According to the first, the wealthiest country would currently be the United States (US), with William “Bill” Gates III ranking as the world’s richest man, followed by another US citizen in second place, while a Mexican national holds third place.²² However, there are also two Indian citizens among the ten richest men in the world. Does this make India richer than China, for instance, which features no billionaire among the top ten? What about the number of millionaires per country? In this ranking, the US still leads, but if we look at countries with the fastest growing number of millionaires, the list is topped by India, followed by China and Brazil.²³ In terms of GDP per capita, the three wealthiest countries are Liechtenstein (US\$118,000), Qatar (US\$111,000) and Luxembourg (US\$81,200); the US is ranked tenth (US\$46,900), China 133rd (US\$6000) and India 166th (US\$2900).²⁴

According to these statistics, which country is the wealthiest? What if we include values other than strictly financial ones in our definition of “wealth”? What about cultural diversity, the quality of the environment, health, or public safety and security? Are these not valid criteria for the measurement of “wealth” in a wider sense? Even economists have now discovered “happiness” or life satisfaction as a value.²⁵ In 2007 the OECD hosted a conference on the topic “Is happiness measurable and what do those measures mean for policy?”.²⁶ Recently even the French President became unsatisfied with the reliability of statistical data as a basis for policy decisions and asked prominent economists to draft a report on the “Measurement of Economic Performance and Social Progress” (CMEPSP).²⁷ By the

²¹ Erich Fromm, *To Have or To Be?* (Continuum, New York 1976) 119.

²² See Luisa Kroll, Matthew Miller & Tatiana Serafin, ‘The World’s Billionaires’ *Forbes* (March 11, 2009) <http://www.forbes.com/2009/03/11/worlds-richest-people-billionaires-2009-billionaires_land.html>.

²³ See Daniel Workman, ‘Millionaire Wealth Statistics by Country: Marketers Target Where Millionaires Live Not Who Millionaires Are’ *Forbes* (June 27, 2008) <http://global-economy.suite101.com/article.cfm/millionaire_wealth_statistics_by_country>.

²⁴ The World Factbook <<https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html>>.

²⁵ See e.g. Bruno Frey & Alois Stutzer, ‘What Can Economists Learn From Happiness Research?’ (2002) 40 *Journal of Economic Literature* 402.

²⁶ International Conference, *Is happiness measurable and what do those measures mean for policy?*, held in Rome on 2-3 April 2007 at the University of Rome “Tor Vergata” <http://www.oecd.org/document/12/0,3343,en_21571361_31938349_37720396_1_1_1_1,00.html>.

²⁷ Joseph E. Stiglitz, Amartya Sen & Jean-Paul Fitoussi, *Report by the Commission on the Measurement of Economic Performance and Social Progress* (CMEPSP) <http://www.stiglitz-sen-fitoussi.fr/documents/rapport_anglais.pdf>.

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same token, mere financial aid to financially poorer countries has come under attack for its potential counterproductive and even destructive effects.²⁸

These examples have in common the insufficiency of mere financial or statistical data as a reliable source for policy and decision making. They also indicate the increased complexity of global affairs, which can no longer be assessed in accordance with national boundaries. Most of all, they call for new ways of approaching the well-being of people globally. Finally, it also corresponds to the present scientific paradigm which is trained to dissect, classify and categorize as well as subcategorize. This is also exemplified in the classification of nation states into so-called “developed”, “developing”, “less-developed” or “least developed countries” (LDCs). This categorization has by and large replaced the former distinction of “first”, “second” and “third world”, which itself was preceded by the dichotomous concepts of “civilized” versus “non-civilized” nations which still features in Article 38 of the Statute of the International Court of Justice (ICJ). This is not to mention the classification of peoples as “primitive” versus “modernized” inherited from the era of colonization and missionary activities.²⁹ After the wave of de-colonization and the recognition of “the right of self-determination”, the former colonial powers continued officially to support their former colonies with so-called “development aid” or, more technically, “official development assistance” (ODA). Since, however, the support was frequently coupled with what could euphemistically be called “economic exploitation” of these territories, or proved to be counterproductive because it was too remote from the real needs of the citizens of these territories, a terminological change took place and it has since become correct to speak of “development cooperation” in the sense of a partnership between equal partners. Notwithstanding this slight terminological correction, a subtle underlying and historically built sense of superiority on the one side and inferiority on the other remained. This was also sometimes circumscribed between “donor” and “recipient countries”, i.e., “developed countries” on the one side and “developing countries” on the other.

Such categorization and classification in tables and data, however, becomes problematic when it neglects the currents of change to which nature and all of us, including the countries in which we live, are exposed. The ongoing changes explain the need for the concept of global governance. From the dynamism inherent in the concept of governance, and considering the rapid changes in the world today, it is possible to contend that we are all living in “developing countries”, in the sense that we must all adapt to changes. This adaptation usually infers some form of development. From a political or *de lege ferenda* perspective, focusing on new ways of governance for the future, it would thus be more appropriate to speak of a global development policy as a coherent set of sustainable policies aimed at continuously adapting global society to changes of concern shared by all its members. Under this framework concept, it is still possible to react to the needs of particular countries or regions but without their general stigmatization as “poor” or “least developed” countries, as is implied in the concepts of “development aid”, “official development assistance (ODA)”, or a little more euphemistically, that of “development cooperation”. This would help to create greater global solidarity among all members of the global society. Furthermore, a global development policy also stresses the need for an institutional overview of global developments, as most global problems assume an antagonistic character, such as droughts in one area and floods in another, or demographic growth in one country and demographic regression in another, or trade surplus in one region and balance of payments problems in another, and so on and so forth. These distributive problems, it is argued, would be comparably easy to solve if an adequate institutional framework capable of overseeing the entire

²⁸ See Dambisa Moyo, *Dead Aid: Why Aid Is Not Working and How There is Another Way for Africa*, (London: Allen Lane, 2009); see also William R. Easterly, *The White Man's Burden : Why the West's Efforts to Aid the Rest Have Done so Much Ill and so Little Good* (New York : Penguin Press, 2006).

²⁹ See e.g. Rushton Coulborn, ‘Civilized and Primitive Culture’ (1947) 8 *Phylon* 274; Margaret Mead, ‘The Rights of Primitive Peoples’ (1967) 45 *Foreign Affairs* 304.

scope of the problem were in place. The creation of such a framework, however, presupposes a common political will which first needs to be formed. If this political will is not formed by wise foresight and planning, it will certainly gain further momentum with the increase in global problems, like climate change or the global financial crisis. Inertia means that the longer we wait the higher will be the price that we have to pay.

Finally, the term “development policy” would also account better for the dynamism inherent in nature and the changes we are witnessing in between what we term the past and the future. This process of change has certainly accelerated over time, and nowadays the perception of motion underlying change is, for example, captured in the technology of motion pictures.³⁰ This transition from the static to the dynamic is aptly described in Jean Luc Godard’s statement that “photography is truth. And cinema is truth twenty-four times a second”. Applied to the present topic, this means that it might be appropriate to say that a certain country, economy, or region is currently stagnating or not developing fast enough, but it does not, from the outset, preclude the possibility of it doing so in the future. At the same time, it also provides an incentive to those countries, economies or regions that have attained a certain degree of development to remain innovative and to think about investing in the future. This means recognizing that even if something is developed today, this does not mean that it will be so tomorrow or at a further point in the future. In other words, we are all merely “developing”, since once something has or is “developed” it is usually “dead” or has outlived its purpose. In this sense we are all living in “developing countries”, or at least we would want to be.

III. “Developed” or “Developing Country”: Definition Impossible?

If two contrary actions be excited in the same subject, a change must necessarily take place in both, or in one alone, until they cease to be contrary.

Benedict Spinoza³¹

The terminology related to developed versus developing country is very widespread and used in common expression. When typed into google.com, “developing countries” generates 15,800,000 hits, “developed countries” 6,000,000 hits, “*Entwicklungsländer*” 1,380,000 hits and “*pays en voie de développement*” 1,650,000 hits. By comparison, probably the most common word in the English language on the internet appears to be the article “the”, which generates 11,230,000,000 hits. Similarly a search of the term “developing countries” in the world’s major newspapers on Lexis Nexis retrieves more than 3000 hits. These numbers, it is understood here, underscore that the term “developing countries” is a still widely used one. In contrast, it is impossible to find an authentic definition of what constitutes or defines a “developing” or “developed country”. The WTO merely leaves it to the respective country to decide whether it wants to have the status of a developing country in order to benefit from a certain treatment in its favor.³² Equally, in the vast pool of UN documents, no definition of “developing country” could be found. The UN merely compiles a list of the current 49 least-developed countries (LDCs), which is periodically reviewed and created based on four main criteria, namely the Gross National Income (GNI) per capita, the human assets index (HAI) (providing information regarding the level of development of human capital), the Economic Vulnerability Index,

³⁰ See Walter Benjamin, ‘Das Kunstwerk im Zeitalter seiner technischen Reproduzierbarkeit’, in Rolf Tiedemann & Hermann Schweppenhäuser, eds., *Walter Benjamin – Gesammelte Schriften*, vol I, 2nd ed. (Suhrkamp, Frankfurt a. M. 1978) 436.

³¹ Benedict Spinoza, *Ethics* (Wordsworth Classic, Ware 2001) 230 (W.H. White (tr)).

³² WTO, *Development: Definition: Who are the developing countries in the WTO?* <http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm>.

and the size of the country's population.³³ This list, moreover, only contains LDCs but it does not explicitly distinguish "LDCs" from "developing countries", although in common language the difference between developing and least-developed countries is not clearly defined.

The most common feature of confusion between all these attempts to categorize countries is that the use of these distinctions is not previously defined or delimited to a specific set of criteria, such as economic criteria, but it is strongly characterized by clichés, bias or unfounded stereotypes. Such uncritical use then also often bears traits of a sense of superiority or inferiority among discussion partners. This ultimately obstructs a common understanding which is needed for the global governance debate to yield the reforms necessary to create a dynamic and yet institutionalized global governance architecture.

IV. The Consequences: "Ignorant Arrogance" and "Averted Responsibility"

Every Man carries two Wallets, one before and one behind, and both full of faults. But the one before, is full of his neighbour's faults; the one behind, of his own. Thus it happens that men are blind to their own faults, but never lose sight of their neighbour's.

Aesop³⁴

In the global governance debate one might legitimately ask about the expected benefits of abandoning this well-established conceptual distinction and the added value of the introduction of a new concept. The main reason is that the distinction usually renders any serious debate of global relevance impossible. This impossibility is expressed in the two following phenomena; first, attitudes of arrogance versus irresponsibility displayed by representatives on either side of the divide, and second, the dynamism of politico-legal organization.

First, one expected benefit of abandoning the distinction is to remove twin negative features that usually accompany it, namely arrogance on behalf of people from so-called "developed countries" and the possibility of avoiding responsibility from those of "developing or least-developed countries". In other words, many representatives from developed countries assume that they know and do things better and therefore are in the role of lecturing their counterparts from developing countries. In turn, since they are being lectured to and sometimes policies are being imposed on them, apparently self-appointed representatives from presumed developing countries always have a culprit to blame for the suboptimal situation in their country. A related and often used excuse is reference to the historical past, which is usually referred to by the concepts of colonialism or imperialism. A good reminder against such arrogance in the human rights discourse is provided by Professor Stephen Toope, who warns the Western scholar against falling into this error as follows:

[...] human rights discussions must move beyond arguments over which philosophy underpins whose terminology. Common values within contrary terms and tenets must be recognized. All voices within a cultural group deserve to be heard. *The Western listeners must be humble, approaching the encounter with neither an accusatory nor condescending predisposition.*³⁵

³³ See ECOSOC, Committee of Development, *List of Least Developed Countries* <http://www.un.org/esa/policy/devplan/profile/ldc_list.pdf>.

³⁴ Aesop, *Aesop's Fables* (George S. Appleton, Philadelphia 1851) 30 (Thomas James (tr)).

³⁵ Stephen Toope, 'Cultural Diversity and Human Rights (F.R. Scott Lecture)' (1997) 42 McGill L.J. 169 [*Italics added*].

Unfortunately, human rights discourses are often highly charged with this arrogance and lack of sensitivity. Too often the real legal cases and problems are left untouched because concrete actions become impeded due to mutual recriminations and accusations. It is a race to the bottom instead of a race to the top of a sane and remarkable human rights record that most countries, developed as much as developing, are far from achieving year by year.³⁶ Likewise in other areas of law, the arrogance of representatives of developed countries enables them to indulge in their feeling of superiority, and because of that are incapable of seeing what they could in fact learn from their apparently “inferior” or less developed “partners”. A good example is the failure of the constitutionalization debate in the European Union and the constitutional experiences of the Indian Union over more than six decades.³⁷

Another example is provided by the area of the enforcement of intellectual property rights (IPRs) where especially the United States complains about the insufficient protection of IPRs in China.³⁸ In this the US completely forgets that not only did it “steal” or “copy”³⁹ from mainly European countries in its early phase of development, but also it has been convicted by the WTO itself in the recent past.⁴⁰ On the other hand, it is very likely that countries like China, as a so-called “developing country”, are rapidly catching up in innovation and originality due to increasing amounts of financial resources dedicated to the field of research and development (R&D).⁴¹ Based on the historical experiences of the US, this allows for the prediction that within a decade, these countries will shift their policy from lower to higher standards of IPRs protection and, most of all, advocate a stricter compliance with the multilateral rules of the global enforcement regime.

Secondly, another expected benefit from abandoning these presumed obsolete concepts is that it ushers in a new era of understanding of the dynamism underlying the politico-legal organization of nature and the evolution of humanity. Such new understanding refers here to the legal sphere where a new approach to the regulation of various issues of societal concern is brought about. This enhanced understanding entails a more holistic, more dynamic and more multi-disciplinary approach to science with a view to finding new and better ways to engage in a process of just and sustainable development for humanity. In this endeavor, it is submitted, legal science can play a major role, if it manages to interpret the drastic changes in societies correctly and reacts quickly and efficiently by providing the right tools and instruments for their implementation. More concretely, multilevel constitutionalization, including *inter alia* the global, supranational, national, and local level, is called upon to play a leading

³⁶ See e.g. Human Rights Watch, *World Report 2009: Events 2009* <http://www.hrw.org/sites/default/files/reports/wr2009_web.pdf>; see also Amnesty International, *The Amnesty International Report 2009: The State of the World's Human Rights* <<http://thereport.amnesty.org/sites/report2009.amnesty.org/files/documents/air09-en.pdf>>.

³⁷ See e.g. Mahendra P. Singh & Surya Deva, ‘The Constitution of India: Symbol of Unity in Diversity’ (2005) 53 *Jahrbuch des Öffentlichen Rechts der Gegenwart* 649; see also Rostam J. Neuwirth, ‘India – The Largest Democracy in the World: An EU/WTO Comparative Appraisal’, in Harald Eberhard, Konrad Lachmayer & Gerhard Thallinger, eds., *Perspectives and Limits of Democracy. Proceedings of the 3rd Vienna Workshop on International Constitutional Law* (Facultas, Wien 2008) 109.

³⁸ See WTO Panel Report, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS 362/R (Jan. 26, 2009); see also Rostam J. Neuwirth, ‘Der WTO-Bericht zu China – Measures Affecting the Protection and Enforcement on Intellectual Property Rights: ein Kommentar’ (2009) 58 *GRUR Int* 367.

³⁹ See US Congress, Office of Technology Assessment (OTA), *Intellectual Property Rights in an Age of Electronics Information*, OTACIT-302 (1986) 228, reporting as follows: “When the United States was still a relatively young and **developing country**, for example, it refused to respect international intellectual property rights on the grounds that it was freely entitled to foreign works to further its social and economic development” [emphasis added].

⁴⁰ Panel Report, *United States – Section 110(5) of the US Copyright Act*, WT/DS160/R (June 15, 2000); see also Sarah E. Henry, ‘The First International Challenge to U.S. Copyright Law: What Does the WTO Analysis of 17 U.S.C. § 110(5) Mean to the Future of International Harmonization of Copyright Laws Under the TRIPS Agreement?’ (2001) 20 *Penn St. Int’l L. Rev.* 301.

⁴¹ See e.g. ‘Research and Development: Rising in the East’ *The Economist* (January 3, 2009) 47, reporting that “while corporate R&D in America and Europe grew by 1-2% between 2001 and 2006, in China it soared 23%”.

role. The reason is that constitutionalism, as the science of constitutional law in the widest sense,⁴² is intrinsically holistic in a sense that, instead of opting for one of two divergent or conflicting concepts or interests, it provides the framework within which conflicts between two opposing parties can be peacefully resolved. In this sense, the US Supreme Court held in a landmark case involving a highly controversial issue that “The Constitution is made for people of fundamentally differing views [...]”⁴³. Thus constitutional law emphasizes the complementarities between apparently differing views rather than elaborating on their mutual exclusivity.

Thus from a constitutional and a normative perspective, the distinction between developed and developing countries can at its very best be a temporary distinction based on a set of pre-defined criteria. Thus constitutionalism will be understood here as being holistic and inclusive, and as being dynamic in a sense that it takes into account the development of the society which it is supposed to “constitute” and govern with a view to its sustainable development in the future. Based on the most common constitutional principles of equality, rule of law and fundamental rights, it is also asked to perform a task of providing legal certainty and distributive justice at the very foundation of its society. The dynamic aspect also means that its method will be more multidisciplinary, building new bridges (or re-establishing old ties) between related social sciences, such as sociology, economics and political science. This trend can already be observed in discussions on the role of soft law amid hard legal facts,⁴⁴ the law and economics movement,⁴⁵ and the international relations theory.⁴⁶ In short, this brief discussion underscores the need for a renewed understanding of law that requires a more comprehensive debate on the legal tools and instruments employed in the governance of an ever more globalizing world in a relentlessly expanding universe.⁴⁷

V. A Meta-Juridical Critique of the Developing/Developed Country Dichotomy

*Everything is in flux and nothing abides, everything flows
and nothing stays fixed, everything is constantly
changing and nothing stays the same.*

Heraclitus of Ephesus

Before we proceed to a strictly juridical analysis of the subject matter, we will have to pursue the question of a possible meta-juridical implication of the developing/developed country dichotomy. This is not unusual as nobody can claim to be free from influences that originate in the gray area between the conscious and the unconscious, the spirit and the mind, or the intuitive and the rational. Not even judges or lawyers are free from such influences. For example, Elihu Lauterpacht has asked to what extent “a court should be influenced in its judgment by other than strictly legal considerations?”⁴⁸ The

⁴² See the critique of “modern constitutionalism” in Neil Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65 *The Modern Law Review* 317, 319-333.

⁴³ US Supreme Court, *Roe v. Wade* [1973] 410 US 113, 116.

⁴⁴ See John J. Kirton, & Michael J. Trebilcock, *Hard Choices, Soft Law* (Ashgate, Aldershot 2004).

⁴⁵ See e.g. James Boyd White, ‘Economics and Law: Two Cultures in Tension’ (1986) 54 *Tenn. L. Rev.* 161.

⁴⁶ See e.g. Anne-Marie Slaughter Burley, ‘International Law and International Relations Theory: A Dual Agenda,’ (1993) 87 *A.J.I.L.* 205.

⁴⁷ For some elements of such a renewed understanding, see Rostam J. Neuwirth, ‘Law as Mnemonics: The Mind as the Prime Source of Normativity’ (2008) 2 *European Journal of Legal Studies* 143 <<http://www.ejls.eu/4/55UK.pdf>>.

⁴⁸ See Elihu Lauterpacht, ‘The Juridical and the Meta-juridical in International Law’, in Jerzy Makarczyk, ed., *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Kluwer, The Hague 1996) 215, 215.

meta-juridical level is also of great interest for the realm of constitutional law, as it is for instance reflected in Kelsen's concept of a *Grundnorm* (basic norm). In the beginning, we therefore want to pursue the question of the utility and foundation of the developing/developed country dichotomy in meta-juridical areas beyond the law, that is to say, areas beyond the letter of the law, such as religion, morality and philosophy as well as perhaps science. This brief inquiry into some meta-juridical areas is meant to complement the following legal analysis of the dichotomy. As a matter of fact, for aeons, civilizations have struggled with and tried to bring about change and have also invariably become subject to it.⁴⁹ As an expression thereof, their various religious and spiritual concepts passed on to future generations are replete with references to the ever-changing nature of things and of life. In this ever-changing context, it is the aspiration for improvement and spiritual refinement, a sort of inner development and cultivation, that is a feature common to many, if not all, religious, spiritual and scientific systems.

For instance, the concept beyond the letter of the law is well expressed in the Jewish legal system, where it is called "*lifnim mishurat hadin*". This translates into "that which goes beyond the boundaries of law".⁵⁰ The purpose of this concept has been laid out as follows:

It is vital to recognize at least in this aspect of their search for just results, the Sages did not turn outside the legal system to any vague "spirit" or unspecified "higher law". The term *lifnim mishurat hadin* designates rather the use of the legal system as a whole, its positive law and as well its superseded law, to produce just results.⁵¹

In Christianity, this is reflected in the notion of paradise, as it is used, for instance, in the Revelation where it is written: "To him that overcometh will I give to eat of the tree of life, which is in the midst of the paradise of God".⁵² The Quran sums up and continues the revelations found in the Old and the New Testaments, recognizes the change through the motion of the Earth as well as the expansion of the universe and takes a similar stance towards the hereafter.⁵³ More concretely, the continuous process of refinement is reflected in the primary sources of Islamic law, which comprise the *Shari'a*. *Shari'a* literally means the "pathway" or "the path to be followed", deriving from the original usage which denotes the "road to the watering place or path leading to the water, *i.e.*, the way to the source of life".⁵⁴ Similar elements of dynamism can be found in many other spiritual movements, such as Tantra, which means "technique", the Tao, which also translates as "way" or "path", or the Kabbalah, which literally means "receiving". In all these and many more spiritual movements, the foundation is the dynamism inherent in nature and the emphasis is hence on the process and not on the result. In other words, they strive for a process of refinement, improvement or, last but not least, a process of "developing" or "development" with a view of attaining a higher level of perception or enhanced understanding.

⁴⁹ See Arnold J. Toynbee, *A Study of History* (Oxford University Press, London 1934-54).

⁵⁰ See Saul J. Berman, 'Lifnim mishurat hadin (I)' (1975) 26 *Journal of Jewish Studies* 86, 86; see also Yanki Tauber, *Beyond the Letter of the Law: A Chassidic Companion to the Ethics of the Fathers* (Vaad Hanochos Hatmimim, New York 1995).

⁵¹ See Saul J. Berman, 'Lifnim mishurat hadin (II)' (1977) 28 *Journal of Jewish Studies* 181, 193.

⁵² Revelation 2:7.

⁵³ See *e.g.* Quran, 26:196 ("It has been prophesied in the books of previous generations"), 27:88 ("When you look at the mountains, you think that they are standing still. But they are moving, like the clouds") (and 39:5, 21:33 and 36:36-40) and 51:47 ("We constructed the sky with our hands, and we will continue to expand it") and 2:4 ("And they believe in what was revealed to you, and in what was revealed before you, and with regard to the Hereafter, they are absolutely certain").

⁵⁴ See Irshad Abdal-Haqq, 'Islamic Law: An Overview of Its Origin and Elements' (2002) 7 *J. Islamic L. & Culture* 27, 33.

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Philosophical explanations of this dynamism are equally replete with references to this dynamism. This is well exemplified in the concept of “*panta rei*”, as formulated by Heraclitus of Ephesus (c.535–475 BCE) which means that “everything is in flux” and that change is central to the universe. For our current age, this observation of “change” was also confirmed by Paul Nora when he spoke about the “acceleration of history” as follows:

An increasingly rapid slippage of the present into a historical past that is gone for good, a general perception that anything and everything might disappear; these indicate a rupture of equilibrium.⁵⁵

In a similar way and perhaps more accurately for the legal sphere, Isaac Asimov observed as follows:

The only constant is change, continuing change, inevitable change, that is the dominant factor in society today. No sensible decision can be made any longer without taking into account not only the world as it is, but the world as it will be.⁵⁶

This apparent paradox is also well captured by Reinhard Koselleck’s understanding of history, distinguishing evolution from revolution, or events that are unique from those that recur.⁵⁷ The constant flux of time is also recognized in Chinese philosophy, as reflected in the symbol of *ying* and *yang*. It is also expressed in the writings of Zhuang-Zi (370–286 BCE) who uses the concept of “vital nourishment”, which not only refers to the “constant influx that links life to its source” but also implies a principle of openness to change.⁵⁸

This dynamism is precisely where our legal understanding usually fails. We tend to equate certainty of law with static norms and their unaltered interpretation over centuries. In the same way, the central argument put forward against the prolific use of the developing/developed country dichotomy is thus the apparent hypocrisy that accompanies our legal and political reasoning. Our era is characterized by a strong striving for scientific discovery and technological progress. We have gone so far as to describe this era as the global information society which is driven by a knowledge-based economy. This is however only partially true. In most cases of our legal reasoning and policy- and lawmaking, we still use instruments from the “Stone Age”. Notwithstanding our so-called unprecedented “scientific progress”, we have lost touch with the basic questions that science is supposed to answer and the central purpose it is meant to serve.

Even science is replete with references to the dynamism underlying all manifestations in the universe. We only have to think of Galileo Galileo’s words “*e pur se muove*” (“it does move though”),⁵⁹ referring to the Earth’s constant movement, representing a microcosmic example of the universe’s steady expansion as a whole. The so-called “hard” natural sciences have in the past produced ample evidence of the changing nature of the cosmos. It suffices to mention here the first thermodynamic law or principle of the conservation of energy, according to which energy cannot be lost but only transformed. Similarly, the physical reality at the atomic level as captured by quantum physics appears to reveal the constant flux of nature. This is, for instance, caught by the principle of uncertainty as formulated by Werner Heisenberg as follows:

⁵⁵ Paul Nora, ‘Between Memory and History: Les lieux de mémoire’ (1989) *Representations* 7, 15.

⁵⁶ Isaac Asimov, ‘My Own View’, in Robert Holdstock, ed., *The Encyclopedia of Science Fiction* (Octopus, London 1978) 5.

⁵⁷ Reinhard Koselleck, *Zeitschichten: Studien zur Historik* (Suhrkamp, Frankfurt a. M. 2000) 352.

⁵⁸ See Francois Jullien, *Vital Nourishment: Departing from Happiness* (Zone Books, New York 2007) 27.

⁵⁹ See J.E. Drinkwater Bethune, *Life of Galileo Galilei with Illustrations of the Advancement of Experimental Philosophy* (William Hyde, Boston 1832).

The uncertainty principle refers to the degree of indeterminateness in the possible present knowledge of the simultaneous values of various quantities with which the quantum theory deals; it does not restrict, for example the exactness of a position measurement alone or a velocity measurement alone.⁶⁰

In the realm of particles this means that it is “impossible to know the *momentum* and the *position* of a particle simultaneously and with perfect accuracy”.⁶¹ Could not this principle, one may ask, also be applied to the measurement of the respective state of development of a country in the context of the developing/developed country dichotomy?

In their fascination for the unknown and uncertainty underlying this dynamism, science and the arts converge, whether we think of music and the ephemeral nature of live performances, the paintings depicting clocks by Salvador Dali, or the pictures in motion of every cinematograph film, to mention but a few. Dynamism is even found when marveled in stone, such as expressed in the unfinished sculptures by Michelangelo on display in the *Galleria dell'Accademia* in Florence. In other words, there are numerous examples of elements of change found in different religious, philosophical, or scientific as well as artistic models. This reflects, in my eyes, the perennial challenge imposed by the apparent paradox of change and non-change and points out the bigger truth of change being an important factor in our life or at least our perception of it. Based on these numerous instances of change at various meta-juridical levels, it is interesting to turn to the international legal framework for further insights.

VI. Global Governance and the “Clash of Institutions or the Remaking of the Global Legal Order”⁶²

We put thirty spokes together and call it a wheel; but it is on the space where there is nothing that the usefulness of the wheel depends.

We turn clay to make a vessel; But it is on the space where there is nothing that the usefulness of the vessel depends.

We pierce doors and windows to make a house; And it is on these spaces where there is nothing that the usefulness of the house depends.

Lao Tzu⁶³

The global governance debate, we have said, is both about how we are governed on this planet and how we plan to be governed in the future. Considering path dependencies, the two questions usually work hand in hand. The central purpose of this analysis, however, is to pave the way for the emergence of a common understanding of the scope of the debate and to provide a common framework for debate. This can be achieved better if there is a coherent institutional framework, a so-called “global arena” in which different ideas about the topic can be exchanged. Unfortunately, such a framework is not in place and much preliminary work still has to be done. In order to determine both the institutional fragmentation and substantive lack of consistency of the present international legal order, the following sections provide an overview of the current usage of the developing/developed country distinction in the different areas of international law.

⁶⁰ Werner Heisenberg, *The Physical Principles of the Quantum Theory* (Dover Publications, New York 2003) 20 (Carl Eckart & F.C. Hoyt (tr)).

⁶¹ See Benjamin Crowell, *The Modern Revolution in Physics* (Light and Matter, Fullerton 2000) 90 [*Italics added*].

⁶² See Samuel P. Huntington, *The Clash of Civilizations and the Remaking of the World Order* (Touchstone, New York 1996).

⁶³ Lao Tzu, *Tao Te Ching* (Wordsworth Classics, Ware 1997) 23.

1. The United Nations Charter as the World's Constitution

The United Nations Charter is sometimes compared to a World Constitution due to its special legal status in the present international legal system.⁶⁴ Its supremacy, as enshrined in Article 103, qualifies it for a first look at the developed/developing country distinction. It must be added that, like in the case of its predecessor, the League of Nations, at the time of the drafting, most countries which are today qualified as developing countries were not yet released into independence from their colonial legacy. Consequently, it comes as no surprise that the UN Charter as the “World Constitution” (just as the Covenant of the League of Nations) contains no single reference to the developed/developing country dichotomy. The UN Charter mainly aims at maintaining international peace and security, establishing friendly relations between nations and achieving enhanced international cooperation. Concern for economic or other progress in terms of development is mentioned indirectly through references to “social progress and better standards of life” or the “promotion of the economic and social advancement of all peoples”.⁶⁵ Had the Preamble merely mentioned the economic and social advancement of all people, instead of peoples, this would have underscored the claim of the “constitutional” nature of the charter. As reflected in the present formulation, however, the Charter is by and large characterized by the principle of the equality of all Member states (Art 2(1)), whether small or big, or rich and poor. With regard to different degrees of (social and economic) development of countries or peoples in general, it must be added that the UN Charter also establishes a few principal organs and institutions which ultimately bear some varying relevance to the developed/developing country dichotomy.⁶⁶ One of those to name here is the Economic and Social Council (ECOSOC)⁶⁷ and the Trusteeship Council (which however was in the meantime dissolved).⁶⁸ To conclude this brief analysis, the case of Article 38 (4) of the Statute of the ICJ (as annexed to the UN Charter) has already been mentioned for its distinction between “civilized” versus “non-civilized” countries. Allowing for this exception, this brief overview of the Covenant of the League of Nations and the United Nations Charter affirms the present paper’s underlying claim that “constitutionalism” is by definition hostile towards dichotomous concepts and in particular to the developing/developed country distinction. It would be even more so, if it had taken the role of private individuals or global citizens into due account.⁶⁹

2. International Human Rights Law

In recent years the importance of respect for fundamental human rights and development has been widely discussed and their close and mutual influence can now be taken for granted.⁷⁰ Notwithstanding this recognition, it appears that a careless and almost subliminal association of human rights violations with a low level of development, where development is not clearly defined, still prevails. This is aggravated by an uncritical use not only of the concept of “developing countries” but

⁶⁴ See e.g. Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Leiden, Martinus Nijhoff 2009); Matthias J. Herdegen, ‘The “Constitutionalization” of the UN Security System’ (1994) 27 Vand. J. Transnat’l L. 135.

⁶⁵ Preamble of the UN Charter.

⁶⁶ Art. 7 and 57 UN Charter.

⁶⁷ Chapter X (Art. 61-72) UN Charter.

⁶⁸ Chapter XIII (Art. 86-91) UN Charter.

⁶⁹ The possibility of granting private individuals *locus standi* before the International Court of Justice, was indeed discussed; see Permanent Court of International Justice: Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee*, 16 June – 24 July 1920 (1920) 3, 6-7 <http://www.worldcourts.com/pcij/eng/documents/1920.07.24_proces_verbaux/1920.06.25/>.

⁷⁰ See e.g. Amartya Sen, *Development as Freedom* (Oxford University Press, Oxford 1999).

equally by a not less uncritical use of the concept of human rights and their continuing fragmentation into political and civil rights, on the one hand, and cultural, social, and economic rights on the other.⁷¹ Hence the basic assumption, as often encountered in the media, is that the more a country is developed, the better is its human rights record. This assumption, however, has to be contrasted with the legal framework as laid down in the International Bill of Human Rights.

To begin with, the most important international human rights document today is the Universal Declaration of Human Rights (UDHR) which was adopted shortly after World War II in 1948.⁷² The UDHR was initially, as a declaration, of non-binding authority on its signatories, but it has been argued that it meanwhile developed normative character through the achievement of the status of customary international law.⁷³ In thirty Articles, it lays down the fundamental rights common to humanity. In line with the basic principles of human rights, the UDHR knows no distinction of developed or developing countries. Instead, it recognizes and stresses the importance of the right of everyone to the realization of the “economic, social and cultural rights indispensable for his dignity and the free development of his personality”.⁷⁴ Furthermore, it restates the role of education in the full development of the human personality and, next to related rights, also emphasizes that “everyone has duties to the community in which alone the free and full development of his personality is possible”.⁷⁵ To briefly resume, the UDHR does not focus on states or countries but instead on the single individual and her/his rights and duties. In this context, it also recognizes the dynamic nature of the human being and the significance of “development” for her/his development.

Unfortunately, a mere two decades later, the noble ideas enshrined in the UDHR became divided into two legally binding international documents, despite the recognition of the principles of universality, indivisibility and solidarity as the pillars of a global human rights regime. These two documents are the International Covenant on Civil and Political Rights (CCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both of December 16, 1966 which generally emphasize the importance of “development” of all peoples based on their right to self-determination.⁷⁶ Later it is only the ICESCR which recognizes “development” as an important aspect, for instance, in the context of the human personality, children and even a schooling system, natural resources and of science and culture.⁷⁷ The only reference to “developing countries” is found in the ICESCR, where it states that for the progressive realization of their rights “developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals”.⁷⁸ This reference is a mistake since it amounts to a “special and discriminatory treatment” and ultimately denies individuals the central role they play in the protection of human rights and weakens the legitimacy of a global human

⁷¹ See International Covenant on Civil and Political Rights, December 19, 1966, 999 U.N.T.S. 171; and International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, 49, U.N. Doc. A/6316 (1966).

⁷² See Universal Declaration of Human Rights, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

⁷³ See David J. Harris, *Cases and Materials on International Law*, 5th ed. (Sweet & Maxwell, London 1998) 636; Makau wa Mutua, ‘The Ideology of Human Rights’ (1996) 36 Va. J. Int’l L. 589, 591, stating that the legal character of the UDHR is according to a more general and less controversial view recognized for “some UDHR rights, particularly those that implicate state action against personal security, such as freedom from torture, slavery, illegal detention, and disappearances, have achieved the status of customary international law”.

⁷⁴ Art. 22 UDHR.

⁷⁵ Art. 26 and 29 UDHR.

⁷⁶ Art. 1 (1) ICCPR and Art. 1 (1) ICESCR, *supra* note 71.

⁷⁷ Art. 1 (1), 6 (2), 10 (3), 11, 12 (1) lit a), 13 ICESCR.

⁷⁸ Art. 2 (3) ICESCR, *supra* note 71.

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rights regime altogether. In this respect the General Assembly Declaration on the “Right to Development” has better words when it states as follows:

Recognizing that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom [...].⁷⁹

This legally non-binding document is replete with references to “developing countries”, in various contexts, such as in the link between disarmament and economic and social development and well-being, and the need for sustained action to promote a more rapid and comprehensive development of developing countries.⁸⁰ Finally, a more recent account of the state of global affairs in the context of human rights is given by the Vienna Declaration and Action Programme (VDPA), as formulated by the World Conference on Human Rights in 1993.⁸¹ The Declaration restates most of the important international human rights documents and also the various aspects linked to the right to development but also the concept of “sustainable development” which started to emerge in the 1980s. The VDPA also contains two references to developing or least developed countries, in particular in the form of a call for relief of developing countries from their external debt burden and the need for support of LDCs in their transition to democracy and economic development.⁸² The external debt burden, however, is yet another good example for the unreliability of statistical data. In the past one has often read about the need for debt relief for developing countries.⁸³ However, a list of countries drawn by the World Factbook reveals the US holding the first place as the most indebted country in the world, with a debt of US\$13,750,000,000,000, followed by the United Kingdom and Germany, as compared with Macau SAR in 205th and last place with US\$ 0 external debt.⁸⁴ To compare, the first country on the list of Heavily Indebted Poor Countries (HIPC) is Sudan, which holds the 60th place on the World Factbook figures, with an estimated external debt of US\$33,720,000,000.⁸⁵ Even the available statistics are so fragmented that they hardly allow for any interpretation. So when is a country poor, when it has little money to spend or when it spends more than it actually has? I guess this shows the absurdity of our current international financial system.

The international human rights situation is by and large matched by the situation in important regional human rights instruments which also often combine countries of different cultural, social and economic backgrounds, as at the global level. From the European Convention of Human Rights (ECHR), via the American Convention of Human Rights (ACHR) to the African Charter on Human

⁷⁹ General Assembly, *Declaration on the Right to Development*, A/RES/41/128 (December 4, 1986).

⁸⁰ Recital 12 of the Preamble, Art. 4 (2), 7 Declaration on the Right to Development, UN GA A/RES/41/128 (December 4, 1986).

⁸¹ World Conference on Human Rights, *Vienna Declaration and Programme of Action*, UN GA A/CONF.157/23 (July 12, 1993) <[http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En)>.

⁸² *Id.*

⁸³ See also Agasha Mugasha, ‘Solutions for Developing-Country External Debt: Insolvency or Forgiveness?’ (2007) 13 *Law & Bus. Rev. Am.* 859.

⁸⁴ Central Intelligence Agency (CIA), *The World Factbook*, External Debt <<https://www.cia.gov/library/publications/the-world-factbook/rankorder/2079rank.html>>; on the latest quarterly external debt statistics, see the QEDS database jointly developed by the World Bank and the International Monetary Fund <<http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/EXTDECQEDS/0,,menuPK:1805431~pagePK:64168427~piPK:64168435~theSitePK:1805415,00.html>>.

⁸⁵ See Madhur Gautam, *Debt Relief for the Poorest: An OED Review of the HIPC Initiative* (Worldbank, Washington 2003) 61-62.

and Peoples' Rights (Banjul Charter), there is no reference to "developing countries".⁸⁶ The ECHR does not even refer to "development", whereas the ACHR explicitly recognizes the evolutionary character of life by the principle of progressive development for the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.⁸⁷ The Banjul Charter, on the other hand, refers to the peoples' right to development, the right to the free determination of their political status and pursuit of their economic, social and cultural development, a right to a general satisfactory environment favorable to their development.⁸⁸ It also contains the duty imposed on the individual "to preserve the harmonious development of the family".⁸⁹

Last but not least, a *de facto* evaluation of human rights in the world reveals that the distinction between developed and developing countries is not only against the spirit and the letter of the fundamental legal international human rights documents but also incapable of explaining the present situation of respect for and the enforcement of human rights in the world. A simple look at various periodically drafted reviews or country reports on the situation of human rights reveals that human rights violations are committed across the entire globe, in literally all of its countries.⁹⁰ Hence human rights violations occur irrespective of a country's wrongly attributed classification as a "developed" or as a "developing". There are even accounts of severe human rights violations by a so-called "developed country" in other "developed countries".⁹¹ This clearly shows that human rights violations happen across the lines of distinction drawn between developing and developed countries. Last but not least, such a distinction also conceals the fact that most human rights violations are in fact committed not by states and governments but by private individuals, or else individuals committing them in the name of public or governmental authority.

3. *Culture and Development*

The present public perception between culture and development is similar to that in the context of human rights mentioned above, although it appears a little more complex. The link between culture and development has also received greater attention in recent years, especially in the context of the 'culture and trade debate' based on the dual characteristics of the cultural industries as a new and highly technology-based category of goods and services.⁹² Thus, similar to the relation between human rights and development, here the relationship is a triangular one encompassing the fields of culture, the economy and development. Perhaps it is in this context that evidence about the deficiency of the present use of the developing/developed country dichotomy is most evident because it is based on a totally erroneous understanding of humanity and the world. It is interesting at this stage to highlight the commonality between the words "culture" and "development", since in its etymological meaning

⁸⁶ Please note that there exists (yet) no comparable regional human rights instrument in Asia but in November 2007 the ASEAN Ministers announced the intent to create an ASEAN Human Rights Body; see Art. 14 ASEAN Charter <<http://www.aseansec.org/ASEAN-Charter.pdf>>.

⁸⁷ Art. 26 American Convention of Human Rights (ACHR) <<http://www.oas.org/Juridico/english/treaties/b-32.html>>.

⁸⁸ Preamble and Art. 20, 22, and 24 African Charter on Human and Peoples' Rights (Banjul Charter) <http://www.achpr.org/english/_info/charter_en.html>.

⁸⁹ Art. 29 Banjul Charter.

⁹⁰ See e.g. Human Rights Watch, *World Report 2009: Events 2009* and Amnesty International, *The Amnesty International Report 2009: The State of the World's Human Rights*, *supra* note 36.

⁹¹ Council of Europe, Committee on Legal Affairs and Human Rights, *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report* <<http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf>>, stating that: "The Legal Affairs and Human Rights Committee now considers it factually established that secret detention centres operated by the CIA have existed for some years in Poland and Romania, though not ruling out the possibility that secret CIA detentions may also have occurred in other Council of Europe member states".

⁹² See e.g. UNESCO, *Culture, Trade and Globalization: Questions and Answers* (UNESCO, Paris 2000).

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“culture” describes a process of cultivation which was first associated with the soil (*cultura agri* or ‘agri-culture’) and later with the mind (*cultura mentis*).⁹³ Before concluding on this, however, it is necessary to review some of the principal international legal instruments in the field of culture. This brings us first to the case of the United Nations Organization for Education, Science and Culture (UNESCO), which is certainly the key institution in the field of culture. With regard to the dichotomy, it can be stated that the Constitution of UNESCO contains no such reference.⁹⁴ However, subsequently negotiated international conventions are replete with references to the distinction. This, it is submitted here, often stands in clear and open contradiction with some of its other own legal documents, such as notably the recognition of the equality of all cultures.⁹⁵ The equality of all cultures was only laid down in (non-legally binding) Declarations until the most recent convention adopted by UNESCO in 2005, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CDCE), Article 2 (3) of which enshrines the principle of equal dignity and respect for all cultures as follows:

The protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities and indigenous peoples.

Applied to the context of the developing/developed country dichotomy and following the assumption that cultures follow the territorial boundaries of nation states, this clearly means that all cultures are equal and hence all have an equal right to exist, to be protected, and to be promoted. Hence, *de iure*, there is no hierarchy or relation of superiority or inferiority between different cultures and their respective countries. Applied consistently, this means that the developing/developed country distinction can certainly not be applied to describe the state of one culture in relation to another. Perhaps it could be argued that one country’s culture is currently developing faster than it used to, but to some extent it is in contradiction with the principle of equality and the etymological origin of “culture” and the dynamism inherent in the concept of culture.⁹⁶ With regard to the CDCE, it must be said that, unfortunately, the following provisions contain numerous references to developed and developing countries, which can be said to contradict the principle of equality of all cultures as laid down in Art. 2 CDCE.⁹⁷ The inherent contradiction and inconsistency is well illustrated in the call of Art. 16 CDCE for preferential treatment for developing countries in the area of goods and services.⁹⁸ In this context, another inconsistency in the work of UNESCO needs to be pointed out, namely the almost complete lack of references to developing countries in the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage. The only reference to developing countries found in

⁹³ See A.L. Kroeber & Clyde Kluckhohn, *Culture – A Critical Review of Concepts and Definitions* (Vintage Books, New York 1952) 15; and John Rundell & Stephen Mennell, eds., *Classical Readings in Culture and Civilization* (Routledge, London 1998) 12.

⁹⁴ UNESCO Constitution, November 16, 1945, 4 U.N.T.S. 275.

⁹⁵ The principle of equality of cultures is a concomitant of the principle of equality of all states (Art. 2.1. UN Charter) and is, for example, restated in Article 1 of the 1966 Declaration of Principles of International Cultural Co-operation, Resolution adopted on the report of the Programme Commission at the sixteenth plenary meeting, on November 4, 1966, reprinted in UNESCO Records of the General Conference, Fourteenth Session Paris, 1966, 86, or paras. 1 and 4 of the 1982 Mexico City Declaration on Cultural Policies, Mexico City, July 26 –August 6, 1982, as well as implicitly recognized in the Convention Concerning the Protection of the World Cultural and Natural Heritage, November 16, 1972, 1037 U.N.T.S. 151.

⁹⁶ Recital 7 of the Preamble of the CDCE, which reads as follows: “Taking into account that culture takes diverse forms across time and space and that this diversity is embodied in the uniqueness and plurality of the identities and cultural expressions of the peoples and societies making up humanity [...]”.

⁹⁷ Art. 1 lit. f) and i), 2 (4), 14-17 CDCE.

⁹⁸ See e.g. Rostam J. Neuwirth, “‘United in Divergency’: A Commentary on the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions’ (2006) 66 H.J.I.L. 819 <http://www.zaoerv.de/66_2006/66_2006_4_a_819_862.pdf>.

this Convention calls on the Intergovernmental Committee to take into “account the special needs of developing countries” in the selection of projects aimed at the safeguarding of the intangible cultural heritage (Art. 18). No reference to developing countries can be found in the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage, however.

Given that UNESCO itself does not appear to be fully aware of the precise scope and mutual relation between the many conventions it administers,⁹⁹ it is either an inherent contradiction or a lucky mistake that the Intangible Cultural Heritage Convention, just like the World Cultural Heritage Convention, hardly makes any reference to developing countries whereas the CDCE does so frequently. Here it must be seriously asked whether and, if so, how “cultural expressions” are linked to both the world’s cultural and natural heritage and the intangible cultural heritage, and why these documents differ in the frequency of their references to the developing/developed country distinction? Finally it remains to ask whether the current role of UNESCO is based on contradictory perceptions, in particular of the role of culture, but equally of the roles of “education” and “science”. Perhaps in this regard new inspiration for UNESCO could come from one of its predecessors, the International Committee for Intellectual Cooperation (ICIC) and take a more visionary approach towards the formulation and implementation of new ideas for the betterment of global society.¹⁰⁰

4. *International Labor and Social Standards and Development*

In the context of labor and development a similar mode of thinking prevails. It is often assumed that labor (and social) conditions are better in “developed” (or industrialized) countries than in their developing counterparts. While this may in many cases hold true, it nevertheless appears flawed when it is coupled with the problem of democratic or private participation in the governance of global labor conditions.¹⁰¹ The strong correlation between labor and development is further obscured by the comparison and classification of different countries alongside different ideologies that influence the macroeconomic policy making and different macroeconomic theories applied, as it is still expressed in terms of the equally flawed dichotomy between capitalism and communism. This distinction, having become blurred since the end of the Cold War, suffers from one more serious deficiency – that is, the neglect of the dynamic nature underlying every economic system. Ideologies may have their roots in empirical observations from the past but they tend to become petrified over the years and henceforth obstruct the necessary adaptations to the changes in the environment.

Instead of basing such findings on ideological speculations, it would be better to try to shed light on the actual situation. Then we might ask, for instance, about the role of developed countries or their multinational companies in the shaping of labor conditions in developing countries. Even the widely held belief that multinational companies from developed countries exploit labor from developing countries cannot be generally established.¹⁰² What is safer to contend is that income distribution and poverty counts are inadequate for a comparison of labor conditions.¹⁰³ As already indicated, a second important aspect is the role of the representation of the individual worker as a private individual. The deprivation of rights of persons on this planet is more than evident if we compare the rights of free

⁹⁹ This question I posed to Ms. Galia Saouma-Forero (Director of the Division of Cultural Expressions and Creative Industries, UNESCO), on June 12, 2009 in the context of the U40-World Forum 2009 organized by the German UNESCO Commission.

¹⁰⁰ On the role and activity of the ICIC, see Henri Bonnet, ‘L’oeuvre de l’institut international de coopération intellectuelle’ (1937) 61 Rec. des Cours 457.

¹⁰¹ See Milman-Sivan, *supra* note 16.

¹⁰² See e.g. Drusilla K. Brown, Alan V. Deardorff & Robert M. Stern, *The Effects of Multinational Production on Wages and Working Conditions in Developing Countries*, NBER Working Paper 9669 (2003) <<http://www.nber.org/papers/w9669.pdf>>.

¹⁰³ Robert J. Flanagan, *Globalization and Labor Conditions: Working Conditions and Worker Rights in a Global Economy* (Oxford University Press, Oxford 2006) 175.

circulation of goods with those of persons.¹⁰⁴ In the past century little progress was indeed made in the latter area.¹⁰⁵ There is indeed an urgent need to rethink labor conditions in the reality of a globalizing market.¹⁰⁶

Hence in the case of labor conditions and development a more differentiated approach appears to be appropriate. This must especially hold true for the legal sphere, to which we shall now briefly turn. In international law it is the International Labor Organization (ILO) which is not only the main organization competent for labor matters but is also one of the oldest international organizations. ILO's purpose is laid down in the Preamble of the ILO Constitution and can be summed up as securing social justice, primarily by establishing humane conditions of labor which avoid injustice, hardship, and privation, with a view to preserving peace and harmony in the world.¹⁰⁷ As the name suggests, ILO is thus concerned with the conditions surrounding the economic capital or value of "labor". In addition, ILO is the only 'tripartite' United Nations agency, which means that it not only hosts representatives of governments but also allows employers and workers to shape policies and programs jointly. This allows ILO to be qualified as a "transnational organization", hence bridging the traditional public/private international law divide. This equally raises the question whether this special character bears any relevance for the developing/developed countries dichotomy, with the general assumption being that working conditions are better in developed countries. Whether this assumption holds true for the legal realm shall be briefly evaluated in the following paragraphs.

To begin with the Constitution establishing ILO in 1919, it first comes as a surprise that there is no mention of the developed/developing countries distinction. Only in the so-called "Declaration of Philadelphia", which was adopted in 1944 to clarify the aims and purposes of ILO and is now annexed to the Constitution, can a reference to "less developed regions of the world" be found. The relevant passage merely states that "severe economic fluctuations to promote the economic and social advancement of the less developed regions of the world" can be avoided by effective international and national action. Next to the Constitution, ILO has from 1919 until today adopted around 188 Conventions setting standards in the area of working conditions.¹⁰⁸ A review of all 188 Conventions results in the finding that only three of them contain a reference to "developing countries". The first mention of "developing countries" is made in the 1970 Convention concerning Minimum Wage Fixing with Special Reference to Developing Countries, which – as the title suggests – pays special regard to the needs of developing countries in the task of "providing protection for wage earners against unduly low wages". The second reference is found in the 1975 Convention concerning Organizations of Rural Workers and Their Role in Economic and Social Development, which notes as follows:

[I]n many countries of the world and particularly in developing countries there is massive under-utilisation of land and labour and that this makes it imperative for rural workers to be given every encouragement to develop free and viable organisations capable of protecting and furthering the interests of their members and ensuring their effective contribution to economic and social development [...].

¹⁰⁴ Roberto Saviano, *Gomorra: Italy's Other Mafia* (MacMillan, London 2006) 6, writing: "No human being could ever have the rights of mobility that merchandise has".

¹⁰⁵ See e.g. Roger Nett, 'The Civil Right We Are Not Ready For: The Right of Free Movement of People on the Face of the Earth' (1971) 81 *Ethics* 212.

¹⁰⁶ See e.g. Joel P. Trachtman, 'Welcome to Cosmopolis, World of Boundless Opportunity' (2006) 39 *Cornell Int'l L.J.* 477.

¹⁰⁷ Constitution of the International Labor Organization (ILO), June 28, 1919 <<http://www.ilo.org/ilolex/english/iloconst.htm>>.

¹⁰⁸ See the IOLEX Database of International Labor Standards <<http://www.ilo.org/ilolex/english/convdisp1.htm>>.

The Convention equally recognizes that “land reform is in many developing countries an essential factor in the improvement of the conditions of work and life of rural workers”. The third and last reference to “developing countries” is found in the Convention concerning Employment Promotion and Protection against Unemployment, which notes that certain minimum standards of unemployment benefits laid down in the 1952 Convention have been met and surpassed by most compensation schemes in the industrialized countries but are still just a target for developing countries.¹⁰⁹ In this context, the differentiation is between “industrialized” and “developing” countries. To sum up, the ILO Constitution and most of its conventions do not use the developing/developed country distinction, except for the three cases described before. This may come as a surprise, given that the public debate links most problems of social and labor standards to different degrees of economic development, which means that it is widely assumed that labor conditions are better in more economically developed countries, whereas serious problems of, for instance, unemployment, child or forced labor, maternity protection and equal treatment of men and women, are more persistent in the developing countries. Such a view generally disregards the fact that different forms of labor bring about different problems for the well-being of the worker.¹¹⁰ Hence, with a closer critical look such an assumption cannot be maintained in today’s globalized world of rapidly changing conditions. Fortunately, the ILO Constitution and its main conventions do not reflect such uncritical bias. This can perhaps be explained, first, by the historical context of the creation of ILO long before the beginning of the era of de-colonization, and second, its unique tripartite nature which may allow for a better and closer contact with the reality of working conditions.¹¹¹

5. *Environmental Protection and Sustainable Development*

Similar to other policy areas, debates about environmental protection are not only often closely linked to the degree of economic development but are also accompanied by the general assumptions that developing countries are those which care less about the environment, or block progress in the global development of binding legal standards, or as a result those countries where the environment is in a bad condition.¹¹² Other views highlight the developing/developed country dichotomy and insist that environmental degradation is more serious where levels of economic development are low and that environmental protection hampers economic growth.¹¹³ Also various natural cataclysms, from floods to desertification, are generally associated with the developing world, as media reports so often show people in serious distress against the backdrop of various natural or man-made disasters. This is clearly a highly distorted view of the state of things given that recent natural cataclysms have also seriously affected so-called “developed countries”, as in the case of Hurricane Katrina in the US in

¹⁰⁹ Convention concerning Employment Promotion and Protection against Unemployment (C 168), adopted on June 21, 1988.

¹¹⁰ For instance, stress is reported to be one of Europe’s most common work-related health problem. Moreover, it appears that higher levels of stress are correlated with the use of machine technology; see European Foundation for the Improvement of Living and Working Conditions, *Fourth European Working Conditions Survey* (Office for Official Publications of the European Communities, Luxembourg 2007) 46.

¹¹¹ See e.g. the Homepage of ILO, describing the tripartite structure of ILO as a unique arrangement gives the ILO an edge in incorporating ‘real world’ knowledge about employment and work <http://www.ilo.org/global/About_the_ILO/lang-en/index.htm>.

¹¹² See e.g. Janet Daley, ‘Poor People Can’t Afford to Worry About Global Warming’ *The Daily Telegraph* (London) (July 14, 2008) 22; ‘West Told to Stop Blaming Developing Countries for Pollution’ *Xinhuanet News Agency* (June 25, 2007) <http://www.chinadaily.com.cn/china/2007-06/25/content_901695.htm>.

¹¹³ See e.g. Adil Najam, ‘Developing Countries and Global Environmental Governance: From Contestation to Participation to Engagement’ (2005) 5 *International Environmental Agreements* 303, 318, writing that “although the concept of sustainable development has allowed for a valuable dialogue between North and South, it is has not (yet) resolved the chasm between the two which is still generally exemplified by the relatively greater emphasis on environmental effectiveness by many in the North and the relatively greater interest in developmental effectiveness by many in the South”.

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2005, and Typhoon Morakot in Taiwan and the devastating fires in Europe and Australia in 2009.¹¹⁴ Furthermore, new threats to a healthy environment at the global scale have emerged, if we think for example about the nuclear reactor accident in Chernobyl (USSR) in 1986. Paradoxically, while the said assumption still persists, it is also in the developed world where most environmental damage has been inflicted on nature so far and it is in the developing world where most natural resources (on which the eventual survival of this planet may depend) are to be found today. In this area too it appears that a more differentiated approach is needed while at the same time considering the global dimension of the protection of the environment as it is exemplified in the problem of global climate change.¹¹⁵

This is because nature and the environment provide one of the best pieces of evidence of the present hypothesis of the ever developing (or changing) character of the process that we usually term “life”. In this respect, the 1972 Declaration of the United Nations Conference on the Human Environment, which met at Stockholm from June 5-16, 1972, which by and large initiated the global environmental debate, testifies as follows:

Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself.¹¹⁶

This introductory paragraph contains references to both the constant development (i.e., “growth”) and the acceleration of our perception through science and technology. Considering this dynamism, it therefore comes as no surprise that it was in the context of the relation between the human and nature that the concept of “sustainable development” was born. Sustainable development was probably first introduced in 1987 by the World Commission on Environment and Development (WCED), which broadly defined sustainable development as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.¹¹⁷ In other words, it is a process of continuous development respecting the available resources and the principle of intergenerational equality.¹¹⁸ The emergence of this concept, it is submitted, supports the underlying assumption of the need for a global policy instrument that treats all countries as “developing”.

¹¹⁴ See e.g. Shaila Dewan, ‘Louisiana Releases Details on Deaths From Hurricane Katrina and Later Flooding’ *N.Y. Times* (December 10, 2005) 11; Jane Macartney & R. Lloyd Parry, ‘Hundreds ‘Buried Alive’ as Typhoon Morakot Sweeps in’ *Times (London)* (August 11, 2009) 29; ‘Disaster Takes a Terrible Toll on the Nation’ *The Advertiser (Australia)* (February 9, 2009) 16; and ‘Wild Weather Death Toll Rises in Europe’ *The Sunday Mail (Queensland, Australia)* (July 26, 2009) 46.

¹¹⁵ See e.g. Brooke Ackerly & Michael P. Vandenbergh, ‘Climate Change Justice: The Challenge for Global Governance’ (2008) 20 *Geo. Int’l Envtl. L. Rev.* 553; Paul L. Joffe, ‘Current Issues in Public Policy: The Dwindling Margin for Error: The Realist Perspective on Global Governance and Global Warming’ (2007) 5 *Rutgers J.L. & Pub. Pol’y* 89.

¹¹⁶ Declaration of the United Nations Conference on the Human Environment, June 5-16, 1972 <<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97&ArticleID=1503&l=en>>.

¹¹⁷ Report of the World Commission on Environment and Development (WCED), *Our Common Future*, transmitted to the General Assembly as an Annex to document A/42/427 – Development and International Co-operation: Environment <<http://www.un-documents.net/wced-ocf.htm>>.

¹¹⁸ See Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (The United Nations University, Tokyo 1989) (“Principles of equity between generations lead to a set of planetary, or intergenerational, rights and obligations, with associated international duties of use. Planetary rights [and obligations] are the rights [and obligations] which each generation has to receive [and to pass on] the planet in no worse condition than that of the previous generation, to inherit comparable diversity in the natural and cultural resource bases, and to have equitable access to the use and benefits of the legacy”).

Unfortunately, in 1972 when the Stockholm Conference was held, this was not the general view. Instead, clear lines of distinction were drawn between developed countries, on the one hand, and developing countries on the other. For instance, the resolution which established the United Nations Environmental Program in the same year, in order to promote international cooperation in the field of the environment, affirms as follows:

Conscious of the need for processes within the United Nations system which would effectively assist developing countries to implement environmental policies and programmes that are compatible with their development plans and to participate meaningfully in international environmental programmes.

In other places too, the resolution stresses the special needs of developing countries as well as does UNEP in its subsequent activities and reports.¹¹⁹ These findings are also applicable to various other multilateral environmental conventions. One early international environmental convention is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which was adopted in 1973.¹²⁰ The Convention aims at protecting the wild fauna and flora as an irreplaceable part of the natural systems of the Earth and at fostering international cooperation to this end. In this endeavor, the Convention knows no distinction between developed or developing countries. Closely related to CITES is the Convention on the Conservation of Migratory Species of Wild Animals, adopted in 1979, which aims at the conservation of wild animals.¹²¹ Although many animals migrate between the North and the South (a divide often used as a synonym for the developing/developed countries dichotomy), this Convention also makes no special reference to the developing/developed countries dichotomy. A different form of protection is dealt with in the 1985 Vienna Convention for the Protection of the Ozone Layer, which addresses the potentially harmful impact on human health and the environment of modification of the ozone layer due to human activities. Throughout its text, the Convention takes notice three times of “the circumstances and particular requirements of developing countries” in the attempt to protect the ozone layer.¹²² The same trend is continued in a protocol to the Vienna Convention, i.e., the Montreal Protocol on Substances that Deplete the Ozone Layer.¹²³ In the Protocol too, the special developmental needs of developing countries are recognized and a beneficial treatment accorded to them.¹²⁴ The same treatment of developing countries can be found in the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.¹²⁵

An important shift in such uncritical categorization came with the Earth Summit at the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro in June 1992. The summit convened more than hundred heads of state and produced inter alia the Agenda 21, i.e. a comprehensive programme of action for global action in all areas of sustainable development and adopted the Rio Declaration on Environment and Development, i.e. a series of (non-binding)

¹¹⁹ See e.g. Plan of Implementation of the World Summit on Sustainable Development <http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf>; and UN GA, 2005 World Summit Outcome, A/RES/60/1 (October 24, 2005) <<http://daccess-ods.un.org/TMP/8048665.html>>.

¹²⁰ Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), signed at Washington, D.C., on 3 March 1973 <<http://www.cites.org/eng/disc/text.shtml#texttop>>.

¹²¹ Convention on the Conservation of Migratory Species of Wild Animals (1979) <http://www.cms.int/pdf/convtxt/cms_convtxt_english.pdf>.

¹²² See Preamble Recital 3, Art. 4.2 and Annex I Section 3 of the Convention on the Conservation of Migratory Species of Wild Animals; *id.*

¹²³ Montreal Protocol on Substances that Deplete the Ozone Layer (1987) <<http://www.unep.org/OZONE/pdfs/Montreal-Protocol2000.pdf>>.

¹²⁴ Preamble Recitals 6, 7 and 9, Art. 5, 9 and 10 of the Montreal Protocol on Substances that Deplete the Ozone Layer; *id.*

¹²⁵ Preamble Recitals 7, 20 and 21, Art. 4, 10, and 11 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989) <<http://www.basel.int/text/con-e-rev.pdf>>.

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principles defining the rights and responsibilities of States.¹²⁶ Among these principles the Declaration lists Principle 7 which defines the spirit of global cooperation as follows:

States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.¹²⁷

The wording of “common but differentiated responsibilities” thus marks an important step towards a more nuanced approach to environmental global governance than the mere developing/developed country dichotomy. This wording has since then found its entry in practically all subsequent multilateral environmental agreements. While it has certainly brought a useful correction, it still has not entirely replaced the developing/developed country dichotomy. This is the case in the 2001 Stockholm Convention on Persistent Organic Pollutants.¹²⁸ A similar situation is found in the Convention on Biological Diversity (CBD) and the Cartagena Protocol on Biosafety.¹²⁹ In both documents the special needs of developing countries are either taken into account or they are granted special treatment and financial or other means of support in the fields covered by the Convention. This is interesting to note since, paradoxically, when it comes to biological diversity, many of the natural treasures of biological diversity are found in the countries which are generally classified as (economically) “poor” or developing countries whereas the (economically) “rich” or developed countries have already “successfully” destroyed or depleted their habitats.

The same paradox appears to dominate another international legal document in the field of environmental law which not only makes frequent use of the concept of “developing countries” but is practically based on the assumption of the world being divided into developed (or industrialized) and developing countries. This is the United Nations Framework Convention on Climate Change (UNFCCC), which was opened for signature at the said United Nations Conference on Environment and Development (UNCED).¹³⁰ The UNFCCC aims to protect the climate system for present and future generations especially through the stabilization of concentrations of greenhouse gases (GHG) in the atmosphere at a level that would prevent dangerous interference with the climate system caused by human activities. Most interestingly, the UNFCCC categorizes the world's countries as “industrialized countries (and economies in transition)” (Annex I), “developed countries” (Annex II), and “developing countries”. This distinction is obviously based on the following assumption, as laid down in Recital 3 of the Preamble of the UNFCCC:

Noting that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs.

¹²⁶ Conference on Environment and Development (UNCED) <<http://www.un.org/geninfo/bp/enviro.html>>.

¹²⁷ The United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development*, having met at Rio de Janeiro from 3 to 14 June 1992 <<http://www.unep.org/Documents.Multilingual/Default.asp?documentID=78&articleID=1163>>.

¹²⁸ Preamble Recitals 2, 11, 12, 13 and 19 and Art. 4, 8, 10-13 and 20 of the Stockholm Convention on Persistent Organic Pollutants (POPs) (2001) <http://www.pops.int/documents/convtext/convtext_en.pdf>.

¹²⁹ Recitals 16 and 19 and Art. 8-10, 12, 13, and 16-20 of the Convention on Biological Diversity (1992) <<http://www.cbd.int/doc/legal/cbd-un-en.pdf>>; Preamble Recital 8 and Art. 11, 20, 22 and 28 of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (2000) <<http://www.cbd.int/doc/legal/cartagena-protocol-en.pdf>>.

¹³⁰ United Nations Framework Convention on Climate Change (UNFCCC) (1992) <<http://unfccc.int/resource/docs/convkp/conveng.pdf>>.

This description takes a more dynamic stance, stating past developments and predicting trends for the future.¹³¹ A more nuanced characterization is found in Recital 2 which adopts the Rio Declaration's Principle 7 and reads as follows:

Acknowledging that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions.

In this Recital, the phrase of “respective capabilities and their social and economic conditions” is added to the previously mentioned characterization of “common but differentiated responsibilities”. In fact this wording provides a better basis for future cooperation ignoring the general distinction of developed/developing countries. Unfortunately, such a differentiated approach is not followed in the Kyoto Protocol to the UNFCCC, an international agreement adopted in 1997 which sets binding targets for industrialized countries to reduce GHG emissions by at least 5 percent below 1990 levels in the commitment period of 2008 to 2012.¹³² An important mechanism of the Kyoto Protocol is emission trading, which allows countries that have not used all their emission units to trade them for money with other countries that have exceeded their allowed limits. The Kyoto Protocol is replete with references taking into account the special needs of “developing countries”, but when looking at the factual situation of their GHG emissions, the distinction appears to lose much of its value. For instance, the US, which has signed but not ratified the Protocol, shares the role as the world's largest emitter of such gases with China. Nonetheless, the Protocol is not binding on either country – not on the US because it has not ratified it, and not on China (which has ratified it, like India) because it is qualified as a “developing country”. For future actions and with regard to the polluter pays principle (PPP) and in line with the problem of climate change based on GHG emissions, the meaningful line of distinction should not be that of developed or developing, but instead of more polluting and less-polluting countries. Given that the commitment period of the Kyoto Protocol is due to expire in 2012, negotiations for a new global climate change treaty are already underway. Unfortunately, the UN Climate Change Conference at its 15th session (COP-15) held in Copenhagen (Denmark) in December 2009 yielded only few substantial and no legally binding results.¹³³ Even for the subsequent meeting, the 16th Session (COP-16), to be held in Cancun (Mexico) between November 29 and December 10, 2010,¹³⁴ no commitment for the negotiation of a legally binding agreement was included into the text. Moreover, the document adopted by the Conference of Parties, the so-called “Copenhagen Accord”, maintains the developing-developed countries dichotomy as it frequently refers to so-called “developing”, “least-developed” and “developed countries”.¹³⁵ The controversy over the concrete outcomes of the conference proves that the global governance debate, especially when expected to yield legally binding results, requires a global platform to unfold, as it was mentioned in the introduction to this paper. As a matter of fact two critical commentators in my view rightly questioned

¹³¹ See Ben Webster, ‘Poor countries tip balance on levels of greenhouse gas’ *The Times (London)* (November 18, 2009) 20-21.

¹³² Art. 3 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997) <<http://unfccc.int/resource/docs/convkp/kpeng.pdf>>.

¹³³ See United Nations Climate Change Conference <http://www.denmark.dk/en/menu/Climate-Energy/COP15-Copenhagen-2009/cop15.htm>; see also David Hunter, ‘Implications of the Copenhagen Accord for Global Climate Governance’ (2010) 10 *Sustainable Development Law & Policy* 4, Daniel Bodansky, ‘The Copenhagen Climate Change Conference: A Postmortem’ (2010) 104 *A.J.I.L.* 230, Kelley Inman, ‘The Symbolic Copenhagen Accord Falls Short of Goals’ (2010) 17 *U. Balt. J. Envtl. L.* 219, and Richard L. Ottinger, ‘Copenhagen Climate Conference – Success or Failure?’ (2010) 27 *Pace Envtl. L. Rev.* 411.

¹³⁴ See the United Nations Climate Change Conference in Cancun, <http://unfccc.int/meetings/cop_16/items/5571.php>.

¹³⁵ See Sections 2, 3, 4, 5, 6, 7, 8, 10 of the Copenhagen Accord, Decision 2/CP.15 (Copenhagen Accord), reprinted in United Nations Framework Convention On Climate Change (UNFCCC), *Report of the Conference of the Parties on its fifteenth session*, held in Copenhagen from December 7-19, 2009, 3FOC CMCa/rCchP/22001009 /11/Add.1 (March 30, 2010), <<http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf>>.

whether the “UN is the proper venue for these negotiations” but failed to question the “developing-developed” or so-called “North-South Divide” terminology as a possible further cause for the lack of concrete and legally binding results.¹³⁶

In sum, environmental protection at the global level is not only closely entwined in a complex structure with other policies, but also reflects, first, the trend that most urgent problems and serious challenges can no longer be tackled by one country alone and, second, that the simplistic classification of the world into developing and developed countries is certainly now obsolete. Instead the spirit of global cooperation between all countries in accordance with “their common but differentiated responsibilities and respective capabilities and their social and economic conditions” appears to be a better basis for a future global governance regime.

6. Development for Development

Finally, another UN body active in the sphere of development is the United Nations Development Program (UNDP) which was established in 1965.¹³⁷ It is not a specialized agency in the sense of Article 57 of the UN Charter but emerged from the Expanded Program of Technical Assistance (EPTA) and the Special Fund (SF). It can be qualified as the United Nations’ global development network and handles various portfolios related to development. It pledges to advocate “for change and connecting countries to knowledge, experience and resources to help people build a better life”.¹³⁸ Presently, its work focuses on the challenges of democratic governance, poverty reduction, crisis prevention, the environment and energy, as well as HIV/AIDS and the achievement of the Millennium Development Goals by 2015.¹³⁹ As such UNDP’s work stretches across various specialized agencies or programs. Moreover, UNDP is responsible for drafting the Human Development Indices (HDI), which contain an assessment of country achievements in different areas of human development and categorizing the world’s countries in countries of “high”, “medium” and “low” human development.¹⁴⁰ In short, the UNDP can be qualified as the prime program of the UN system dealing with development matters and as such it makes frequent use of the developing/developed country dichotomy, or can even be said to be entirely based on it. In this respect the founding resolution restates that “requests for assistance on the part of the developing countries are steadily increasing in volume and in scope” and that “United Nations assistance programs are designed to support and supplement the national efforts of developing countries in solving the most important problems of their economic development, including industrial development”.¹⁴¹ In addition to this distinction, UNDP suffers from the fact that the entire UN system is far from coherent in policy making and often wastes resources by an unnecessary duplication of activities.¹⁴² Hence there is an urgent need for reform of the entire UN system, which must be more ambitious than current efforts.¹⁴³

¹³⁶ See John Whalley & Sean Walsh, ‘Environmental Justice Post-Copenhagen: Post-Copenhagen Negotiation Issues and the North-South Divide’ (2010) 8 Seattle J. Soc. Just. 773, 785.

¹³⁷ See General Assembly Resolution 2029 (XX) of November 22, 1965, *Consolidation of the Special Fund and the Expanded Programme of Technical Assistance in a United Nations Development Programme* <<http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/217/92/PDF/NR021792.pdf?OpenElement>>.

¹³⁸ See UNDP Homepage, *A World of Development Experience* <<http://www.undp.org/about/>>.

¹³⁹ See the Millennium Development Goals <<http://www.undp.org/mdg/>>.

¹⁴⁰ See UNDP, *Human Development Statistics* <<http://hdr.undp.org/en/statistics/>>.

¹⁴¹ See General Assembly Resolution 2029 (XX) of November 22, 1965, *supra* note 137.

¹⁴² See e.g. Ashley Seager, ‘Inefficient UN Must Reform to Tackle Poverty, Panel Says’ *Guardian* (November 10, 2006) <<http://www.guardian.co.uk/world/2006/nov/10/ashleyseager.mainsection>>.

¹⁴³ See e.g. United Nations High Level Panel on Coherence, *Delivering as one: Report of the High-level Panel on United Nations System-wide Coherence in the Areas of Development, Humanitarian Assistance and the Environment*, (UN GA

Only with more radical structural and conceptual changes to the UN system and to global governance, could the UNDP play a useful role in the future. This role could in fact consist in being a think tank for the formulation of policy and a steering committee for the coordination between the various policy areas under what could be called a “global development policy”.

7. *Global Public Health and Food Security*

The situation is similar in the context of public health and food security. Both areas are not only crucial to a meaningful existence but are also closely linked to each other and to other public policy areas, such as labor conditions, international trade, or wars and international conflicts. Hence they presuppose a coherent policy-making scheme. Health and food security also highlight the primordial role of the individual person, since it is in the first place always the single person who suffers from disease or starvation. In this sense both of the principal international organizations active in these areas, the World Health Organization (WHO) and the Food and Agricultural Organization (FAO), lack due representation of the rights and interests of individuals. As state-driven organizations, they focus on states. The founding statutes of both, the FAO and WHO Constitutions, ignore the concept of developing countries.¹⁴⁴

In subsequent treaties negotiated under the two organizations, however, the concept is frequently used.¹⁴⁵ In the areas of both organizations, apparent contradictions exist with regard to the developing/developed country distinction. If we look at the Tobacco Control Convention, we can see that consumption varies regardless of this distinction (but is probably related to a great many more factors, such as anti-tobacco legislation, working conditions, reception in society etc).¹⁴⁶ Paradoxically when it comes to food security, the FAO estimates that 1.02 billion people in this world suffer from hunger or undernourishment,¹⁴⁷ and it is also not a phenomenon unknown in the so-called “developed world”, with an estimate of 15 million people suffering from undernourishment. At the same time the WHO reports that approximately 1.6 billion adults (age 15+) were overweight in 2005.¹⁴⁸ Moreover, the FAO reports also that obesity is rising in the so-called “developing world”.¹⁴⁹ Since the world produces enough food for everyone, the problem of undernourishment is clearly one of a lack of good global governance and an unequal distribution of resources. The preceding examples also reflect the problem of the grouping of individual fates in states as each single person suffering from these symptoms is a cause for blame of the global community, regardless which country scores the highest percentage. Finally, fighting the causes and to improve health and food security for all citizens will require better intergovernmental and inter-organizational cooperation and greater policy coherence, as the causes are of political and military, environmental, agricultural, scientific, or legal character.¹⁵⁰

(Contd.) _____

A/61/583 (November 20, 2006) <<http://daccessdds.un.org/doc/UNDOC/GEN/N06/621/41/PDF/N0662141.pdf?OpenElement>>.

¹⁴⁴ Constitution of the Food and Agricultural Organization, September 24, 1949, 126 U.N.T.S. 257; Constitution of the World Health Organization, July 22, 1946, 14 U.N.T.S. 185.

¹⁴⁵ International Treaty on Plant Genetic Resources for Food and Agriculture, (November 3, 2001) <<http://www.fao.org/Legal/treaties/033t-e.htm>>; and WHO Framework Convention on Tobacco Control (May 21, 2003) <<http://whqlibdoc.who.int/publications/2003/9241591013.pdf>>.

¹⁴⁶ See e.g. the statistics in WHO, *The World Tobacco Atlas 2009*, 25-31 <<http://whqlibdoc.who.int/publications/2002/9241562099.pdf>>.

¹⁴⁷ FAO, *The State of Food Insecurity in the World: Economic crises – impacts and lessons learned* (Rome 2009) <<http://ftp.fao.org/docrep/fao/012/i0876e/i0876e.pdf>>.

¹⁴⁸ See the WHO Homepage, *Factsheet on Obesity and Overweight* <<http://www.who.int/mediacentre/factsheets/fs311/en/index.html>>.

¹⁴⁹ FAO, *The developing world's new burden: obesity* <<http://www.fao.org/FOCUS/E/obesity/obes1.htm>>.

¹⁵⁰ See e.g. the World Food Programme (WFP), *What causes Hunger?* <<http://www.wfp.org/hunger/causes>>.

This underscores the fading significance or counterproductive impact of the developing/developed country dichotomy and constitutes a major task for the global governance debate.

8. *International Trade and Development: The Multilateral Trading Regime under the WTO*

The link between international trade and development is characterized by a multitude of different aspects, such as the links between trade and development and investment, intellectual property rights, competition law, and human rights.¹⁵¹ In fact, the trade and development debate displays the full complexity of the trade and linkage debate. Most prominently, however, the trade and development debate is centered on the question of special and differential treatment (S&D) for developing countries, which refers to preferential provisions that apply to developing countries (DCs) and least developed (LDCs) countries, usually on the basis of non-reciprocity of mutually granted benefits. Their purpose is to offset existing asymmetries between developed and developing countries. Thus here the general perception is that developing countries deserve to receive preferential treatment and various other benefits in order to be able to participate in the global economic integration process otherwise known as “globalization”. The present institutional and legal framework underlying this process was started following World War II and the first and foremost source of reference is the Havana Charter, the Final Act of the United Nations Conference on Trade and Employment. As far as the developed/developing country distinction is concerned, the Havana Charter proposed the creation of an International Trade Organization (ITO), but contains no such distinction (yet). The ITO was planned to be a specialized agency under the organizational structure established by the UN Charter as a world constitution and was endowed with the purpose of contributing to “particularly the attainment of the higher standards of living, full employment and conditions of economic and social progress and development” of its Members.¹⁵² In its Preamble, the Havana Charter lays out as one of the objectives of the ITO:

2. To foster and assist industrial and general economic development, particularly of *those countries which are still in the early stages of industrial development*, and to encourage the international flow of capital for productive investment [*Italics added*].

Thus the Havana Charter did not undertake a general stigmatization of countries as “developing countries”, but emphasized “economic conditions and social progress”, merely highlighting differences in one well-defined area, that is, “industrial development”.¹⁵³ It is well known that the ITO never materialized and was instead replaced by a provisional application of the part on free trade in goods, which was known as the General Agreement on Tariffs and Trade (GATT). This development was a major flaw in the later organizational structure of the UN system and the overall coherence of the international legal order.¹⁵⁴ With regard to the issue of the developed/developing countries dichotomy, the GATT, as the immediate successor of ITO, is replete with references to what it calls

¹⁵¹ See e.g. V.N. Balasubramanyam & David Greenaway, eds., *Trade and Development: Essays in Honour of Jagdish Bhagwati* (Basingslake: MacMillan, 1996); Robert D. Anderson & Hannu Wager, ‘Human Rights, Development, and the WTO: The Cases of Intellectual Property and Competition Policy’ (2006) 9 J.I.E.L. 707.

¹⁵² Preamble of the Havana Charter; UN Conference on Trade and Employment, Havana Charter for an International Trade Organization and Final Act and Related Documents, November 21, 1947 to March 24, 1948), UN Doc ICITO (April 1, 1948).

¹⁵³ The Havana Charter uses the terms “undeveloped” or “underdeveloped” but in the context of industrial development or the development of resources or the devastation by war; see Art. 8, 10 (2) and (3) Havana Charter and the Resolution Relating to Economic Development and Reconstruction.

¹⁵⁴ For an overview of the evolution of the GATT/WTO system from the ITO until the WTO and the implications for coherence, see e.g. Rostam J. Neuwirth, *The Cultural Industries in International Trade Law: Insights from the NAFTA, the WTO, and the EU* (Dr. Kovač, Hamburg 2006) 79-102.

“less-developed” as opposed to their “developed” contracting parties.¹⁵⁵ In particular Art. XXXVI:8 GATT stipulates as follows:

The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.

This clause introduces the principle of non-reciprocity or S&D treatment between developed and less-developed countries. S&D treatment has been termed a “defining feature of the multilateral trading system”¹⁵⁶ but also continues to cause controversy.¹⁵⁷ The Agreement Establishing the WTO, adopted as a result of the Uruguay Round negotiations (1986–1994), first generally recognizes the legitimate need to adopt a more differentiated approach to the conduct of international trade by action “consistent with needs and concerns at different levels of economic development”, but later states as follows:

Recognizing further that there is need for positive efforts designed to ensure that *developing countries*, and especially the *least developed* among them, secure a share in the growth in international trade commensurate with the needs of their economic development [*Italics added*].

Similarly Article XI of the WTO Agreement clarifies the following:

2. The least-developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.

In sum, examples of the distinction between developed and developing, as well as less-developed, countries are to be found in all agreements covered by the WTO. Like the GATT, the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and the Understanding on the Settlement of Disputes (DSU), all make ample use of this distinction. In addition to the general flexibility built into the GATS, it equally recognizes the special needs of developing and least-developed country members, including problems related to their domestic services capacity, efficiency and competitiveness, the facilitation of their participation in trade in services, the role of subsidies, the negotiation of specific commitments and provision of technical assistance to them.¹⁵⁸

Of still greater relevance is the TRIPS Agreement, which was already controversial during its negotiation and continues to be after its entry into force as well as after the end of the transitional periods foreseen for developing country Members.¹⁵⁹ As mentioned above, the controversy stems from the tendency of some countries to “copy” or opt for a less rigid enforcement of IPRs and others to insist on the strict protection and enforcement of IPRs, where usually the former are countries with little or no innovative industries and the latter those with more innovative and more competitive industries. The controversy is even more severe in the context of public health and pharmaceutical products.¹⁶⁰ In detail, the TRIPS Agreement recognizes these special needs of developing and least-developed countries by granting them transitional arrangements for the implementation of TRIPS

¹⁵⁵ Art. XXVIII^{bis}, XXXVI-XXXVIII GATT.

¹⁵⁶ See e.g. Alexander Keck & Patrick Low, *Special and Differential Treatment in the WTO: Why, When and How?*, WTO Staff Working Paper ERSD, 03/2004.

¹⁵⁷ See also Andrew D. Mitchell & Tania Voon, ‘Operationalizing Special and Differential Treatment in the WTO: Game Over?’ (2009) 15 *Global Governance* 343 and Frank J. Garcia, ‘Beyond Special and Differential Treatment’ (2004) 27 *B.C. Int’l & Comp. L. Rev.* 291.

¹⁵⁸ Recital 2 and 4-6 of the Preamble, Art. III:4, IV and V:3, XV, XIX:2 and 3, and XXV GATS.

¹⁵⁹ See also J.H. Reichman, ‘The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?’ (2000) 3232 *Case W. Res. J. Int’l L.* 441.

¹⁶⁰ See e.g. Haochen Sun, ‘Reshaping the TRIPs Agreement Concerning Public Health: Two Critical Issues’ (2003) 37 *J. World T.* 163.

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standards and an entitlement to the receipt of technical and financial cooperation.¹⁶¹ In the context of the technology-charged TRIPS Agreement it is also necessary to mention briefly the SPS and the TBT Agreement, which deal with the complex areas of technical regulations and international standards. Both agreements, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and the Agreement on Technical Barriers to Trade (TBT), generally recognize the technology divide between and the need for technology transfer from developed to developing countries.¹⁶²

Finally, the DSU deserves some special attention since it was often mentioned as the compensation for developing countries under the WTO single package deal for unwanted concessions in the context of the TRIPS Agreement and its multilateral minimum standards in the protection and enforcement of IPRs. The compensation was said to consist in equal access to the dispute settlement system of the WTO, meaning that small and economically weaker countries were able to challenge the big and rich (or allegedly developed) countries.¹⁶³ The evaluation of this claim is not easy to realize but recent statistics of the WTO Dispute Settlement Body (DSB) suggest that, although the US and the EU are involved in the largest share of disputes (both as complaining and as responding parties), smaller or developing countries are also using the system and often with success.¹⁶⁴ As an example, we just need to think of the case of the small state of Antigua and Barbuda successfully challenging the US.¹⁶⁵ From a look at the text of the DSU, however, there is frequent reference to the developed/developing (and least-developed) country distinction. The references include the right of a developing country Member involved in a dispute with a developed country to invoke the Decision of 5 April 1966 on procedures under Article XXIII,¹⁶⁶ and, if requested, the right to have a panelist from a developing country member on the panel, the privilege of being given “special attention to their problems” and the possibility of an extension of the relevant time periods in the consultation stage.¹⁶⁷ At the implementation too, special rules may apply to developing countries, such as respect of their interests and a general possibility to receive legal advice and assistance from the WTO Secretariat.¹⁶⁸

Finally, in the context of the WTO it is important to mention the so-called “Doha Development Agenda (DDA)”, which marks a new round of negotiation launched in 2001.¹⁶⁹ The focus of the DDA is on various problems that developing countries face in general in the participation of developing countries in the multilateral trading system and in particular in the application and implementation of the WTO administered agreements. However, these negotiations have so far had little success and

¹⁶¹ Recital 6 of the Preamble and Art. 65(2) and (4), 66, as well as 67 TRIPS.

¹⁶² Recital 7 of the Preamble and Art. 9 (“Technical Assistance”), 10 (“S&D”) and 14 SPS Agreement and Recitals 8 and 9 of the Preamble and Art. 2.12, 5.9, 10.5, 10.6, 11 (“Technical Assistance”), and 12 (“S&D”) of the TBT Agreement.

¹⁶³ For an overview, see *e.g.* Chad P. Bown & Bernard M. Hoekman, ‘WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector’ (2005) 8 J.I.E.L. 861; Naboth van den Broek, ‘Power Paradoxes in Enforcement and Implementation of World Trade Organization Dispute Settlement Reports Interdisciplinary Approaches and New Proposals’ (2003) 37 World T. 127; and Arvind Subramanian & Jayashree Watal, ‘Can TRIPS Serve as an Enforcement Mechanism for Developing Countries in the WTO?’ (2000) 3 J.I.E.L. 403.

¹⁶⁴ See the useful tables and summary in Kara Leitner & Simon Lester, ‘WTO Dispute Settlement 1995-2007 – A Statistical Analysis’ (2008) 11 J.I.E.L. 179.

¹⁶⁵ WTO Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (April 7, 2005).

¹⁶⁶ See *Decision of 5 April 1966 on procedures under Article XXIII* (BISD 14S/18) <http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/a2s1p1_e.htm>.

¹⁶⁷ Art. 3 (12), 4(10), 12 (10) and (11) DSU.

¹⁶⁸ Art. 21 (2), (7) and (8), 22 (2) DSU.

¹⁶⁹ Ministerial Declaration, *Ministerial Conference Fourth Session*, Doha, November 9-14, 2001, WT/MIN(01)/DEC/W/1 (November 14, 2001).

were suspended in 2006 with no clear road map leading towards its conclusion.¹⁷⁰ Since then, it is unclear when the DDA negotiations will be successfully concluded and it is even less certain that the possible outcome might help to improve the fairness and efficiency of the multilateral trading system.

Two more institutions which are closely involved in the debate on the trade and development linkage and work closely with the WTO are the International Trade Center (ITC) and the United Nations Conference on Trade and Development (UNCTAD). The ITC was institutionalized in 1964 as a center in the Secretariat for the General Agreement on Tariffs and Trade (GATT) and now assists small businesses in developing countries in their export efforts. Its entire purpose can therefore be characterized as being based on the developed/developing countries distinction. UNCTAD was created in 1966 on the basis of a General Assembly Resolution. Based on the conviction that “sustained efforts are necessary to raise the standards of living in all countries and to accelerate the economic growth of the developing countries”, the principal purpose of UNCTAD is defined in Article II as follows:

To promote international trade, especially with a view of accelerating economic development, particularly trade between countries at different stages of development, between developing countries and between countries between different systems of economic and social organization, taking into account the functions performed by existing international organizations.¹⁷¹

While UNCTAD’s founding instrument still appears to be relatively value-neutral in terms of its reference to developing countries, it already hints at the present problem of the proliferation of international organizations which is considered detrimental for the sake of policy coherence. Later documents and the entirety of its core activities are now being based on the distinction between developed and developing countries.¹⁷² This underscores a general trend of international organizations to proliferate the developed/developing countries distinction in their secondary documents and principal activities, in a way not envisaged in their founding and primary legal instruments.

9. International Financial Institutions and Development: The World Bank and the IMF

Generally the financial aspects of development are associated with “rich” developed countries unilaterally providing financial aid to “poor” developing or least-developed countries.¹⁷³ This is strongly reflected in the continuing use of the concepts of “development aid” or “official financial assistance” (ODA). Most likely, the existence of official development assistance in financial terms, which is propagated by several international financial institutions, national governments and a plethora of NGOs, is the main cause of the continuing association with developing countries being inferior to their so-called “superior” developed counterparts. This finance-based perception of inferiority is also to some extent institutionalized, if we think about the allocation of voting rights in the World Bank and the International Monetary Fund (IMF), the two central institutions created by the United Nations Monetary and Financial Conference in Bretton Woods in July 1944 with a view to establishing a postwar international monetary system.¹⁷⁴ This system of voting rights is currently being challenged by the so-called “BRIC countries” (Brazil, Russia, India and China) who argue that, for the IMF and the World Bank, “the main governance problem, which severely undermines their legitimacy, is the

¹⁷⁰ See Doha Development Agenda: Doha Work Programme: *The July 2008 package* <http://www.wto.org/english/tratop_e/dda_e/meet08_e.htm>.

¹⁷¹ General Assembly, *Establishment of the United Nations Conference on Trade and Development as an Organ of the General Assembly*, GA Res. 1995 (December 30, 1964).

¹⁷² See e.g. United Nations Trade and Development Conference, *Trade and Development Report 2009* <http://www.unctad.org/en/docs/tdr2009_en.pdf>.

¹⁷³ See e.g. Anthony Clunies-Ross, ‘Development Finance: Beyond Budgetary “Official Development Assistance”’ (2004) 26 Mich. J. Int’l L. 389, 389.

¹⁷⁴ Art. XII Section 5 Articles of Agreement of the International Monetary Fund (IMF) and Art. V Section 3 lit. a) of the Articles of Agreement of the International Bank for Reconstruction and Development (IBRD).

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unfair distribution of quotas, shares and voting power”.¹⁷⁵ It is also interesting to note that the very existence of financial development has come under attack.¹⁷⁶ The merits of such criticism cannot be discussed here, however. Instead the present discussion will aim to find out whether the current situation is also rooted in the legal foundations underlying the system governing the relation between finance and development under the aegis of the IMF and the World Bank. Both institutions were originally designed to ensure coherent economic policy-making at the global level in cooperation with the (failed) ITO. Since their inception they have come under criticism for their often inefficient and uncoordinated role in economic policy-making in combination with their involvement in international development assistance.¹⁷⁷ Moreover, there is a clear lack of policy coherence and institutional comity between the IMF, the World Bank and the WTO, which can only be seen as highly detrimental to their common as well as individual purposes.¹⁷⁸ These organizations, albeit partly separated, are hence at the core of the trade and development debate. To begin with the IMF, its principal objectives as laid down in the 1944 Statute are to promote international monetary cooperation, to facilitate the expansion and balanced growth of international trade and, especially, to “contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy”.¹⁷⁹ In the Statute, there are, however, few explicit references to “developing members”. They merely relate to operations of the fund, and balance of payments problems.¹⁸⁰ The main distinction between the Members of the IMF is economic and institutional, however, in the sense that Members’ voting rights are based on the quota they contribute to the IMF.¹⁸¹ As opposed to the general principle of one-country-one-vote, in this way, the IMF creates differences between its members in accordance with their financial contributions. Hence the IMF Statute hardly makes use of the developed/developing country distinction explicitly, but it does so implicitly. It also does so in its many activities, which include financial assistance for “low-income countries” for the purpose of poverty reduction and growth facilitation,¹⁸² debt relief for “poor countries”,¹⁸³ as well as emergency assistance in the wake of natural disasters and armed conflicts.¹⁸⁴

The second Bretton Woods organization, the World Bank, has developed from the International Bank for Reconstruction and Development (IBRD) that was created in 1944. Today it is supported by the International Development Association (IDA) and further complemented by three affiliates, the

¹⁷⁵ See Mu Xuequan, ‘BRIC countries call for reform of international financial institutions’ *Xinhua News Agency* (September 5, 2009) <http://news.xinhuanet.com/english/2009-09/05/content_11998707.htm>.

¹⁷⁶ For a recent account of such criticism, see Moyo, *supra* note 28.

¹⁷⁷ See also Joseph E. Stiglitz, *Globalization and Its Discontents* (Norton, New York 2002).

¹⁷⁸ See e.g. the *Agreement between the WTO and the IMF and the World Bank*, Decision adopted by the General Council at its meeting on November 7, 8 and 13, 1996, WTO Doc. WT/L/194 (November 18, 1996) and its Addendum, WT/L/194/Add.1 (November 18, 1996) <http://www.wto.org/english/thewto_e/coher_e/wt1194_e.doc>; see also Deborah E. Siegel, ‘Legal Aspects of the IMF/WTO Relationship: The Fund’s Articles of Agreement and the WTO Agreements’ (2002)96 A.J.I.L. 561.

¹⁷⁹ Art. 1 Articles of Agreement of the International Monetary Fund, adopted at the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, July 22, 1944 (entry into force on December 27, 1945), last amended on November 11, 1992 <<http://www.imf.org/external/pubs/ft/aa/aa.pdf>>.

¹⁸⁰ Art. V (“Operations and Transactions of the Fund”) Section 12 (e) and (f), VI Section 2, and Schedules B and D; *id.*

¹⁸¹ Art. XII Section 5 Articles of Agreement of the IMF.

¹⁸² See the Factsheet on the Poverty Reduction and Growth Facility (PRGF) <<http://www.imf.org/external/np/exr/facts/prgf.htm>>.

¹⁸³ See the Factsheet on Debt Relief Under the Heavily Indebted Poor Countries Initiative <<http://www.imf.org/external/np/exr/facts/hipc.htm>>.

¹⁸⁴ See the Factsheet on IMF Emergency Assistance: Supporting Recovery from Natural Disasters and Armed Conflicts <<http://www.imf.org/external/np/exr/facts/conflict.htm>>.

International Finance Corporation (IFC), the Multilateral Guarantee Agency (MIGA), and the International Center for the Settlement of Investment Disputes (ICSID). The original as well as the amended version of the Agreement establishing the IBRD makes a single reference to “less developed countries”, when laying out the purposes of the Bank as follows:

- (i) To assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the reconversion of productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources in less developed countries.¹⁸⁵

A contextual reading of this paragraph, however, indicates more a reference to the economic degree of development rather than an uncritical and stereotypical categorization of countries in two or more categories.

Without going into further detail, the examples of the IMF and the World Bank reveal first that the developed/developing country distinction was hardly used in the more distant past and that it grew historically over the decades following World War II. Second, they also uncover the central *raison d'être* of their existence, namely to provide a platform for cooperation in economic policy-making and monetary stability in order to assist countries in distress and to prevent such distress in the future. Past and present episodes, from the two World Wars to Hurricane Katrina in the US (2005), Typhoon Sidr in Bangladesh (2007), or Typhoon Morakot in Taiwan (2009), reveal that all sorts of disasters, whether armed conflict or natural disasters, can strike any country, regardless of whether it is (wrongly) called a “developed” or a “developing” country. Hence what is needed is not an international organization based on differential or “discriminatory” categories of membership but an efficient global framework for mutual help and assistance serving the relevant constituencies’ special needs.

10. *International Criminal Law*

In accordance with the fundamental principle of equality before the law, it would be a great surprise if in the area of international criminal law there should be a distinction made in the provision of international justice and peace. Nonetheless, the controversy over several theories of crime causation, ranging from their origin in genetics to social conditions, is still alive.¹⁸⁶ Both extremes of theories, namely those believing in “born criminals” and those believing in social conditions being responsible for deviant behavior, can be abused for the purpose of establishing the inferiority of certain countries as compared to others. For instance, the criminal character of a nation can be made responsible for the prevalent conditions in the country, at the same time as the prevalent conditions can be used to justify why crimes are more frequent in some countries than others. A similar approach was also applied in the colonization process which has survived in the distinctions between civilized and non-civilized or “primitive” nations as well as developing and developed countries. Similar sentiments using the same flawed logic occasionally surface in the context of international criminal tribunals, which are widely perceived as the exercise of “victor’s justice”.¹⁸⁷ In this context, I feel it is necessary to clarify that it is believed here that these theories are at their best indicative of certain trends, but are far from being capable of explaining the true causes of deviant behavior. Moreover, most of these theories appear to be based on the same false foundations which are responsible for the continuous use of the flawed

¹⁸⁵ Art. 1 of the Articles of Agreement for the International Bank of Reconstruction and Development, December 27, 1945, 2 U.N.T.S. 134.

¹⁸⁶ See e.g. Jan Gorecki, ‘Crime Causation Theories: Failures and Perspectives’ (1974) 25 *The British Journal of Sociology* 461.

¹⁸⁷ See e.g. Mohau Pheko, ‘It seems the West’s War-Crimes Tribunals Are Reserved for Africans’ *Sunday Times (South Africa)* (July 27, 2008) 21.

developed/developing country distinction. This brings us back to the question of whether the body of international criminal law makes use of this distinction. Fortunately, and contrary to policy and media reports and statements, this concern appears unfounded in the legal sphere, since the Rome Statute of the International Criminal Court (ICC), as a permanent institution vested with the power to exercise its jurisdiction over persons for the most serious crimes of international concern, knows no such distinction and follows a truly “constitutional” model, i.e., in the sense of a universal and inclusive approach to global justice. Its Preamble states, *inter alia*:

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time [...]

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished [...],

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes [...].

However, this ideal picture is somehow shattered first by the absence of some of the largest and most important countries of the world’s community from the list of 110 countries that have ratified the Statute, “developing” and “developed” alike, such as India, China, Russia, Saudi Arabia, Singapore, Israel, and the United States. Another unfortunate element in the current situation is the long list of *ad hoc* international criminal tribunals or special courts with limited jurisdiction which, however, is also linked to the late creation of the ICC in 1998.¹⁸⁸ These *ad hoc* tribunals are often perceived as bearing an imperialistic element of victor’s justice, being biased, or providing undue interference in “national affairs”.

In accordance with its basic principles, the area of international criminal law rightly avoids use of the so-called “developing/developed country” dichotomy. It even transcends to some limited extent the present fragmentation of international law and the exaggerated role of national states. Moreover, it underscores the fact that many of the constant challenges that the purpose of dual function of criminal sanctions pursues, that of prevention (deterrence or general prevention) and that of punishment (special prevention), are directly related to the dynamic evolution of the underlying societies it is meant to serve. It also emphasizes the primordial role of the individual as a “subject of international law” next to states and organizations. However, there is need for great care to be taken not to be influenced by the ongoing stereotypical perception, and frequent and uncritical use of the distinction by other areas and to enhance the legal framework’s universal jurisdiction with a view to greater justice in a global society.¹⁸⁹

11. General Public International Law

Next to various special international treaty regimes, there exist a few important international conventions which form the foundation of public international law. These conventions address general problems related to the functioning of international law and to the practice of states and international organizations. Like the Statute of the ICJ mentioned before, these documents contain useful norms for the interaction between states and hence also between so-called “developing” and “developed” countries. This is why it is interesting to look briefly at some selected examples of this body of international laws. Some prominent examples are the Vienna Convention on Diplomatic Relations (1961), the Vienna Convention on Consular Relations (1963), the Vienna Convention on the Law of

¹⁸⁸ See *e.g.* the International Criminal Tribunal for the Former Yugoslavia (1993); International Criminal Tribunal for Rwanda (1994); the Special Court for Sierra Leone (2002); the Special Tribunal for Lebanon (2005); the Special Tribunal for Cambodia (2003).

¹⁸⁹ See *also* Eric K. Leonard, ‘The International Criminal Court and Global Governance: Justice Beyond State Sovereignty’ (2004) 1 *Eyes on the ICC* 117.

Treaties (1969), the Vienna Convention on Succession of States in respect of Treaties (1978), and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986). For quite obvious reasons rooted in the notion of justice, it is with the sole exception of the ICJ Statute that none of these conventions differentiates between “developing” and “developed” countries.

12. *General Private International Law*

With the terms “countries”, “nations”, or “states” often being used synonymously, it comes as no surprise that a vast amount of public international law documents use the concept of “developing countries”. However, the areas of international private law or private international law – from the angle of global constitutionalism – also need to be included in this brief analysis. For instance, with the Commission on International Trade Law (UNCITRAL) the United Nations system also maintains an organization competent for the international harmonization of private law.¹⁹⁰ One of the most prominent conventions of UNCITRAL is the United Nations Convention on Contracts for the International Sale of Goods (CISG), adopted in 1980, which aims at removing obstacles to international trade caused by disparities in the respective national laws. The CISG, like other related conventions with one exception,¹⁹¹ makes no reference to “developing countries”.

Another good example of the harmonization of international rules in the area of private law is given by the various conventions drafted by the International Institute for the Unification of Private Law, UNIDROIT. Some of them touch upon issues which may be of particular relevance to the present analysis. For example, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects deals with a subject of illicit trade in cultural property. Such illicit trade is often caused by the insufficient protection and preservation of cultural objects by so-called “developing countries” which often lack adequate funds for this purpose. At the same time many of the important cultural sites that contain such objects are found in the so-called “developing world”.¹⁹² Another distinction, therefore, is that of “art-rich” and “art-poor” or “art-collecting” countries which in the context of cultural property appears to make more sense.¹⁹³ In any event, the said UNIDROIT Convention does not contain a reference to “developing countries”.

Another organization active in the field of private international law is the Hague Conference on private international law (HCCH), the purpose of which is “to work for the progressive unification of the rules of private international law”. So far it has drafted several conventions covering an extensive scope of private law. Neither the Statute nor the 39 conventions analyzed, however, contain a reference to developing countries.¹⁹⁴

In sum it is therefore safe to contend that the distinction between developing and developed countries is of no or little relevance to the areas of private international or international private law. This is because private persons are at the center of their focus. In a globalized world of mutual

¹⁹⁰ GA Resolution 2205(XXI) of December 17, 1966, Establishment of the United Nations Commission on International Trade Law <<http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/005/08/IMG/NR000508.pdf?OpenElement>>.

¹⁹¹ United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (2008) <http://www.uncitral.org/pdf/english/workinggroups/wg_3/CTCRotterdamRulesE.pdf>; the United Nations Convention on the Carriage of Goods by Sea (1978) <http://www.uncitral.org/pdf/english/texts/transport/hamburg/hamburg_rules_e.pdf>; but see the Convention on the Liability of Operators of Transport Terminals in International Trade (1991) <http://www.uncitral.org/pdf/english/texts/transport/ott/ott_e.pdf>, which in the Preamble gives special emphasis to the situation of developing countries.

¹⁹² See e.g. UNESCO, *World Heritage List* <<http://whc.unesco.org/en/list/>>.

¹⁹³ See Robin Hardy Villanueva, ‘Free Trade and Protection of Cultural Property: The Need for An Economic Incentive to Report Newly Discovered Antiquities’ (1995) 29 *GW J. Int’l L. & Econ.* 547.

¹⁹⁴ The HCCH Conventions are available at <http://www.hcch.net/index_en.php?act=conventions.listing>.

interdependence, where transnational actions between private persons and public entities are increasing, it is however necessary to converge the areas of public and private international law and to “constitutionalize” them to form a coherent whole. One concrete step in this direction would be to strengthen the private individual vis-à-vis the state in the global arena, for instance, through the granting of direct effect to international treaties and *locus standi* of private persons before international courts and tribunals.

13. Other International or Regional Organizations

There is a great plethora of other specialized or regional international organizations of which only a few examples will be discussed here. There are first of all the Group of Eight or G8 meetings, which expanded from the original G6 and then G7 meetings, which were initiated in 1975 among the big economic powers of the northern hemisphere (i.e., Canada, France, Italy, Germany, Japan, Russia, the United Kingdom and the United States). These meetings are clearly held in the spirit of the North-South or developed/developing countries distinction. Nonetheless, more recently these lines of distinction are becoming blurred and there have already been meetings including those of the five so-called developing countries (i.e., Brazil, India, China, Mexico and South Africa), or more recently in the formation of the G-20.¹⁹⁵ Another organization that appears to be based on this distinction is the Organization for Economic Co-operation and Development (OECD), which was created in 1960 and presently counts 30 members. The Preamble of the founding instrument reads as follows:

Believing that the economically more advanced nations should co-operate in assisting to the best of their ability the countries in process of economic development [...].¹⁹⁶

The same document, however, recalls that the predecessor of the OECD was the Organization for European Economic Co-operation (OEEC), an organization created in 1948 for the reconstruction and development of Europe following the devastation caused by World War II. The example of the OEEC and the OECD shows indeed the evolutionary character of the world and that what is developed today might not be developed tomorrow or vice versa.

Another merely European regional organization is the Council of Europe, created in 1948, the founding document of which does not contain any reference to developing countries.¹⁹⁷ Nonetheless, the organization is based on the spirit of cooperation and solidarity with a view to realizing the objective of greater economic and social progress of the countries in Europe. Similarly, the European Union’s current membership of 27 countries is also characterized by relatively large differences in economic development when measured in GDP per capita. The primary sources of the EU make no reference to developing countries when it comes to their own membership. They nonetheless contain several provisions and instruments which address the economic disparities among Members through provisions on social and economic cohesion and other instruments or funds.¹⁹⁸ Due to the existence of former colonies of some of the EU members, the founding treaties contained references to overseas territories, which were later replaced by the heading “Development Cooperation”, which states as follows:

¹⁹⁵ On the G-20, see also the G-20 Homepage <<http://www.g20.org/>>.

¹⁹⁶ Recital 7 of the Preamble of the Convention on the Organization for Economic Co-operation and Development, adopted in Paris on Dec. 14, 1960.

¹⁹⁷ Statute of the Council of Europe, adopted in London on 5 May 1949.

¹⁹⁸ Art. 146-148 and 158-162 Treaty Establishing the European Community (TEC).

Community policy in the sphere of development cooperation, which shall be complementary to the policies pursued by the Member States, shall foster:

- the sustainable economic and social development of the developing countries, and more particularly the most disadvantaged among them,
- the smooth and gradual integration of the developing countries into the world economy,
- the campaign against poverty in the developing countries.¹⁹⁹

Under the concept of development cooperation a great number of bilateral cooperation or partnership agreements with other countries or regions have been signed. One well-known example is the EU-ACP Partnership agreement which grew out of the Lomé Conventions.²⁰⁰

In contrast, it is also interesting to look at the African Union, which was created by 53 African states in order to promote the socio-economic development of Africa. Despite great disparities between its members, the Constitutive Act knows no distinction between developed and developing countries but instead aims at promoting a “sustainable development at the economic, social and cultural levels as well as the integration of African economies”.²⁰¹ Although it only counts three members – Canada, Mexico and the United States – a strong controversy surrounds the creation of the North American Free Trade Agreement (NAFTA), which is seen as a trade pact between particular members of the so-called “developed” and of the “developing world”.²⁰² The text of the NAFTA agreement, however, knows no such distinction. Planned to introduce cooperation in an even larger context, the draft text of the FTAA, a free trade agreement covering the entire Americas, instead makes several references to this distinction. It grants them special and preferential treatment in several areas, such as antidumping, national treatment, IPRs and dispute settlement.²⁰³

Another interesting regional organization or forum is the Asia-Pacific Economic Forum (APEC) which was launched in 1989 and currently combines 21 Members of a distinctive cultural, political as well as economic background.²⁰⁴ A review of the collection of the Annual Ministerial Meetings held by the APEC Members between 1989 until 2008, however, reveals only one single reference to “developing countries” and one to “least-developed countries”. This reference appears in the 2004 Ministerial Meeting in which Ministers reaffirm the need “to facilitate access by developing countries to medicines to address public health problems such as HIV/AIDS, TB, malaria and other epidemics” and on questions related to market access.²⁰⁵ There are, however, relatively frequent references to the term “developing economies” and “least developed economies”.

¹⁹⁹ Article 177 of the Treaty Establishing the European Community (TEC).

²⁰⁰ Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on June 23, 2000, [2000] O.J. L 317/3 (December 15, 2000).

²⁰¹ Art. 3 lit. j) Constitutive Act of the African Union, done at Lomé, Togo, this 11th day of July, 2000 <http://www.african-union.org/root/au/AboutAu/Constitutive_Act_en.htm>.

²⁰² North American Free Trade Agreement (NAFTA) between the Government of Canada, the Government of Mexico and the Government of the United States, December 17, 1992, (1993) 32 I.L.M. 605.

²⁰³ Free Trade of the Americas Draft Agreement <http://www.ftaa-alca.org/FTAADraft03/TOCWord_e.asp>.

²⁰⁴ See the APEC Homepage, ‘Member Economies’ <http://www.apec.org/apec/member_economies.html>.

²⁰⁵ See the Joint Statement of the Sixteenth APEC Ministerial Meeting, held in Santiago, Chile, between November 17-18, 2004, and the Joint Statement of the Twelfth APEC Ministerial Meeting, held in Bandar Seri Begawan, Brunei Darussalam, between November 12-13, 2000 <http://www.apec.org/apec/ministerial_statement.html>.

A similar regional organization is found in the Association of Southeast Asian Nations (ASEAN), which also combines ten culturally, politically and economically distinct Members. Among their principal objectives is the alleviation and reduction of the development gap within ASEAN through mutual assistance and cooperation. In this regard, the founding document and the most recent version of its Charter aim at ensuring the sustainable development for the benefit of present and future generations and alleviating poverty and narrowing the development gap within ASEAN.²⁰⁶ However, they manage to do so without the classification of some countries as “developing countries”.

No references are contained in the documents of other special regional organizations, which are made of equally diverse member countries, such as the military pact of the North Atlantic Treaty Organization (NATO),²⁰⁷ the Organization of the Petroleum Exporting Countries (OPEC),²⁰⁸ or the Charter of the Shanghai Cooperation Organization (SCO).²⁰⁹

14. Résumé

Vast as it is, the present review of international legal documents for references to the developing/developed country dichotomy is incomplete. It nonetheless allows for a few preliminary conclusions on the usage of the terminology against the backdrop of the current complexity of global regulatory affairs. First, it can be stated that the usage of the developing/developed country dichotomy increased during the years following the establishment of the United Nations to the present days. This is mainly due to the de-colonization process that took place in the past half century, which also brought the number of UN Members from the original 51 to the current 192 Member states. A second finding is that the developing/developed country dichotomy is less likely to be found in the founding statutes or constitutions of the many international organizations. In contrast, their subsequent treaties and especially policy documents make use of it more frequently. This has certainly to do with the historical context, but can also be attributed to the fact that in the core legal areas or the constitutional sphere such categorization is against the principle of equality. This is reflected, for instance, in the various treaties belonging to the sphere of general public international law or those pertaining to the field of international criminal law. The principle of equality also includes the cultural sphere. This means that the application of the developing/developed country dichotomy to the degree of cultural development is ruled out.

A third finding is that the area of private international law, which from a constitutional perspective ought to be included in the framework of an emergent global legal order, knows no such distinction. Generally, the private sphere is less prone to make use of the dichotomy. This has to do with the fact that here not states but private individuals are the core agents or main addressees of the international legal norms. As a fifth point, it is surprising that sometimes the same international organization has adopted treaties which make reference to the distinction and others which do not. This may vary according to the historical context, the respective composition of the treaty regime, and the subject matter of the relevant treaty. It also illustrates the “clash of international organizations” or, in other words, the general fragmentation of international law and the many inconsistencies between the

²⁰⁶ ASEAN Declaration (Bangkok Declaration) 1967 <<http://www.aseansec.org/1629.htm>>; and see the ASEAN Charter <<http://www.aseansec.org/ASEAN-Charter.pdf>>.

²⁰⁷ North Atlantic Treaty, done at Washington on 4 April 1949 <http://www.nato.int/cps/en/natolive/official_texts_17120.htm?selectedLocale=en>.

²⁰⁸ Organization of the Petroleum Exporting Countries (OPEC), *OPEC Statute* <<http://www.opec.org/library/opec%20statute/pdf/os.pdf>>.

²⁰⁹ See the Charter of the Shanghai Cooperation Organization (SCO) <<http://www.sectsc.org/EN/show.asp?id=69>>.

different treaty regimes.²¹⁰ As a last point, it is necessary to differentiate between general and uncritical references to “developing countries” and references which suggest a more nuanced and contextual approach, such as those found in the concept of “developing economies” or the phrase “common but differentiated responsibilities and respective capabilities and their social and economic conditions” used in the context of cooperation in environmental matters.

In sum, this comparative analysis demonstrates that the distinction is frequently used in international documents and that its use has increased over the years. At times, it may prove to be a useful distinction when based on a relatively clear context. At other times, it appears as a standard phrase, devoid of legal and substantive content. From a legal perspective, and in particular a global constitutional perspective, it must be deemed incompatible with the basic principles of law. Before a final conclusion is drawn, however, it is necessary to analyze other areas.

VII. Comparative Constitutional Law

A rolling stone gathers no moss.

Proverb

I. *Aspects of Development in National Constitutions*

The global governance debate also bears a “constitutional” trait.²¹¹ National constitutional systems differ from the system underlying the nascent global order in many ways. Nonetheless, they may serve as useful models for the debate about the architecture of global governance. One distinct element is first and foremost their degree of establishment; while most national (or supra-national) constitutional systems have matured, a global constitutional system is at its best emerging in fragments. This fragmentation also explains the ongoing debate about a global constitutionalization process. Seen from this angle, national constitutions have attained a greater systemic unity which allows for a more coherent balancing of divergent interests and their peaceful mediation. They are also more inclusive, especially in the sense of their legal involvement of citizens, i.e., the rights and duties they bestow upon private persons. They also fulfill the need for a projection of ideas and ideals into the future. In this, they often struggle with adapting to the changes in the society which ultimately constitutes them. Almost paradoxically, constitutions provide for continuity and change in the development of their respective societies. These elements are at present widely absent at the global level. The absence of matured structures, institutions and procedures, however, is also an asset in the current context, which is characterized by ever faster changes. The survival of constitutional systems, it is argued here, largely depends then on the ability to account for and respond to changes that occur in their respective societies. In this sense, constitutional systems have a significant role in the development of the societies which they constitute. The following sections are an attempt to draw parallels between constitutionalism at the national level and the global governance debate. I will identify a few selected provisions in four selected constitutional systems which bear such dynamic elements that address the development of their respective societies.

²¹⁰ See e.g. Wolfram Karl, ‘Conflicts between Treaties’, in Rudolf Bernhardt, ed., *Encyclopedia of Public International Law*, vol 7, (North Holland, Amsterdam 1984) 467; Manfred Zuleeg, ‘Vertragskonkurrenz im Völkerrecht’ (1977) 20 *German Yearbook of International Law* 246; Wilfred Jenks, ‘The Conflict of Law-Making Treaties’ (1953) *B.Y.I.L.* 401; Charles Rousseau, ‘De la compatibilité des normes juridiques contradictoires dans l’ordre international’ (1932) *Rev. D.I.P.* 10.

²¹¹ See e.g. Kennedy, *supra* note 4, 853-860.

2. *The Constitution of the United States of America (March 17, 1789)*

I will begin with one of the oldest and shortest constitutions, the Constitution of the United States of America. The US Constitution was adopted on September 17, 1787 and has been amended 27 times since then. It is the supreme law of the US and its current 50 states (including one federal district). Although the US is made of 50 quite distinct states spread across a wide territorial area, the Constitution knows no reference to “developing countries”. However, it contains some general references to aspects of development, such as in the Preamble, which reads as follows:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Normative aspects are found notably in the objectives to “form a more perfect Union”, to “establish justice” and to promote the “general welfare”. These objectives are all formulated in an open manner, indicating the dynamic nature of the affairs the Constitution is supposed to govern. A more indirect expression of this dynamic nature is found in Amendment 14 “Citizens Rights”, which bars States from depriving any person of life, liberty, or property, without due process of law. Citizens’ rights can be taken as a precondition for their ability to develop and lead the life they want. In this respect, it is the Declaration of Independence of July 4, 1776, which specifies the developmental aspects. The Declaration is not part of the Constitution but is considered a statement of principles through which the US Constitution should be interpreted. In the second sentence of the Declaration, it reads as follows:

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed, by their CREATOR, with certain unalienable Rights, that among these are Life, Liberty, and the *Pursuit of happiness*. [Italics added]

The “pursuit of happiness” can be interpreted as a legal recognition of the dynamic nature underlying this world. From a regulatory perspective it also means that “happiness” is not defined or regulated but its “pursuit” is laid down. There is a controversy surrounding the meaning of this phrase, mainly as to whether it means that citizens have the right merely to “pursue” or also to “obtain” it.²¹² Probably this distinction is in itself flawed, as happiness once it is obtained, usually ends. This is also the case with development, which once it is obtained, it will quickly fade out in the future. Hence, here too, a dynamic understanding must be applied to give the phrase its full meaning and allow it to be fully realized in a sustainable way.

3. *The Constitution of India (January 26, 1950)*

The Indian Constitution was enacted on November 26, 1949. The Republic of India is presently constituted by 28 states and seven Union Territories. Since its entry into force on January 26, 1950, the Constitution has been frequently amended and has served as the supreme legal framework for a country that is not only the world’s second most populous, but also a country with an extremely diverse religious, political, economic, and cultural background.²¹³ This background certainly constitutes an enormous challenge in the development of the country. From a constitutional perspective, it is therefore interesting to point out one legal aspect of particular relevance to the dynamism underlying development in general. In the context of the Indian Constitution, this element is found in the so-called “directive principles of state policy” laid down in Articles 36–51. Together with

²¹² See also Arthur M. Schlesinger, ‘The Lost Meaning of “The Pursuit of Happiness”’ (1964) 21 WMQ 325, 325.

²¹³ For an English version of the Constitution of India, see the Webpage of the Ministry of Law and Justice of the Government of India <<http://lawmin.nic.in/coi/coiason29july08.pdf>>.

fundamental rights and fundamental duties, they form the so-called “trilogy” or “conscience of the Constitution”.²¹⁴ In Art. 38, the promotion of the welfare of the people is laid down as follows:

38. State to secure a social order for the promotion of welfare of the people.—1[(1)] The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

2[(2)] The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.]

The central provision of legal importance is Article 37, which states that the directive principles are not enforceable by any court. It further stipulates that they are “nevertheless fundamental in the governance of the country” and that it shall be the “duty of the State to apply these principles in making laws”. This is in my eyes akin to the principle of progressive development as enshrined in the IESCR and points to the fact that development is a process and not a certain state. In other words, the realization of formulated objectives cannot be achieved at once by a mere legislative act but usually requires some time and continuous effort. That means a mere result is not achieved by its codification in a legal text but usually takes serious efforts over a certain time period.

4. *The Constitution of the People’s Republic of China (December 4, 1982)*

The present Constitution of the People’s Republic of China was adopted on December 4, 1982 and has been revised by the National People’s Congress four times since then.²¹⁵ The 1982 Constitution coincides with the beginning of the opening of China and most of all it is a remarkable record of development. This is even more remarkable given that it is the most populous country in the world. The Preamble of the Constitution recalls the history of the Chinese people and the “great and earthshaking historical changes” that took place throughout the twentieth century. The Preamble is equally replete with normative elements that illustrate in manifold ways the striving for development. This striving is expressed, for instance, in the concept of “struggle” or 努力 or 奋斗, which means “to struggle” or “to work hard”. These struggles were first for “national independence and liberation and for democracy and freedom” and to overthrow “the rule of imperialism, feudalism and bureaucrat-capitalism”. It also refers to a class struggle which will continue to exist within certain bounds for a long time to come. Finally, it also emphasizes the role of the Chinese People’s Political Consultative Conference in “promoting friendship with other countries and in the struggle for socialist modernization and for the reunification and unity of the country”. Finally, the struggle also includes efforts to safeguard the unity of the ethnic groups and the combat against big-ethnic chauvinism, mainly Han chauvinism, and also local-ethnic chauvinism. To this end, the state is called to do its utmost to promote the common prosperity of all ethnic groups. In sum, the Preamble explains that the Constitution is an affirmation in legal form of the “struggles of the Chinese people of all ethnic groups”. As such it “defines the basic system and basic tasks of the state; it is the fundamental law of the state and has supreme legal authority”.

All in all, the Preamble reflects a highly dynamic spirit giving great importance to development. This spirit is underscored by the principles of equality, unity and mutual assistance internally as well as externally in the development of diplomatic relations and economic and cultural exchanges with other countries. In this context, it is interesting to note that China has signed several bilateral trade or

²¹⁴ See Mahendra P. Singh & Surya Deva, ‘The Constitution of India: Symbol of Unity in Diversity’ (2005) 53 *Jahrbuch des Öffentlichen Rechts der Gegenwart* 649, 652.

²¹⁵ For an English version of the Constitution of the PRC, see the Chinese Government’s Official Webportal <http://english.gov.cn/2005-08/05/content_20813.htm>.

partnership agreements, none of which refers to the other party as a “developing country”.²¹⁶ In sum, China’s rise and development in the past years is remarkable and has spurred speculations about the right model for development also in other parts of the world and the general consequences for geopolitics and the world economy.²¹⁷ It would be interesting to know to what extent the Constitution and its underlying spirit has contributed to it.

5. The “Basic Constitutional Charter” of the European Union

As was mentioned before, the European Union knows no direct reference to developing countries when it comes to its internal governance. However, frequent use of the concept features in its external relations. In this subsection the focus is on the dynamic aspect of its “constitutional” foundation laid down in the Treaties on which the EU is built. Here we need to mention first the continuing objective of “creating an ever closer union among the peoples of Europe”.²¹⁸ This open-ended formulation of the *finalité* of European integration continues to cause confusion about the ultimate goal to be achieved. With such formulation it remains at least formally unclear whether the European Union shall develop into a union of states, a federal state, or something entirely new. While this arguably creates some uncertainty, it is in truth the beauty of it, given that the future remains widely unknown to us. In other words, perhaps the ultimate achievement is the process and not a certain stage to be achieved, which would certainly mean its end. The key to the problem of the EU’s *finalité* is hidden in Recital 5 of the Preamble of the first Treaty, the one Establishing European Coal and Steel Community (ECSC), where it reads as follows:

RESOLVED to substitute for age-old rivalries the merging of their essential interests; to create, by establishing an economic community, the basis for a broader and deeper community among peoples long divided by bloody conflicts; and to lay the foundations for institutions which will give direction to a destiny henceforward shared.²¹⁹

In this paragraph, the emphasis is hence not on the final outcome of the process of European integration but instead on a “destiny henceforward shared”. Unfortunately, this valuable dictum no longer features in the present version of the so-called “basic European Constitutional Charter”²²⁰, the Lisbon Treaty.²²¹ Nonetheless, perhaps it can be said to continue in the principle of sustainable development which prominently features in the Treaties, notably in the context of the promotion of economic and social progress, the internal market, the Earth, the management of natural resources, as

²¹⁶ See *e.g.* Free Trade Agreement between the Government of the Islamic Republic of Pakistan and the Government of the People’s Republic of China; Closer Economic Partnership Arrangement between China and Macau; Closer Economic Partnership Arrangement between China and Hong Kong; Free Trade Agreement between the Government People’s Republic of China and the Government of the Republic of Chile; Notification of China’s Accession to the Bangkok Agreement; Framework Agreement on Comprehensive Economic Cooperation between the Association of South East Asian Nations and the People’s Republic of China; Agreement on Trade in Services of the Framework Agreement on Comprehensive Economic Co-operation between the People’s Republic of China and Association of South East Asian Nations.

²¹⁷ See *e.g.* Randall Peerenboom, ‘China: The Fire-Breathing Dragon and the Cute, Cuddly Panda: The Implication of China’s Rise for Developing Countries, Human Rights, and Geopolitical Stability’ (2006) 7 Chi. J. Int’l L. 17.

²¹⁸ Recital 13 of the Preamble and Art. 1 of the Treaty on European Union (TEU) as well as Recital 1 of the Preamble of the Treaty Establishing the European Community (TFEU); see the consolidated versions of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) (including the Charter of Fundamental Rights of the European Union (EU Charter)), March 30, 2010, [2010] O.J. C 83/01 [Lisbon Treaty (LT)].

²¹⁹ Treaty Establishing the European Coal and Steel Community, signed at Paris, on April 18, 1951, 261 U.N.T.S. 142.

²²⁰ See European Court of Justice, Case 294/83, *Parti écologiste “Les Verts” v European Parliament*, [1986] E.C.R. 1339 at para. 23.

²²¹ Consolidated versions of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), March 30, 2010, [2010] O.J. C 83/01 [Lisbon Treaty (LT)].

well as environmental protection and the improvement of the quality of the environment.²²² The concept of sustainable development hence plays an important role. In the achievement of a sustainable development and other expressly mentioned objectives, one regulatory approach undertaken by the EU deserves our special attention. This approach is found in the use of so-called “integration clauses” which – as their name aptly suggests – shall contribute to greater coherence in EU policy making.²²³ Instead of the previously used exceptions (which are still widely used in international law), this regulatory approach provides not only greater coherence but is also characterized by a certain degree of dynamism, which is deemed to be of great significance for the realization of the objective of a sustainable development.

6. *Résumé*

The brief analysis of the preceding four constitutional systems was selective in trying to locate a few concepts and instruments which reflect elements of *panta rei* in their respective constitutional legal texts. As different as the history, the background and the objectives of each constitutional document may be, they all contain elements pointing out the dynamic nature underlying the life of the societies by which and for which they were drafted, to govern their affairs henceforward. In this respect it is noteworthy that none of these constitutions knows a developed/developing dichotomy for the territories they govern. This is because constitutions take a more balanced stance. They also include the rights and duties of individuals and do not merely focus on nation states and their mutual relations. This is one major aspect to which the constitutionalization (or global governance) debate can contribute at the global level. Therefore beginning to dismantle the developing/developed dichotomy is a first constructive step to this end.

VIII. Conclusion

No state is forever strong or forever weak. If those who uphold the law are strong, the state will be strong; if they are weak, the state will be weak.

Han Fei Tzu²²⁴

For millennia civilizations have struggled with and tried to bring about change. In this struggle they have also invariably succumbed to change. In the past, however, they have defined their success in relation to other competing civilizations. The present state of the world and our available technological means of transport, travel, and communication permit and also mandate a new level of understanding of change in a global dimension. To this end, we need to do our best to use the available means if we plan to tackle the present challenges and realize our goals for the future. Possibly for the first time in history, we face the privilege and stand the chance of establishing a global civilization where the existential struggle is not staged in conflicts between different competing civilizations, whether the differences are religious, political, economic, cultural, philosophical or linguistic in character. Instead, and as long as we can relinquish the tendency of a merely dualist thinking between antagonistic concepts, we may well change the conflict to a cooperative effort of bridging the gap between the

²²² Recital 9 of the Preamble, Art. 3 (1) and (5), 21 (2) lit. h. TEU, Art. 6 TFEU and Recital 3 of the Preamble and Art. 37 of the Charter of the Charter of Fundamental Rights of the EU, *supra* note 218.

²²³ Art. 11 TFEU and Art. 37 EU Charter (Environment), Art. 9 and 147 (2) TFEU (Employment), Art. 167 (4) TFEU (Culture), Art. 168 (1) TFEU (Public Health), Art. 12 TFEU and Art 38 EU Charter (Consumer Protection), and Art. 3 (3), 174, 175 TFEU, Art. 36 EU Charter and Protocol (No. 28) (Economic, Social and Territorial Cohesion). For a historical account of the introduction of these clauses, see R. Lane, “New Community competences under the Maastricht Treaty” (1993) 30 C.M.L.R. 939.

²²⁴ Han Fei Tzu, *Basic Writings* (Columbia University Press, New York 1964) 21 (Burton Watson (tr)).

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inner world of thoughts and ideals and their outer manifestations. Linking this gap is also one of the fundamental functions of law and normative change and the same is also expressed in the focus of global governance on how we are governed and how we want to be governed. To contribute to this debate, the preceding sections have essentially contested the concept of “developing countries” in its use in opposition with so-called “developed countries”.²²⁵ The grounds on the basis of which the concepts have been contested and the reasons why this distinction should be overcome reside first and foremost in their inability to account for *change* as an important constant in life. This is supported by the fascination for change, in which science, religion and the arts widely concur in their endeavors and their results. By contrast, the developing/developed country dichotomy creates an artificial distinction, the main value of which resides perhaps in a momentary glimpse into a phenomenon of limited scope in both time and space. It also threatens to engrave in stone the status quo, thus hampering necessary changes and improvements to it. It is thus incapable of explaining some of the rapid changes taking place; and as such it is unqualified to provide a long-term perspective based on the actions of the many different actors, from individuals to states and to international organizations, involved. This is also reflected in the analogy between the uncertainty surrounding the measurement of the momentum and position of subatomic particles with the current stage and future path of development of societies or countries. This incongruence between the situation as we perceive and subsequently evaluate it and the situation that we want to see established in the future leads to a second ground for abandoning the dichotomy, which is cognitive. Since the classification into developing and developed countries often carries an uncritical projection of one area (e.g. the degree of industrialization) into another area (e.g. the level of education), it obstructs a comprehensive view, distorting not only much significant data but also blinding us in the design of coherent global policies. This was largely established through the analysis of the use of the concept in various international legal instruments. This analysis has not only shown great inconsistencies in the concept’s use but also confirmed the ongoing process of fragmentation of international law and its respective institutions.²²⁶ Most of all, it also showed that even in the attempts to present an accurate image of the state of the world, many facts and figures, such as those related to financial debt, public health, labor conditions and natural disasters, are no longer reliable when applied to the developed/developing country distinction. They are totally unreliable and thus unacceptable in the framework of a debate which focuses on the design of a global governance structure for future generations. In the context of such normative focus, the global governance debate can learn from the experiences of existing national or supranational constitutional systems. These constitutional systems not only widely ignore such a distinction among their respective states or provinces but also give greater credentials to private persons. They all share, albeit to a different degree and with different objectives, open-ended concepts which allow for continuity and change and most of all, continuity in change. The questions of how to provide continuity in change and what kind of architecture to adopt for a global legal framework appear to be at the heart of the global governance debate. In this respect, I would advocate, a common vocabulary for deliberations taking place as an indispensable first step towards the creation of a much needed global governance order.

²²⁵ See W.B. Gallie, ‘Essentially Contested Concepts’ (1955-1956) 56 Proceedings of the Aristotelian Society 167.

²²⁶ See also Pierre-Marie Dupuy, ‘A Doctrinal Debate in the Globalisation Era: On the “Fragmentation” of International Law’ (2007) 1 European Journal of Legal Studies 1; Gerhard Hafner, ‘Pros and Cons Ensuing from Fragmentation of International Law’ (2004) 25 Mich. J. Int’l L. 849; Pierre-Marie Dupuy, ‘L’Unité de l’ordre juridique’ (2002) 297 Rec. des Cours 9; Cesare P. R. Romano, ‘The Proliferation of International Judicial Bodies: The Pieces of the Puzzle’ (1999) 31 N.Y.U. J. Int’l L. & Pol. 709; Pierre-Marie Dupuy, ‘The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice’ (1999) N.Y.U. J. Int’l L. & Pol. 791.

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